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ALLEN v. STATE BAR OF CALIFORNIA.

L. A. 13945.

Supreme Court of California.

April 21, 1933.

1. Attorney and client ⇐53(1).

Payment of client by attorney upon filing petition to review recommendation that he be disbarred *held* admission of charge of misappropriation of client's share of judgment.

2. Attorney and client ⇐53(1).

Evidence of attorney's character is admissible in disbarment proceeding when produced in manner sanctioned by rules of evidence, and not by ex parte letters inadmissible as hearsay.

3. Attorney and client ⇐53(2).

Finding that attorney without client's authority satisfied judgment for less than amount thereof and misappropriated client's share, and that he should be disbarred, *held* supported by evidence.

In Bank.

Petition by William G. Allen for a review of the recommendation of the Board of Governors of the State Bar of California that petitioner be disbarred.

Recommendation approved and adopted, and petitioner disbarred from practicing law, and his name stricken from roll of attorneys.

Anthony Jurich, of Los Angeles, for petitioner.

Philbrick McCoy, of Los Angeles, for respondent.

PER CURIAM.

Local administrative committee No. 8, State Bar of California, in and for the county of Los Angeles, upon a hearing duly had, found that the petitioner, William G. Allen, had committed acts of gross moral turpitude and had violated his oath as an attorney and counselor at law, and, basing its conclusions upon said findings, recommended to the board of governors of the State Bar that he be disbarred and that his name be stricken from the roll of attorneys of the state of California. The board of governors of the State Bar, on July 15, 1932, acting upon the findings of said local administrative committee, approved and adopted the same as the findings of said board of governors, and recommended to this court that said William G. Allen be disbarred from the practice of the law in the state of California.

Petitioner was employed by Mrs. Anna Hoagard, wife of James W. Hoagard, and an aged lady, who was injured in an automobile collision, to prosecute her claim against Melvin Pepper, a minor, and J. C. Ferguson, on account of personal injuries sustained by her as the result of the negligence of the two persons last named. James W. Hoagard, her husband, is totally blind in one eye and has but a small percentage of vision in the other eye. Judgment went for Mrs. Hoagard against said minor, Pepper, and Ferguson in the sum of $1,500, and costs taxed at $49.

Approximately thirty days after the judgment was entered, petitioner collected upon said judgment the sum of $500, and entered a partial satisfaction. Some five or six months thereafter petitioner collected the further sum of $750, and satisfied the judgment in full without the knowledge or consent of his client. She was in need of financial assistance, and had repeatedly interviewed petitioner as to the unpaid balance, and upon each occasion he told her that it was not collectible, as the defendants had become bankrupt and their estates were in the hands of a receiver. Mrs. Hoagard discovered some months thereafter that petitioner had collected an additional sum of $750 by a chance meeting with a person who had actual knowledge that two other persons who were injured in the same accident had been paid the amounts awarded to them under a similar judgment. She thereupon investigated the record and discovered that petitioner had satisfied in full the judgment rendered in her favor for the sum of $1,549 upon payment to him of the sum of $1,250. The whole of said sum of $750 had been appropriated to his own use in the manner herein related.

Petitioner claimed that his agreement, which was oral, allowed him 45 per cent. of the amount collected, while Mr. Hoagard, who made the agreement with petitioner, said that the understanding was that he was to receive 40 per cent. of the amount collected. That petitioner did not consult his client as to the advisability of satisfying her judgment in the sum of $1,500, plus $49 for costs, is not contradicted. The satisfaction of said judgment was kept from her by deliberate falsehoods which were the invention of petitioner's dissembling mind. Petitioner admitted that he had not informed either his client or her husband that he had collected said sum of $750, or that he at any time contemplated, or that there was any reason to seek, a compromise of said judgment. His conduct in this respect stands out absolutely indefensible. At the hearing he made a feeble attempt to justify himself in retaining all of the $750 payment by relating three other matters in which he claimed to render some indefinite service. One had to do with a quiet title action to 160 acres of land situate in Riverside county, in which Mrs. Hoagard had some interest. He claims to have written several letters for her, and held a telephone conversation with the party pressing the

claim against her, and, according to his statement, by advising Mrs. Hoagard to pay $100, the litigation resulted favorably to her.

Mrs. Hoagard testified that, in addition to giving him the $100 above mentioned, she was required to raise an additional sum of $160 for the advantage that came to her out of the transaction, whatever may have been its value or benefit, which is not mentioned. The petitioner was unable to give any positive information as to the transaction, and was uncertain as to whether the proceeding was an action to quiet title or foreclose a mortgage. It would seem most likely from Mrs. Hoagard's reference to the matter that an attachment had been levied on her property on account of her unpaid bills. His testimony shows very clearly that he performed no service that was more than a trifle in value, and he himself was really conscious that he had not performed any service worth making a charge for. He drew no pleadings, he did not appear in court, and just what convincing force his letters contained does not appear, as he made no attempt to produce them. This transaction occurred after he had collected and appropriated said sum of $750, and before his client had made the discovery of those facts. His client said that she mentioned the matter in a casual way, and petitioner at once volunteered his services without cost. The second matter brought in as a defense was that petitioner upon one occasion furnished Mr. Hoagard with a blank form prescribed by the state for persons making application for a pension for the blind. Hoagard denies that petitioner even furnished the blank, but petitioner admitted his services did not extend beyond furnishing said blank. Mr. Hoagard's application for a pension was denied.

The third service alleged to have been rendered by petitioner consisted of an effort made by Mrs. Hoagard to resist an order of cancellation by the government of a homestead entry of land in New Mexico made by her deceased son under the Veterans' Act. At the contest held at New Mexico, the homestead entry was canceled. No opposition was pressed by Mrs. Hoagard, as she was informed by an experienced lawyer in such matters that the land was not worth the cost of the contest. Mrs. Hoagard also had had correspondence with a lawyer residing in New Mexico on the subject. Petitioner makes out a sorry case by his own statement. None of the attorneys was paid a fee. Indeed, it does not appear that any felt that he had earned a fee. Petitioner, in this transaction, as in the other two, had no contract of employment with Mrs. Hoagard, and had never rendered her a bill or in any way claimed that she was indebted to him for said services until after he was called to account in this proceeding by his client, and threatened with criminal prosecution by the district attorney of the county of Los Angeles. It was then that he tardily began to build up earned fees as an offset to the moneys he secretively obtained on a judgment and appropriated to himself without making a pretense of accounting to his client.

As a matter of fact, when he first appeared before the local committee, he said that all services outside of his fee in the negligence case would not exceed the sum of $20. An examination of the record will amply justify the above statement as to the value of said services. Early in the investigation of his conduct he stated that he had spent the money in taking his wife into Canada, as she was illegally in this country, and the government was about to deport her to England. At the hearing later he denied that he spent any part of said sum of $750 in transporting his wife to Canada, but admitted that immediately after he received said moneys he and his wife did go to Canada, and he returned ten days thereafter.

Petitioner presented nothing at the hearing before the local committee, nor does he present anything upon his petition to this court, that would have a tendency to refute the charge placed against him or mitigate the punishment recommended by the board of bar governors. He did not give any insight into his career as a lawyer or as a member of society. We glean from the record that he is a native of the state of South Carolina and 42 years of age, and that he was admitted to this bar on motion in 1919. The transcript of his registration card indicates that he last practiced law in the state of Nevada 1912–1918. Whether he was originally admitted to practice in Nevada does not appear, as he did not mention any other state of which he was a resident or a practicing attorney. His testimony is self-contradictory, is lacking in definiteness and frankness, shows faulty memory as to matters about which he should have entertained no doubt, and at times is incoherent. Upon several occasions he gave expression to the evil motives of the attorneys examining him, which were entirely unjustified by anything we are able to find in the record.

The following is a fair exemplar of his testimony upon being interrogated as to whether or not disbarment proceedings had ever been filed against him:

"A. Not to my knowledge.

"Q. That is in this state or elsewhere? A. Elsewhere.

"Q. Now, how many years have you engaged in the active practice of law, and where? A. In the state of California only.

"Q. And is that for the last six and one-half years? A. Yes."

A few moments before petitioner had answered that he had not practiced for the last six years and a half, and stated that he was admitted in Palo Alto.

Upon criminal complaint being made to the district attorney of Los Angeles county, petitioner was summoned to that office to explain away the incriminatory appearance of his conduct. He admitted to the deputy district attorney who had the matter in charge that he had satisfied said $1,500 judgment for $1,250, and that he had spent the $750 paid him upon full satisfaction of said judgment. The deputy district attorney thereupon said to him: "You know what that means, Mr. Allen. It is a criminal offense, an embezzlement, a felony." Petitioner replied that he was fully aware of its legal effect, and asked if the deputy district attorney would give him ten days to straighten the matter out. This request was granted by said officer, and the matter was kept open for some time during the pendency of the disbarment proceedings. A number of papers touching all the transactions herein mentioned were turned over to the district attorney. During the hearing before the local committee, petitioner made frequent reference to the materiality of matters contained in said papers, and their importance in disproving the charge preferred against him. He was repeatedly requested by the local committee to produce them, and the committee offered its assistance if he should meet with difficulty in procuring them. The committee adjourned its session for a period of one week to a day certain to enable petitioner to procure the papers which he had repeatedly said were of great value to him in presenting his defense. Upon reconvening on the day fixed, petitioner did not appear, and the proceedings were concluded in his absence. No attempt was made by him to produce said papers, which would have been of no value to his defense if they had been produced.

[1] The evidence could leave no doubt in the mind of any one reviewing it as to the moral breakdown of a person who has demeaned himself as petitioner has through a period of approximately three years in practicing deception, inventing falsehoods, and making false and forged affidavits in order to put himself into a position where he could collect and appropriate to his own uses his client's portion of her judgment. Mrs. Hoagard related another experience she had with petitioner which tends to prove that petitioner should no longer remain a member of the bar.

To petitioner's closing brief, filed in this cause on December 9, 1932, is attached a canceled check in the sum of $412.50, payable to Mrs. Anna Hoagard, and indorsed by her as payment in full of the judgment. The drawer of the check is not petitioner, but one "H. S. Allen." The check is dated October 21, 1932, the day that petitioner filed his petition for review in this court. Said check, computed on a 55 per cent. basis, equals Mrs. Hoagard's share of the unauthorized and secretly satisfied judgment. This check, although not the check of petitioner, coming as it does to us, can be regarded in no other light than another admission of the truth of the charges laid against him.

[2] Two letters written by members of the bar of this state and addressed to this court are attached to the record, and forwarded to us for our consideration in reaching a conclusion herein. These letters from the dates they bear, could not have been before the local administrative committee or board of bar governors, whose findings we are here reviewing. Said letters do not disclose sufficient knowledge on the part of the writers of the character and legal career of the petitioner to have justified said authors in assuming to advise us in an ex parte fashion upon a matter of grave public importance. They come to us as mere hearsay evidence, which of itself should have been a sufficient reason to have deterred the writers from violating a cardinal rule of evidence. Said letters were intended as evidence tending to establish the good reputation of petitioner in the ranks of the profession. We do not mean to say that character evidence is not admissible in disbarment proceedings. Inasmuch as the charges are necessarily an attack upon the honesty and integrity of the accused, character evidence is in every case available as a defense. A long and honorable career at the bar may of itself, in the circumstances of a particular case, be sufficient, in the minds of the triers of fact, to outweigh the incriminatory effect of the evidence produced by the accusers. Good character, when satisfactorily established, is an important element in every disciplinary case as an aid to the court in determining the degree of punishment that may be proper in the circumstances of the cause presented. Such evidence, like all other kinds, is to be produced in the manner prescribed and sanctioned by the rules of evidence, to the end that the persons who would put the issue of character in the case may be fully cross-examined; and, further, that the testimony given upon that issue may be rebutted by counter evidence. Strictly speaking, an attempt to influence a court's judgment on pending matters by writing letters to the judges who are to decide the cause is a contempt of court. We feel satisfied that the letters in the instant case were written without a due consideration of the duties which attorneys owe not only to courts, but also to the orderly administration of the law. We pass the incident without further comment in the hope that we will not be called upon again to make reference to a reprehensible practice.

[3] The findings of the local administrative committee are fully sustained by the evidence, and the recommendation of the board of governors of the State Bar is hereby approved and adopted. It is therefore made the order of this court that petitioner, William

G. Allen, be and he is hereby disbarred from practicing law in all of the courts of this state, and his name is stricken from the roll of attorneys of the state of California.

218 Cal. 1

TALBOT v. TALBOT.

L. A. 12932.

Supreme Court of California.

April 19, 1933.

1. Husband and wife ⇐295.

In separate maintenance action, filing of husband's answer denying marriage did not oust court of jurisdiction to make order for alimony, counsel fees, and costs, pendente lite on record as it stood when matter was submitted before answer.

2. Husband and wife ⇐295.

Order in separate maintenance action for alimony, counsel fees, and costs pendente lite imported finding that plaintiff was not married woman at time of alleged marriage to defendant.

In Bank.

Appeal from Superior Court, Los Angeles County; Robert H. Scott, Judge.

Action for separate maintenance by Esther Talbot against Hayden Talbot. From an order for the payment of alimony, counsel fees, and costs pendente lite, defendant appeals.

Affirmed.

Paul W. Schenck, Milton M. Cohen, and C. O. Bacon, all of Los Angeles, for appellant.

William Ellis Lady, of Los Angeles, for respondent.

SHENK, Justice.

This is an appeal by the defendant from an order for the payment of alimony, counsel fees, and costs pendente lite in an action for separate maintenance.

The plaintiff alleged that the parties intermarried on September 13, 1922, at London, England, and were and continued to be husband and wife. On the day the complaint was filed an order was issued requiring the defendant to show cause why he should not be required to pay temporary alimony, counsel fees, and costs. The order to show cause came on regularly for hearing on October 30th; both parties being present in court and represented by counsel. The matter was then heard, but the determination thereof was continued to November 6th for the filing of briefs. Thereafter, on November 17, 1930, the court made the order from which this appeal is taken. In the meantime, on November 10, 1930, the defendant filed with the clerk an answer in which he denied that the plaintiff and the defendant then were, or ever had been, husband and wife.

[1] The point made by the defendant on the appeal is that, to justify alimony, marriage must be admitted or proved, citing Hite v. Hite, 124 Cal. 389, 57 P. 227, 45 L. R. A. 793, 71 Am. St. Rep. 82, and that there is no showing to that effect in the present case. In the Hite Case relied upon the marriage was denied on the hearing of the order to show cause. Here the evidence of the plaintiff on the hearing was that the parties had been, and continued to be, married as alleged in the complaint. The proof on behalf of the plaintiff was sufficient to support the order. The filing of the answer after the matter had been submitted for decision was not sufficient to oust the court of jurisdiction to make the order on the record as it stood when the matter was submitted. See In re Morgan, 106 Cal. App. 602, 289 P. 647.

On November 6, 1930, the defendant filed as an exhibit certified copies of the complaint, interlocutory decree, and final decree of divorce in an action entitled Joseph Jay Pausner v. Esther Roof Pausner, in the superior court in and for the city and county of San Francisco. By these documents it is disclosed that the plaintiff therein was granted a divorce against defendant therein. In that case it appeared that the parties thereto had intermarried at Cleveland, Ohio, on August 23, 1920, and that the final decree of divorce was entered on August 21, 1923.

[2] It is now contended by the defendant that the record in that divorce action conclusively shows that the plaintiff herein was a married woman at the time of her alleged marriage to the defendant herein in September, 1922, and therefore that the essential basis for the present action, namely, the marriage relation, could not exist. The point would be well grounded if there were any showing that the plaintiff in the present action and the defendant in the former action were one and the same person. But there is no such showing whatever in the record, and the order now under attack imports a finding that such was not the fact.

On the proof made by the plaintiff and on the record now presented, the order must be affirmed.

It is so ordered.

We concur: WASTE, C. J.; SEAWELL, J.; IRA F. THOMPSON, J.; PRESTON, J.; LANGDON, J.; CURTIS, J.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

218 Cal. 32

GARACHICO et al. v. FAURE.

L. A. 13940.

Supreme Court of California.

April 24, 1933.

Vendor and purchaser ⊜78.

Time *held* essence of contract for sale of lots as to both seller's and purchaser's covenants.

The contract provided that time was essence thereof, that, if buyer failed to comply therewith, seller should be released from obligation to convey property, and buyer should forfeit all right to property and moneys paid, but that seller, on receiving full payments at times and in manner mentioned, would deliver title certificate and deed to buyers.

In Bank.

Appeal from Superior Court, Los Angeles County; Francis J. Heney, Judge.

Action by Porfiro A. Garachico and another against Elise Faure. Judgment for plaintiffs, and defendant appeals.

Affirmed.

James Warren Bell, of Los Angeles, for appellant.

Y. B. Arsen, of Los Angeles, for respondents.

PRESTON, Justice.

On August 11, 1926, plaintiffs agreed to buy from defendant a certain lot in Los Angeles for the purchase price of $1,200, to be paid in installments covering a period of about five years. Defendant agreed to furnish clear title, shown by certificate to that effect, and to give a good and sufficient deed to the property upon the final payment. Time was made the essence of the contract. Plaintiffs discharged their obligations in full, making the final payment on March 31, 1931, and they then duly demanded that defendant convey clear title to them as prescribed. Failing, after repeated efforts, to secure a deed, plaintiffs instituted this action in rescission, demanding a return of the purchase price paid, with interest. Defendant admitted the allegations respecting the contract, including final payment thereon, but pleaded as a special defense that a cloud rested upon the title to said property due to a similar contract made by her with one Alvarado in 1923, upon which Alvarado made payments of about $800 and then defaulted, paying nothing after October 31, 1925, and defendant further set up the fact that she was proceeding to clear the title by the institution of a suit against said Alvarado to have his claims upon the property declared null and void, in which suit Alvarado had filed an answer and cross-complaint.

Pending trial, however, of the present action, defendant was able to secure a decree quieting her title to the property as against the claims of Alvarado. She thereupon amended her answer to set up this fact, and tendered with it a deed to plaintiffs. In other words, the substance of her contention is that time was not the essence of the contract, and that she proceeded diligently to clear title, and now, having done so, she should in law be permitted to exchange the deed and certificate of title in satisfaction of the contract between plaintiffs and herself.

The whole case is whether or not under the contract between the parties time was made the essence thereof. The clause involved reads: "It is understood and agreed, that time is the essence of this contract, and should the buyer fail to comply with the terms hereof, then the Seller shall be released from all obligations in law and equity, to convey said property, and the Buyer shall forfeit all right thereto and to all moneys theretofore paid under this contract, but the Seller, on receiving the full payments at the times and in the manner above mentioned, agrees to deliver a certificate of title showing the title to be vested in Seller, and to execute and deliver to the Buyers or their assigns, a good and sufficient deed of grant, Bargain and Sale." Plaintiffs had judgment as prayed.

It is too clear for controversy that under said agreement time was made the essence of the contract not only as to the covenants by the purchaser but as to the covenants by the seller as well.

The judgment is affirmed.

We concur: WASTE, C. J.; LANGDON, J.; CURTIS, J.; SHENK, J.; IRA F. THOMPSON, J.; SEAWELL, J.

⊜For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

217 Cal. 754

GOLDEN GATE BRIDGE AND HIGHWAY DIST. v. FILMER et al.

S. F. 14830.

Supreme Court of California.

April 12, 1933.

1. Highways ⇐90.

Bridge and highway district board of directors may sell district bonds at times or in manner it deems to public interest, though at price below par value thereof (St. 1923, p. 461, § 15).

2. Constitutional law ⇐143.

Electors' approval of bond issue, proposed by municipal or district officers, creates status analogous to contractual relation entitled to protection under Constitution.

3. Highways ⇐90.

"Rate of interest," contemplated by statute and proposition, submitted to bridge district electors, to issue bonds "bearing interest not exceeding 5%," *held* coupon rate, not rate of yield to bond purchasers (St. 1923, pp. 461, 462, §§ 15, 16).

[Ed. Note.—For other definitions of "Rate of Interest," see Words and Phrases.]

4. Municipal corporations ⇐921(1).

Bonds bearing maximum interest fixed by statute, providing for sale thereof without expressly fixing price, may be sold at discount, if best terms obtainable.

In Bank.

Proceeding by the Golden Gate Bridge and Highway District for a writ of mandate to William J. Filmer, as President of the Board of Directors of such District, and another.

Writ granted.

George H. Harlan, of San Rafael, and W. H. Orrick, of San Francisco (Orrick, Palmer & Dahlquist, of San Francisco, of counsel), for petitioner.

Chas. Albert Adams, of San Francisco (Adams & Adams, of San Francisco, of counsel), for respondents.

WASTE, Chief Justice.

The Golden Gate Bridge and Highway District initiated this proceeding in mandamus to compel the respondents, its president and secretary, to execute bonds of the district in the principal amount of $200,000, a portion of an issue of $35,000,000 authorized at an election held in the district November 4, 1930, for the purpose of raising funds for constructing a bridge across the Golden Gate. The validity of these bonds was upheld by this court in Golden Gate Bridge and Highway District v. Felt, 214 Cal. 308, 5 P.(2d) 585, 595, and by the United States District Court for the Northern District of California in Garland Co. v. Filmer et al., 1 F. Supp. 8. The district thereupon advertised for bids for $6,000,000 of the bonds, to bear interest at the rate of 4¾ per cent. per annum, payable semiannually. That amount of bonds was sold at a price of 92.30 per cent. of their face value, together with accrued interest—a price conceded to represent their market value at the time of sale, but which will yield to the purchasers of the bonds 5¼ per cent. interest.

Section 15 of the Bridge and Highway District Act (Stats. 1923, p. 452; as amended, Stats. 1925, p. 714; 1927, p. 574; 1931, p. 239; Deering's Gen. Laws 1931, Act 936), hereinafter referred to as the Bridge Act, provides that before incurring any bonded indebtedness the board of directors of a district shall, by resolution, state the proposition to be submitted to the electors, which statement, among other matters, must show the purpose for which the proposed debt is to be incurred, the maximum term the bonds proposed to be issued shall run, and the maximum rate of interest to be paid, which interest shall not exceed 6 per cent. per annum. Pursuant to this provision, the board of directors of the district submitted to the electors a proposition for a bonded indebtedness amounting to $35,000,000, maturing in not more than forty years from the date of the bonds, and *bearing interest not exceeding 5 per cent. per annum.* The respondents, as president and secretary of the board of directors, refused to execute and deliver the bonds, upon the ground that, at the price for which they were sold, the rate of yield to the purchasers—according to the bond tables approximately 5¼ per cent.—exceeds the rate of interest, 5 per cent., mentioned in the proposition submitted to the electors of the district.

The contention of the respondents is that the interest provisions of the statute and of the proposition submitted to the electors refer solely to the rate of interest yielded to the purchasers of the bonds; that therefore the sale was illegally made at a rate in excess of the 5 per cent. referred to in the proposition, and amounts to an invasion of a contractual relation resulting from the submission to, and the approval by the electors of the district of, the proposition submitted to them. The position of the petitioner, on the other hand, is that the rate of interest contemplated by the Bridge Act, and specified in the bond proposition, relates to and is a rate of interest based on the principal amount of the bond; that is, the coupon rate.

[1, 2] It should be noted, as we begin our discussion, that there is no express provision in the Bridge Act that the district may not sell its bonds at a price below their par val-

ue. The board of directors may sell or dispose of the bonds at such times or in such manner as it may deem to be to the public interest. Notwithstanding the absence of any restriction regarding the sale price, the respondents contend that the price at which the bonds may be legally sold must not be so far below par as to necessitate the payment of interest to the purchasers in excess of 5 per cent., computed on the amount of money the district receives for its bonds. In support of their position respondents rely upon the principle firmly established that, by reason of a proposal on the part of the officers of a municipality or district and the approval of the electors therein as to the authorization and issuance of a bond issue, a status analogous to a contractual relation comes into being, which is entitled to protection under the Constitution. This proposition may not be denied. The case of Peery v. City of Los Angeles, 187 Cal. 753, 203 P. 992, 19 A. L. R. 1044, is authority to that effect. It may, however, be distinguished from the case at bar without departing from the rule it lays down. It involved an effort on the part of the city of Los Angeles to dispose of an unsold portion of a bond issue for less than the par value of the bonds. The law in force at the time, and under which the bonds were voted, contained an inhibition against that being done. As all the bonds could not be sold at par, the law was changed by an act permitting the bonds remaining unsold to be disposed of at less than par, and for a price which would net the purchasers a rate of interest greater than the rate permitted by the act under which they were authorized. Here, as above stated, there is no express provision in the act that the district may not sell its bonds at a price below their par value. There, the rate of interest on the bonds was not in question. Our present consideration narrows to a determination of the question as to what was intended by the provision in section 15 of the act which declares that "the maximum rate of interest to be paid [on bonds] * * * shall not exceed six per centum per annum," and the provision in the proposition submitted to the electors describing the bonds as "bearing interest not exceeding 5 per cent per annum."

Another decision of this court cited by respondents is O'Farrell v. Sonoma County, 189 Cal. 343, 208 P. 117. The board of supervisors called an election for the purpose of voting bonds for the construction of a road of a definite length, and stating the amount to be expended. Subsequently the board attempted to enter into a contract for the construction of only a part of the road specified. This court held that the order calling the election, and the ratification of that order by the electors, constituted a contract between the state and the individuals whose property was thereby affected—a contract which could not be altered except by all the parties thereto. The statement of facts in the case serves to distinguish it from the present situation.

[3] We deem it unnecessary to discuss at length or refer to the many decisions cited by the respondents on this phase of the question. They have been thoroughly discussed and distinguished by counsel on the respective sides. They are distinguishable in large measure by peculiar facts and the language of statutes under consideration. While some of them do support the respondents' position, we are of the view that the contention of the petitioner is fundamentally sound in theory, is supported by the general weight of authority, and has the approval of procedure and practice generally accepted in this state under statutes containing provisions similar to those of the Bridge Act. The practice has borne the test of practical construction which has been long given by the officers of the state charged with the supervision and control of the issuance of such bonds, and is approved by the action of the Legislature, which has left, in many instances, the sale and disposition of them to the business judgment and good faith of local officers, to be controlled by financial conditions. The nature of municipal and district bonds and securities issued for definite purposes, the procedure under which they are issued, and the burdens placed upon the issuing communities are definitely understood. They are recognized as a commodity on the market, and pass from hand to hand on delivery, being commonly treated as a species of tangible property in themselves. Westinghouse Electric & Mfg. Co. v. County of Los Angeles, 188 Cal. 491, 494, 205 P. 1076.

Petitioner, in its brief, has set forth at considerable length the distinction between the rate of yield to a purchaser of bonds and the coupon rate, and has also quoted at length from decisions and from works bearing on various questions relating to the sale of bonds. This discussion involves mathematical calculations, and sets out examples of computations commonly made in ascertaining for a buyer, by resort to bond tables and other sources of information ordinarily used, the rate of yield that will be obtained upon the purchase of bonds at given prices and according to the coupon rate. It seems to be definitely settled in the financial world that the three essential characteristics of such bonds are principal amount, coupon rate, and maturity. The Supreme Court of the United States, in Old Colony R. Co. v. Commissioner of Internal Revenue, 284 U. S. 552, 52 S. Ct. 211, 76 L. Ed. 484, took the view, in regard to a contention as to the meaning of "interest," that it could not believe that Congress, in using the word in the act, had in mind any concept other than the usual, ordinary, and everyday meaning of the term,

or that it was acquainted with the accountants' phrase "effective rate" of interest, but no doubt used it in the common understanding that interest means what is usually called interest by those who pay and who receive the amount so denominated in bond and coupon.

It seems to us that since the language in the Bridge Act and in the proposition submitted to the electors clearly refers to one of the essential characteristics of bonds, to wit, the coupon rate, there can be no justification for disregarding the natural meaning of the language used and its evident purpose, and that it must be held that the language of the act and of the proposition refers directly to the description and form of the bonds to be issued.

[4] In addition to failing to provide that the board of directors may not sell the bonds at less than par, the Bridge Act (section 16 [St. 1923, p. 462]) provides that, if the vote of the district is "favorable to the incurring of such indebtedness, then the board of directors may by resolution at such time or times as it deems proper provide for the form and execution of such bonds, and for the issuance of any part thereof, and may sell or dispose of the bonds so issued at such times or in such manner either for cash in lawful money of the United States of America, or its equivalent as it may deem to be to the public interest. * * *" We are of the view that the general rule, as established by the authorities, applies to this case, and is that so well stated by the Supreme Court of Kansas in Rowland v. Deck, 108 Kan. 440, 195 P. 868, 871. There, a taxpayer sought to enjoin the issuance of county bonds bearing coupons at the rate of 5 per cent. per annum (the maximum rate of interest permitted by the enabling act), which had been sold at a discount from par. The court discussed many decisions from its own and from other jurisdictions, some of which are relied on by the respondents here, and said: "Where it is desired by the lawmaking body to restrict the amount for which bonds may be sold, the custom in this state and elsewhere is general to insert a clause in the statute to the effect that par or better must be obtained for them; this practice is so common that the omission of that or some other provision expressly covering the subject creates a strong presumption that the Legislature was content to rely upon the good faith and business judgment of the local officials to see that the bonds brought substantially the market price, which would necessarily be controlled by financial conditions." As a conclusion, the court held that where a statute authorized the issuance of bonds bearing not more than a stated rate of interest, and provides for their sale without making an express requirement as to the amount they shall bring, bonds issued thereunder, which bear the maximum interest named, may be sold at a discount, if the sale is made on the best terms obtainable. In exact accord with this view is the decision of the Court of Appeals of Maryland in Stanley v. Mayor of Baltimore, 146 Md. 277, 126 A. 151, 155, 130 A. 181. The court said: "* * * where a statute authorizes the issuance of bonds bearing not more than a stated rate of interest, and provides for their sale without making an express requirement as to the amount they shall bring, bonds issued thereunder which bear the maximum interest named may be sold at a discount if the sale is made on the best terms obtainable." The Supreme Court of Oregon has said:

"The weight of authority is to the effect that the sale of municipal bonds below par is not illegal, unless the act or ordinance authorizing the issue expressly directs that they shall not be sold for less than par.

" 'That the bonds of a municipal corporation may be sold by it for less than par must be regarded as the general understanding of lawmakers of the states, as well as the officers of the municipalities, because, when it is desired to prevent such sale, that fact is incorporated in the enabling act or in the ordinance or resolution providing for the issue of the bonds.' Simonton on Munic. Bonds, § 146." Kiernan v. Portland, 61 Or. 398, 122 P. 764, 765, Ann. Cas. 1914B, 255.

We may take it as conceded that the bonds of the Golden Gate Bridge and Highway District were sold on the best terms obtainable; and, other than the legal question raised, it is not suggested that there has been any act of the directors of the district tending in any way to violate the terms of their contract with the electors of the district. The good faith of the directors of the bridge district is in no way challenged.

We have been presented by the petitioner with a comparative analysis of the legislation in California relating to the issuance of bonds by public corporations, together with the practical construction given to many of these statutes by the officers of the state, the public, the legal profession, and the courts, over a long course of years. The fifty-three acts so analyzed may be divided into three classes: (a) Statutes providing for the issuance of bonds by public corporations which designate or limit the interest rate of bonds, and also designate or limit the sale price of bonds; (b) statutes providing for the issuance of bonds by public corporations which, like the Bridge Act, contain limitations as to interest rate and provisions for the sale of bonds, but no requirement as to the selling price; (c) statutes providing for the issuance of bonds in which the coupon rate is designated, and in which the sale price is limited to a price which will net the purchaser not more than a specified rate of yield

according to the standard table of bond values. Conceding to the Legislature the familiarity it must have had with its own enactments and with the general rule prevailing in other jurisdictions, we cannot escape the conclusion that, had the lawmakers, when they enacted the Bridge and Highway District Act (supra), intended that the bonds of such district should not be sold at less than par, they would have so provided in the act. "It seems more reasonable to infer [again quoting from the supreme court of Oregon in Kiernan v. Portland] from the language here employed that it was the intent of the lawmaking power to grant to the [directors] the entire discretion to sell at the best advantage possible under the circumstances."

Respondents have called our attention to and argue from a statement contained in our former opinion, Golden Gate Bridge, etc., v. Felt, supra, wherein it was said: "They [the voters] certainly knew that a costly project was to be built and financed by bonds *selling at par with a low rate of interest.*" (Italics added.) We must confess to the inadvertent use of language not at all pertinent to the question then before us. It does not need this explanation to establish that fact, for a reading of the decision at once indicates that the words used were entirely aside the mark, and could have no relevancy and binding effect in the opinion. Our conclusion is that the terms, "rate of interest" in the Bridge Act, and "bearing interest not exceeding 5%" in the proposition submitted to the electors, must be held to refer to the coupon rate of the bonds to be issued.

For the foregoing reasons, the respondents should execute and deliver the bonds of the district as prayed for. Let the necessary writ issue.

We concur: CURTIS, J.; SHENK, J.; SEAWELL, J.; THOMPSON, J.

LANGDON, J., deeming himself disqualified, does not participate herein.

131 Cal.App. 251

BRADLEY CO. v. SCOTT, City Treasurer, et al.

Civ. 838.

District Court of Appeal, Fourth District, California.

April 15, 1933.

Hearing Denied by Supreme Court June 12, 1933.

1. Municipal corporations ⇐485(1).

Where, under compromise agreement, street improvement contractor agreed to take 75 per cent. of amount unpaid, bonds received by it were not invalid as being issued for 25 per cent. more than cost of work (St. 1911, p. 730, as amended).

It was agreed that contractor should receive as full compensation for work performed 75 per cent. of amounts unpaid, full amount being collected by bank, but 25 per cent. being turned over to another than contractor. Thus the 75 per cent. turned over to contractor and the 25 per cent. turned over to such other person constituted the cost of work or improvements, and bonds received by contractor were not issued for 25 per cent. more than cost of work.

2. Appeal and error ⇐110.

No appeal lies from order denying motion for new trial.

Appeal from Superior Court, Tulare County; Frank Lamberson, Judge.

Suit by the Bradley Company against Eugene L. Scott, Treasurer of the City of Porterville, and another, to enjoin the sale of real property on foreclosure of bonds under the Improvement Act of 1911. From an adverse judgment, plaintiff appeals.

Affirmed.

Frank J. Gordon, of Porterville, Bradley & Bradley, of Visalia, and Herbert Chamberlin, of San Francisco, for appellant.

Guy Knupp, of Porterville, and Mathew Weber, of San Francisco, for respondents.

VAN ZANTE, Justice pro tem.

This is an appeal from a judgment denying plaintiff an injunction. The plaintiff brought suit to enjoin defendants from selling real property in the city of Porterville in a proceeding for the foreclosure of bonds, issued under the "Improvement Act of 1911." St. 1911, p. 730, as amended, Deering's Gen. Laws, Act 8199.

The facts in this case are undisputed, and are aptly set out in the findings of the trial court, and we quote therefrom the portions pertinent to this appeal.

"That during the years 1914 and 1915, the defendant Federal Construction Company entered into certain contracts with the board of trustees of the City of Porterville, under and by virtue of that certain act designated as the 'Improvement Act of 1911' and acts amendatory thereof, under which contracts said defendant Federal Construction Company improved certain streets in said City of Porterville by constructing pavements thereon; that assessments for the cost of said improvements were made and issued by the superintendent of streets of said City of Porterville, from which assessments certain

owners of property against whose property assessments were levied, appealed to the board of trustees of said City of Porterville from said assessments; that said appeals were, by said board of trustees sustained; that certain of said assessments so levied were against the properties of plaintiff hereinbefore particularly described. That thereafter and prior to the 9th day of May, 1921, certain litigation was engaged in by the defendant Federal Construction Company and certain owners of property in said City of Porterville which litigation was ended and terminated on said 9th day of May, 1921. * * *" That a "written compromise agreement was executed between said Federal Construction Company as party of the first part and Guy Knupp, C. L. Russell Jr. and Thomas, Beedy and Lanagan as parties of the second part, for and on behalf of and representing said property owners in said City of Porterville and in and by said agreement and compromise said Federal Construction Company agreed to assign and transfer the assessments, warrants and diagrams covering the street improvements hereinbefore referred to, to the First National Bank of Porterville with power and authority to collect all amounts due thereunder, or in lieu of the payment of said assessments in cash, to receive all bonds that might be issued representing unpaid assessments and instructing and authorizing said bank to pay over to Guy Knupp 25% of all amounts paid upon said assessments in cash and 25% in amount of all bonds issued to represent unpaid assessments. It being the understanding and agreement of the parties thereto, that the said Federal Construction Company was to have and receive as full compensation for the work and labor performed by it, 75% of all amounts unpaid as shown upon said assessments, warrants and diagrams without interest except from and after the date which said assessments, warrants and diagrams shall bear after being redated, rerecorded and re-issued in accordance with said agreement. That thereafter and in accordance with the terms of said agreement, all of said assessments, warrants and diagrams were assigned to the First National Bank of the City of Porterville, and the said bank was authorized and instructed to collect and did collect all unpaid assessments thereunder. That 75% in amount of all cash received by said bank was turned over to defendant Federal Construction Company and 75% in amount of all bonds was turned over to defendant Federal Construction Company and that 25% in amount of all cash received by said bank was turned over to Guy Knupp and 25% in amount of all bonds received by said bank was turned over to Guy Knupp. That the bonds so held by defendant Federal Construction Company and covering the real properties herein described constitute a portion of 75% of the total bonds issued received by it in accordance with the agreement of May 9th, 1921, and herein referred to."

[1] There is no contention that the above findings are not supported by substantial evidence. But plaintiff does contend that the judgment based on above findings should be reversed because "the bonds in suit were issued for 25% more than the cost of work or improvement and are invalid to that extent."

We find no evidence in the record to support plaintiff's contention that the bonds in suit were issued for 25 per cent. more than the cost of work or improvement, or, in other words, the contract price. Manifestly the above findings show that the 75 per cent. in amount of all cash and the 75 per cent. in amount of all bonds received by the bank and by the bank turned over to the Federal Construction Company and the 25 per cent. in amount of all cash and the 25 per cent. in amount of all bonds received by the bank and by the bank turned over to Guy Knupp constitute the cost of the work or improvement. It should be observed here that only the bonds turned over to the defendant Federal Construction Company are involved in this action. We think the court committed no error in rendering judgment for the defendants.

[2] Plaintiff has attempted to appeal from an order denying motion for new trial. No appeal lies from such order, and the appeal therefrom is dismissed.

Judgment affirmed.

We concur: BARNARD, P. J.; MARKS,

131 Cal.App. 258

MARSHALL v. SMITH.

Civ. 8821.

District Court of Appeal, First District, Division 1, California.

April 17, 1933.

1. Appeal and error ⇐989.

On complaint of insufficiency of evidence, appellate court only inquires whether there is substantial evidence supporting conclusion reached by jury.

2. Appeal and error ⇐1004(1).

On complaint of excessive damages, appellate court can interfere only when damages are so exorbitant as to suggest, at first blush, passion, prejudice, or corruption of jury.

3. Damages ⇐132(1).

$5,000 *held* not excessive under evidence for neck injury, with $376 medical bill.

4. Damages ⇐38.

Where woman's injury has lessened power to work, she may recover therefor, whether engaged in household duties or employed for pecuniary gain.

It was contended that, since evidence showed that plaintiff kept house and was silent as to her following any gainful profession, business, or occupation, instruction on damages erroneously permitted consideration of plaintiff's physical ability to maintain herself before accident as compared with condition and physical ability to maintain herself after accident, and also the effect if any of injuries on her capacity to engage in her usual profession, business, or occupation.

Appeal from Superior Court, Santa Clara County; Robert R. Syer, Judge.

Action by Adeline Marshall against J. J. Smith for damages for personal injuries sustained in an automobile accident. Judgment for plaintiff, and defendant appeals.

Affirmed.

E. M. Rea, of San Jose, and Langton A. Madden, of San Francisco, for appellant.

Frank V. Campbell, of San Jose, and T. G. Negrich, of San Francisco, for respondent.

GRAY, Justice pro tem.

A jury awarded respondent damages in the sum of $5,000 for injuries received by her in a collision between an automobile in which she was riding as a guest and another owned and operated by appellant. From the judgment entered on such verdict, the latter appeals, urging as grounds for reversal: (1) That the amount of the verdict is grossly excessive and was based upon passion and prejudice; (2) that the evidence is insufficient to justify the verdict; and (3) that the instruction on damages is erroneous.

[1-3] "Where a verdict is attacked for insufficiency of evidence, the power of the appellate court begins and ends with the inquiry whether there is substantial evidence, contradicted or uncontradicted, which in and of itself will support the conclusion reached by the jury. Treadwell v. Nickel, 194 Cal. 243, 260, 228 P. 25; Hatzakorzian v. Rucker-Fuller Desk Co., 197 Cal. 82, 239 P. 709, 41 A. L. R. 1027. * * * The question of excessive damages is one which is first addressed to the trial court, and appellate courts can interfere only when the damages are so exorbitant as to suggest, at first blush, passion, prejudice or corruption on the part of the jury." Kleem v. Chapot, 112 Cal. App. 553, 556, 297 P. 574, 575. Here, as in the cited case, a motion for a new trial was denied by the trial court, and the evidence not only supports the verdict, but fails to show it to be excessive.

Paid hospital and medical bills in the sum of $376 are undisputed. Respondent testified that she received temporary, although painful, injuries to her chest and back and permanent injuries to the muscles at the back of her neck, which so greatly limited and made painful beyond such limitation the rotation of her head that she was nervous in traffic, tired easily at housework and shopping, and frequently awakened from sleep. She was confined in a hospital for twelve days, and thereafter received medical treatment for seven months. The physician attending her at the hospital testified that the muscles had been torn, and that she suffered much pain, which he alleviated by opiates and sedatives. The doctor who next treated her stated that examination on her discharge from the hospital disclosed a painful swelling at the base of the skull, in back of the neck, involving the muscles which control certain movements of the head. He further said that, at time of trial, there was probably a permanent decrease in rotation of 40 per cent. and a slight curtailment in the up and down motion of her head. A specialist in physiotherapy, to whom she had been referred by the preceding doctor, and who was treating her at time of trial, testified that the thickening and constriction of the neck muscles limited rotation of her head more than one-third of normal and the upward and downward movement to a less extent, that very slight improvement would be obtained by future treatments, and that the impingement of the terminal nerve in scar tissue made painful motions beyond such limitations. A doctor appointed by the court at appellant's request to examine respondent during the trial fixed the limitation in her ability to move the head from right to left at about 30 to 40 per cent.

Two associated doctors, testifying on behalf of appellant, estimated the limitation in rotation at between 15 and 20 per cent.

[4] Appellant claims that, because the evidence merely shows that respondent kept house for herself and daughter and is silent as to her following any gainful profession, business, or occupation, the instruction on damages erroneously permitted consideration of "the plaintiff's physical ability to maintain herself before the accident as compared with her condition and physical ability to maintain herself after the accident; also the effect, if any, of said injuries, if any, on her capacity to engage in her usual profession, business or occupation." This argument is well answered by the following excerpt from Davis v. Renton, 113 Cal. App. 561, 564, 298 P. 834, 835: "As held in Gotsch v. Market Street Ry., 89 Cal. App. 477, 265 P. 268, the impairment of the power of a woman to work is an injury to her personal rights wholly apart from any pecuniary benefit the exercise of such power may bring, and if her injury has lessened this power she ought to be able to recover damages therefor regardless of whether she was engaged in household duties or employed for pecuniary gain."

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

131 Cal.App. 235

PEOPLE v. SKOFF.

Cr. 1249.

District Court of Appeal, Third District, California.

April 14, 1933.

1. Criminal law ⇐954(6).

Accused waived right to apply for new trial on ground of insufficiency of evidence by failing to designate such ground in motion for new trial.

2. Criminal law ⇐954(6).

Where application for new trial was not made on ground of insufficiency of evidence, court lacked authority to grant it on that ground.

3. Criminal law ⇐954(1).

Motion for new trial may be granted in criminal case only on grounds specified in statute (Pen. Code, § 1181).

4. Criminal law ⇐949(1).

Application for new trial must be made orally to court before entry of judgment, and mere filing of written notice of motion for new trial without presenting it to court is insufficient (Pen. Code, § 1182).

5. Criminal law ⇐947.

Court cannot grant new trial except on application of defendant (Pen. Code, § 1181).

6. Automobiles ⇐354.

In prosecution for driving automobile while intoxicated, evidence as to finding bottle of brandy near place of collision *held* erroneously excluded (St. 1923, p. 553, § 112, as amended by St. 1929, p. 537).

7. Automobiles ⇐355(6).

In prosecution for driving automobile while intoxicated, evidence *held* sufficient to sustain finding that defendant was intoxicated as charged (St. 1923, p. 553, § 112, as amended by St. 1929, p. 537).

Appeal from Superior Court, Sonoma County; Donald Geary, Judge.

Martin Skoff was convicted of driving an automobile while under the influence of intoxicating liquor. A new trial was granted, and the State appeals.

Reversed, with directions.

For prior opinion, see 20 P.(2d) 366.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

H. B. Churchill, of Santa Rosa, for respondent.

PER CURIAM.

The defendant was convicted by a jury of driving his automobile while he was under the influence of intoxicating liquor, contrary to the provisions of section 112 of the California Vehicle Act (as amended by St. 1929, p. 537). Upon motion therefor, a new trial was granted. The state has appealed.

The defendant is a farmer residing near Cotati. At 9 o'clock on the evening of August 28, 1932, a collision occurred on the highway near his home between the defendant's automobile and a machine which was being driven by the prosecuting witness, Marie Gutermute. The defendant claimed the wheels of his car had dropped into the rut which existed adjacent to the right-hand side of the concrete pavement; that in his effort to pull the machine back onto the pavement he lost control of it and the car crossed onto the wrong side of the highway, causing the collision. Miss Gutermute's machine was overturned, but she was only slightly injured. The defendant was thrown violently against the steering wheel of his car. His chest was injured. A rib was broken. He received a cut on the elbow, which, he claims, caused a numbness and partial paralysis of that side of the body. Two teeth were loosened, and his mouth and nose were bleeding. He asserts that he was dazed

and rendered partly unconscious from the effect of the shock. Miss Gutermute released herself from the overturned machine and walked over to the car of the defendant, which remained upright on the pavement. She observed the defendant's bleeding nose. She charged him with negligence. She even accused him of being drunk. He did not reply to her accusations. He sat silent beside another man who occupied the front seat with him. She said he didn't seem to know anything. It is related he sat in his seat in this attitude for approximately fifteen minutes until two highway patrolmen arrived in their car. In the meantime Miss Gutermute had returned to her machine. The officers first talked with her. They then went over where the defendant sat in his machine. One of the officers asked him how the accident occurred. He said the girl ran into him. He was then requested to get out of his car, but he said that he was unable to do so. The officer helped him out, and assisted him to walk to their machine. The officer testified that the defendant seemed excited; his eyes were inflamed and an odor of liquor was upon his breath; he thought that the defendant was drunk. In the meantime the other officer searched the defendant's car for liquor, but found none. In the grass, about fifteen feet from the defendant's machine, the officers found a bottle half filled with jackass brandy. Both men denied they had any knowledge of this bottle. The defendant admitted they had drunk half a bottle of wine with their lunch in the middle of the afternoon. The defendant denied that he had imbibed any other liquor that day. He testified he never saw or heard of the bottle of brandy until it was produced by the officer.

The defendant was taken by the officers to Santa Rosa. Within about one hour of the time of the accident, a doctor was called and, after examining the defendant as to his sobriety, testified that he was unable to walk a straight line; that the pupils of his eyes were dilated; that he did not articulate clearly; and that he discerned "a marked odor of liquor" on his breath. The doctor said the defendant walked with his hand on his chest; that he complained of pain in the chest and arm, and that his mouth was bleeding. The doctor nevertheless pronounced him intoxicated. Both officers also testified that the defendant was intoxicated. A subsequent examination by another doctor disclosed the fact that the defendant was seriously injured as above related. At the trial, six reputable neighbors of the defendant testified they had known him many years and that he bore a good reputation as to sobriety. Two or three of them said they had never known of his drinking intoxicating liquor. The jury found him guilty of the offense with which he was charged, but recommended the imposition of a fine as penalty therefor.

During the trial the bottle of jackass brandy was admitted in evidence without tracing its possession to the defendant or his associate, except to prove that it was found in the grass near the roadside a short distance from their machine. Upon motion, the evidence of this bottle of liquor was stricken from the record and the jury was admonished to disregard it. As reasons for granting the new trial the court assigned "error in admitting in evidence the bottle of liquor and testimony regarding the same, and because the evidence in the absence thereof was not sufficient to warrant a conviction."

Upon rehearing, our attention is called to the fact that the motion for a new trial was not made on the ground of insufficiency of the evidence to support the verdict and judgment, and that the court granted the new trial on the sole ground that the admission of evidence of the bottle of brandy constituted prejudicial error, in spite of the fact that this evidence was subsequently stricken from the record and the jury admonished to disregard it.

It does appear the defendant filed a written notice of intention to move for a new trial, which assigned as grounds for the granting thereof only misconduct of the jury and prosecuting officer, newly discovered evidence, and errors committed by the court in the course of the trial.

The insufficiency of the evidence was not assigned as a ground for new trial. In his oral motion for a new trial, the attorney for the defendant said: "I file the notice of intention to move for a new trial, and I make orally a motion for a new trial *based upon it*." The actual motion for a new trial failed to designate the insufficiency of the evidence as a ground upon which the application was made. The court granted the new trial on the sole ground that "error (was committed) in admitting in evidence the bottle of liquor and testimony regarding the same, and because the evidence in the absence thereof was not sufficient to warrant a conviction." In other words, it does appear the court granted a new trial on the sole ground that the absence of evidence regarding the bottle of brandy left an insufficiency of proof to support the judgment. It necessarily follows that if this evidence regarding the presence of the bottle of liquor near the machine where the accident occurred was competent, then the court believed there was sufficient proof to support the judgment.

[1, 2] The defendant waived his right to apply for a new trial on the ground of insufficiency of the evidence by failing to designate the lack of proof as a reason therefor. The court did not grant a new trial on the ground of lack of evidence, but upon the contrary it was granted for "error in admitting in evidence the bottle of liquor and testimony regarding the same." Since the application

for a new trial was not made on the ground of the insufficiency of evidence, the court lacked authority to grant it upon that ground.

[3-5] A motion for new trial may be granted in a criminal case only upon the grounds specified in section 1181 of the Penal Code. People v. Amer, 151 Cal. 303, 90 P. 698. The statute does not require the giving of a written notice of intention to move for a new trial, in a criminal case. The application for a new trial must be orally made to the court before the entry of judgment. Section 1182, Pen. Code; People v. Ah Sam, 41 Cal. 645, 651. In the case last cited the court said: "The statute neither required nor authorized this motion to be made in writing. It must be made viva voce."

The mere filing of a written notice of motion for new trial without presenting it to the court is insufficient to comply with the requirements of the statute. In re Estate of Hunter, 99 Cal. App. 191, 196, 278 P. 485. The court is without authority to grant a new trial except upon the application of the defendant. Section 1181 of the Penal Code reads in part: "When a verdict has been rendered against the defendant, the court may, *upon his application*, grant a new trial, in the following cases only. * * *"

In the case of People v. Bangeneaur, 40 Cal. 613, the court said: "The statute only authorizes the Court to grant a new trial upon application of the defendant."

In some states a trial court may grant a new trial upon its own initiative, but this is because a difference exists in the statutes with relation thereto. A reasonable construction of section 1181, supra, would imply that a defendant waives his right to a new trial upon all grounds included within the provisions of that section unless he specifies the grounds upon which he relies in his application therefor. It follows that since the defendant failed to move for a new trial on the ground of insufficiency of the evidence, the order granting the motion may not be supported on that ground.

[6] Evidence of the presence of the bottle of jackass brandy was improperly excluded from the jury under the circumstances of this case. A collision had just occurred. The defendant's intoxication was charged as the cause of the accident. There was substantial evidence that the odor of alcohol was upon his breath. The car was standing on the highway in a sparsely settled country district. The bottle was found in the grass within a few feet of the automobile where it was likely to have been thrown by the occupants of the machine. There appears no other reasonable way to account for the presence of the bottle at that particular time and place. In the case of State v. Gondeiro, 82 Mont. 530, 268 P. 507, 508, under similar circumstances, the finding of a bottle of liquor in close proximity to the machine of an accused person was held to be competent evidence upon a charge of manslaughter. The court said: "It is urged strenuously that the court erred in admitting testimony respecting the bottle found in proximity to the car. We are wholly unable to agree with this argument. Clearly the testimony was relevant."

[7] In spite of the exclusion of this evidence in the present case, the jury found the defendant guilty as charged. There appears to be sufficient evidence of the intoxication of the defendant, whether the testimony regarding the discovery of the bottle of brandy remains in or out of the case.

For the reason that the court was without authority to grant a new trial on the ground of insufficiency of the evidence, and because we are of the opinion the evidence respecting the presence of the bottle of brandy is competent and should not have been stricken from the record, it becomes necessary to reverse the order granting the new trial. It is so ordered. The trial court is directed to vacate the order granting the new trial, and to proceed to pronounce judgment against the defendant.

131 Cal.App. 224

HASENDAHL v. J. D. HALSTEAD LUMBER CO.

Civ. 7838.

District Court of Appeal, Second District, Division 2, California.

April 14, 1933.

Appeal and error ⇐391(1).

Appellee was not entitled to dismissal of appeal from money judgment, where sureties on supersedeas bond became insufficient and appellant was unable to give new bond ordered, since bond was not essential to appeal, failure to file one subjected party only to execution, and supersedeas bond may be given or not at appellant's discretion (Code Civ. Proc. §§ 940–942, 954, 1057).

Appeal from Superior Court, Los Angeles County; Eugene P. McDaniel, Judge.

Action by W. Hasendahl against the J. D. Halstead Lumber Company. From a judgment for plaintiff, defendant appeals. On appellee's motion to dismiss the appeal.

Motion denied.

Benjamin & Benjamin and Aaron Elmore, all of Los Angeles, for appellant.

L. Lee Bernstein, of Los Angeles, for respondent.

ARCHBALD, Justice pro tem.

Respondent has moved to dismiss the appeal. Plaintiff recovered a money judgment for $4,063.22 against defendant, who thereafter filed a bond under section 942 of the Code of Civil Procedure in double the amount of the judgment, to stay execution thereon. Subsequently the sureties on such bond became insufficient, and the trial court ordered a sufficient undertaking to be filed by a date named, or "the execution shall not longer be stayed in this cause and the clerk of this court is directed thereafter to issue an execution." No bond was filed in compliance with such order, and execution issued.

Respondent now contends that, as there is no undertaking to which he can look to secure payment of his costs on appeal, if any are awarded, under section 942 and 1057 of the Code of Civil Procedure appellant has failed to furnish one of the "requisite papers" for the support of its appeal and that the same should be dismissed under section 954 of the Code of Civil Procedure.

Prior to 1921 section 940 of the Code of Civil Procedure required as one of the requisites of an appeal the filing of an undertaking on appeal, and section 941 of the same Code then in effect provided that such undertaking was to "pay all damages and costs which may be awarded against [appellant] on the appeal * * * not exceeding three hundred dollars." In 1921 the Legislature repealed section 941 as it then stood, and struck out that part of section 940 which made a bond on appeal one of the effective requisites (Stats. 1921, p. 193, §§ 1, 2), thus making "the mere filing of a notice with the clerk effective to take the appeal in all cases." People v. Jackson, 190 Cal. 257, 262, 212 P. 4, 6.

The only "right" obtained by an appellant under section 942 of the Code of Civil Procedure is to have execution stayed on a money judgment against him, and that is the only right he can lose by a failure to file a sufficient bond under section 1057 of the same Code. The language of section 954 of the Code of Civil Procedure providing that "no appeal can be dismissed for insufficiency of the undertaking, if a good and sufficient undertaking * * * be filed * * * before the hearing upon motion to dismiss the appeal," refers to the appeal bond which was formerly a requisite to support the appeal, but was apparently overlooked by the Legislature when that provision was repealed. The section last mentioned was amended in 1907 (Stats. 1907, p. 579), by adding to the section as it then stood and following the language quoted a provision referring to a stay bond as distinguished from an appeal bond, and providing as a penalty for the failure to file a sufficient bond in the event of the one filed becoming inadequate or lost that "execution may issue" the same as if no bond had been filed. Mersfelder v. Spring, 136 Cal. 619, 69 P. 251. Now there is no bond required to cover costs on appeal unless an appellant obtains a stay of execution under section 942 by filing an undertaking. The right to obtain a stay, however, is discretionary with appellant. To adopt respondent's contention would make it imperative on everyone appealing from a money judgment to obtain a stay of execution by filing a stay bond. The Legislature has not so provided, but by repealing the provision for a cost bond on appeal has clearly indicated a contrary intention.

Motion denied.

We concur: WORKS, P. J.; CRAIG, J.

131 Cal.App. 156

MULLER v. JOHN J. DAVI & BRO. et al.

Civ. 8899.

District Court of Appeal, First District, Division 2, California.

April 11, 1933.

Brokers ⇨4.

Real estate brokers, in collecting purchase-money note, *held* vendor's agent, rendering surety on brokers' bond liable for brokers' misappropriation of money (Gen. Laws 1931, Act No. 112).

Real estate brokers received commission for negotiating sale of realty and agreed to collect balance of purchase price for benefit of vendor. A note was given for part of the purchase price and was expressly made payable at the office of the real estate brokers. The brokers collected payments on the note and appropriated them to their own use. Oral testimony, express terms of note, and actions of parties demonstrated that brokers were employed to act as agents of vendor for purpose of collecting proceeds of note and that all money collected by them was received in accordance with terms of agency.

Appeal from Superior Court, Sacramento County; John F. Pullen, Judge.

Action by E. Muller against John J. Davi & Brother, a copartnership, composed of John J. Davi and another, and John J. Davi, individually, and others. From a judgment in favor of the plaintiff, the defendant Fidelity & Deposit Company of Maryland appeals.

Affirmed.

Butler, Van Dyke, Desmond & Harris, of Sacramento, and Thomas E. Davis, of San Francisco, for appellant.

H. Nelson French and Chauncey H. Dunn, both of Sacramento, for respondent.

NOURSE, Presiding Justice.

Plaintiff sued as assignee for collection of one E. Varanini to recover moneys misappropriated by John J. Davi & Brother, real estate brokers. The Fidelity & Deposit Company of Maryland was sued upon its bond given the real estate brokers as surety under the Real Estate Brokers' Act of July 27, 1919, as amended (Deering's Gen. Laws, Act No. 112). Plaintiff had judgment, and the surety company alone has appealed upon typewritten transcripts.

The facts are without material conflict. Plaintiff's assignor, through the agency of the real estate brokers, sold certain property to Palestini for the total price of $16,125; $4,000 was paid at the time of the execution of the contract. The brokers received a commission of $500 and agreed that they would collect the entire balance for the benefit of plaintiff's assignor. Payments were made from Palestini to the brokers in accordance with this agreement until the balance of the purchase price had been reduced to $9,000. The purchasers then obtained the sum of $7,500 from a first mortgage on the property which was paid to plaintiff's assignor together with a note for $1,500 secured by a second mortgage on the property. This note was expressly made payable at the office of the real estate brokers. Pursuant to this agreement they collected payments of $1,300 upon this note which they appropriated to their own use. The basis of the action is the money thus received and retained by the brokers and the surety is held under the provisions of section 9a of the statute, which requires a bond conditioned "for the honest and faithful performance by such broker * * * of any undertaking * * * and the honest and faithful application of all funds received."

The appellant directs its entire attack upon the sufficiency of the evidence to sustain the finding that the brokers were the agents of plaintiff's assignor for the collection of the note and the finding that such agency was one, the faithful performance of which was assured under the bond. As to the first point the oral testimony, the express terms of the note, and the actions of the parties all demonstrate that the brokers were employed to act as agents of plaintiff's assignors for the purpose of collecting the proceeds of the note and that all money collected by them was collected in accordance with the terms of this agency.

When moneys are collected under such an agency and misappropriated by the real estate brokers, the principal may recover on the bond given under the terms of the statute. We so held in Nittler v. Continental Casualty Co., 94 Cal. App. 498, 505, 271 P. 555, 559, 272 P. 309, where we said: "It cannot be doubted that, when a licensed broker has obtained the proceeds of a sale of property belonging to his principal and refuses to turn over such proceeds to his principal, he has failed to perform the duty incumbent upon him as such broker or agent irrespective of any provision of the act requiring him to do so." This language was quoted with approval in Clark v. Patterson, 213 Cal. 4, 9, 300 P. 967, 75 A. L. R. 1124, a case where the broker failed to turn over to his principal moneys received under a sales contract which was not completed. In holding that the surety was liable for such misappropriation, whether the contract was complete or not, the Supreme Court said (page 10 of 213 Cal., 300 P. 967, 969): "In each case, the duty is one which he has incurred *while acting as a real estate broker*, and for his failure to perform such duty his surety is liable to the person damaged."

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

131 Cal.App. 245

ROGERS v. GOODRICH.

Civ. 8740.

District Court of Appeal, First District, Division 2, California.

April 15, 1933.

1. Appeal and error ⇐1064(1).

In action for injuries in automobile collision, modification of instructions by elimination of concrete instructions on contributory negligence of guest claimed to be drunk and riding with drunken host *held* not harmful to defendant, where general instructions on subject were given.

2. Negligence ⇐93(1).

Negligence of automobile host will not be imputed to guest who has no control or right of control over host, notwithstanding they attended social gathering and that guest prepared intoxicating drinks for host.

3. Damages ⇐132(1).

$3,500 *held* not excessive where woman sustained cut over left eye requiring several stitches leaving scar on forehead, broken left clavicle, and many bruises.

4. Appeal and error ⇐1004(1).

Appellate court will not disturb verdict for damages in personal injury case unless it

is so excessive as to suggest passion, prejudice, or corruption on part of jury.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Separate actions by Beth Rogers and one McSweeney against Howard L. Goodrich, a minor, by his guardian ad litem, F. L. Goodrich, which were tried together. From judgment for Beth Rogers against the defendant, defendant appeals.

Affirmed.

James M. Koford, of Oakland (John J. Earle, of Oakland, of counsel), for appellant.

James R. Agee and John F. Balaam, both of Oakland, for respondent.

STURTEVANT, Justice.

In an action to recover damages for personal injuries the jury brought in a verdict in favor of the plaintiff. From the judgment entered thereon the defendant has appealed.

On the evening of October 24, 1931, Mr. and Mrs. Dunham arranged a party in honor of the wedding anniversary of Mr. and Mrs. Washen. Mrs. Dunham invited Miss Rogers, the plaintiff, who in turn invited Mr. McSweeney as her escort. Between 8 and 9 on that evening the party gathered at the Dunham home. There each of them had three highballs of gin and ginger ale. About 10 o'clock they left the Dunham home and went to a resort called the Alabam. After arriving there Mr. Dunham produced a pint of gin and each had a drink. At 11 o'clock dinner was served. After dinner there was dancing until 1 o'clock. At that time the house closed and the members of the party returned to their respective automobiles. They drove to different places, but no further drinking was done during the night and prior to the accident. At about half past 3 Mr. McSweeney was driving south on Dutton avenue. The plaintiff was riding with him as his guest. As Mr. McSweeney approached East Fourteenth street the defendant Howard L. Goodrich was driving west on that street, which is a boulevard and on which boulevard signs had been installed. The two automobiles were so operated that a collision occurred in the intersection and the plaintiff suffered the injuries complained of. Mr. McSweeney was also injured. Each filed a suit against Howard L. Goodrich, who appeared by his guardian and defended. The two actions were tried together. The plaintiffs contended that the defendant Goodrich was negligent in failing to keep a lookout and because he was driving at an excessive speed. The defendant contended that Mr. McSweeney was negligent because: (1) He did not keep a lookout; (2) he did not yield the right of way; (3) he did not stop at the boulevard signs; and (4) he was intoxicated at the time of the accident. The jury returned a verdict against Mr. McSweeney and in favor of the defendant. It also returned a verdict in favor of the plaintiff and against the defendant in the sum of $3,500.

[1] The defendant complains because the trial court modified two of his requested instructions. After inserting the parentheses A and B for our convenience, the requested instructions were as follows:

"(A) I instruct you that if at the time of the accident or immediately before the same plaintiff McSweeney, who was driving the automobile in which plaintiff Rogers was riding was under the influence of intoxicating liquor to such an extent as to dull his sense of sight, and to prevent or tend to prevent him from exercising the care and caution which a sober and prudent man would have exercised under the circumstances, and that plaintiff Rogers knew, or should have known, of McSweeney's condition, and thereafter continued to ride with him, this would constitute negligence on the part of plaintiff Beth Rogers, (B) and if such condition of the driver of the automobile under such circumstances contributed proximately in the slightest degree to cause the accident neither plaintiff Beth Rogers or plaintiff McSweeney can recover, and your verdict must be in favor of the defendant."

"(A) If you find from the evidence that plaintiff Beth Rogers rode, or continued to ride, in plaintiff McSweeney's automobile when she knew, or must have known, that McSweeney was intoxicated, then I instruct you that plaintiff Beth Rogers was negligent in so doing, and her negligence constituted negligence, independent of McSweeney's negligence, (B) and bars any right of recovery by her if such intoxication of the driver proximately contributed to the accident and under such circumstances your verdict must be in favor of the defendant."

The alteration complained of consisted of striking out of each of the instructions that portion following B. The defendant asserts that the passage so stricken was correct as a proposition of law and should have been given. The plaintiff replies that it was given elsewhere. The reply is entirely sufficient, because an examination discloses that another instruction which the court did give was as follows: "Contributory negligence is such an act or omission on the part of a plaintiff amounting to a want of ordinary care, as concurring or co-operating with the negligent act of a defendant, was a proximate cause of the injury complained of. * * *" And in still another instruction the court instructed as follows: "* * * It is your duty, if you find any contributory negligence at all on the part of a plaintiff, which contributed proximately to cause the accident complained of, to render your verdict in favor of the

defendant and against the plaintiff you so find to have been negligent." The most that can be said is that the portions stricken were concrete and that the instructions which were given were general. But even if that be so it is impossible to see how the defendant could have been injured. By reason of the two verdicts brought in, the defendant claims, it must be assumed that the jury did not understand that Miss Rogers was not entitled to recover if the jury found that she was guilty of knowingly riding with an intoxicated driver and that her injury was a result of her contributory negligence. Of course that claim is not sound. Perhaps the jury found that Mr. McSweeney was guilty of negligence under divisions 1, 2, and 3, as hereinabove classified, but was not guilty under division 4.

[2] Contending that all participants in a joy ride are engaged in a joint enterprise and that the negligence of one is imputed to all, the defendant requested the trial court to give an instruction to that effect to the jury. That request was denied and the defendant assigns the denial as error. In support of the legal proposition he cites Winston's Adm'r v. City of Henderson, 179 Ky. 220, 200 S. W. 330, L. R. A. 1918C, 646; Kinnie v. Town of Morristown, 184 App. Div. 408, 172 N. Y. S. 21; Franco v. Vakares, 35 Ariz. 309, 277 P. 812; and Hershey v. Township of Millcreek, 9 A. 452, 6 Sad. (Pa.) 459. The plaintiff replies that whatever may be the rule in other states the rule contended for does not exist in this state. She cites Kelley v. Hodge Transportation System, 197 Cal. 598, 242 P. 76; Pope v. Halpern, 193 Cal. 168, 223 P. 470; Bryant v. Pacific Electric Ry. Co., 174 Cal. 737, 164 P. 385, and Sale v. Illinois Electric Co., 114 Cal. App. 71, 299 P. 561. Those cases are to the general effect that the passenger must exercise some control over the driver, or in law, may be said to possess the right of such control, before it will be held that they are engaged in a joint enterprise. Answering that reply the defendant concedes that the point has never been ruled on in this state but that the reasoning of the cases on which he relies induces him to make the contention. Furthermore he emphasizes the evidence which was to the effect that this plaintiff prepared the drinks and handed them to Mr. McSweeney. However reprehensible the act of the plaintiff may have been such act does not logically enter into or tend to change the branch of law that has recently developed into what is known as joint adventures. 33 C. J. 839. There is not a word of testimony to the effect that at any time Mr. McSweeney entered into any kind of a contract, written or oral, with the plaintiff giving her any control or right of control over his automobile. That the participants lent their presence to the social gathering did not in any way tend to change their property rights. We are therefore of the opinion that the point may not be sustained.

[3, 4] As stated above, the jury returned a verdict in favor of the plaintiff in the sum of $3,500. The defendant asserts the amount was excessive. In making that assertion we think he is not sustained by the record. The evidence showed that in the accident the plaintiff was cut over the left eye and several stitches were necessary. At the time of the trial she had a defined scar on the forehead. There was evidence that it was doubtful whether the scar could be removed by any kind of a surgical operation. To what extent the appearance of the plaintiff has been marred by the scar does not appear in the written transcript. The left clavicle of the plaintiff was broken and she was compelled to have it set. She suffered much pain for some weeks. Before the trial the bone had knit and the union was very satisfactory. She also suffered many bruises, some of which had disappeared; but at the trial she still complained of suffering pain from one of the bruised spots. She had incurred medical expenses in the sum of $100. In view of all of the foregoing facts it may not be said the verdict suggests at first blush passion, prejudice, or corruption on the part of the jury. It follows that a court of review may not disturb it. Morris v. Standard Oil Co., 188 Cal. 468, 473, 205 P. 1073.

The judgment is affirmed.

We concur: SPENCE, Acting P. J.; GOODELL, Justice pro tem.

131 Cal.App. 241

SANBORN v. POMONA PUMP CO.

Civ. 791.

District Court of Appeal, Fourth District. California.

April 14, 1933.

1. Corporations ⇐503(1).

Where venue of action against corporation may be in two counties, plaintiff can choose either of them in which to institute action (Const. art. 12, § 16).

2. Corporations ⇐503(1).

Venue of action for damages lay either in county where corporation breached its warranty in sale of pump, or in county where corporation resided (Const. art. 12, § 16).

3. Appeal and error ⇐1024(3).

On conflicting evidence, trial court's order granting motion to change place of trial cannot be disturbed.

4. Corporations ⇐503(2).

If corporation's contract to pay plaintiff's cost of attempting to operate pump and remove it from well was made, was to be performed, and was breached in same county, venue of action was in such county (Const. art. 12, § 16).

5. Corporations ⇐503(3).

Place of trial will be changed where there are two causes of action against corporation, under one of which only it has right of transfer (Const. art. 12, § 16).

Appeal from Superior Court, Kern County; Allan B. Campbell, Judge.

Action by Samuel Sanborn against the Pomona Pump Company. From an order granting defendant's motion to change the place of trial, plaintiff appeals.

Affirmed.

See, also (Cal. App.) 18 P.(2d) 65.

R. W. Henderson, of Bakersfield, for appellant.

David G. Kling, of Los Angeles, for respondent.

MARKS, Justice.

Appellant filed this action in the superior court of the county of Kern seeking to recover a judgment for $3,479.38. The complaint attempts to state three causes of action. From this pleading it appears that respondent is a corporation engaged in the business of manufacturing, selling, and installing pumps; that appellant owned land in Kern county upon which was a water well from which 100 gallons of water could be pumped each minute; that respondent sold appellant, and agreed to install, at a cost of $879.38, a Pomona turbine pump, which was guaranteed to pump 100 gallons of water each minute; that appellant paid the agreed price therefor; that the pump was installed but would pump no water from the well. The facts thus far stated are common to all three causes of action, though not sufficiently incorporated in two of them. One cause of action is for $2,500 damages suffered between May 11 and July 1, 1931, by reason of appellant not being able to pump any water from his well. The second is for the recovery, after a purported rescission of the contract, of $879.38, paid for the pump and its installation. The third is to recover $100 expended by appellant "at the request of and with the consent of the defendant * * * in attempting to install and operate such and in removing the same." Without passing on the sufficiency of the pleading, we conclude that the complaint attempts to state causes of action (1) for damages for breach of contract; (2) for money had and received after a rescission of the contract; (3) for money alleged to be due under a contract.

The demand for the change of place of trial was made principally upon the ground of the residence of respondent in Los Angeles county, and that the contract was made in that county and rescinded there. From the order changing the place of trial, it appears that "evidence both oral and documentary" was introduced at the hearing of the motion. No parol testimony is incorporated in the bill of exceptions. The certificate of the trial judge to this document contains the following: "The foregoing Engrossed Bill of Exceptions on behalf of the plaintiff, the original draft whereof was presented to the Honorable Allan B. Campbell, the Judge who made the Order hereinbefore excepted to, on the 10th day of February, 1932, is hereby settled and allowed as a full, true and correct Engrossed Bill of Exceptions and as containing the complaint, notice of motion for change of venue, the affidavits of B. Joseph, A. W. Miller, and George A. McKenna; the demand for change of venue, the affidavit of Samuel Sanborn in opposition to the motion for change of venue hereinbefore set out, and the same, and no other evidence was submitted to and considered by the above entitled Court, in making its order transferring the above entitled action for trial."

Section 16 of article 12 of the Constitution provides that: "A corporation or association may be sued in the county [1] where the contract is made or [2] is to be performed, or [3] where the obligation or liability arises or [4] the breach occurs; or [5] in the county where the principal place of business of such corporation is situated, subject to the power of the court to change the place of trial as in other cases."

[1] Where the venue of an action against a corporation may be in two counties the plaintiff has the option of choosing either of them in which to institute his action. Cook v. Ray Mfg. Co., 159 Cal. 694, 115 P. 318.

[2] From the affidavits it appears that the contract for the purchase of the pump was made and accepted by respondent in Los Angeles county. The breach of the warranty occurred in Kern county. Venue of the cause of action for damages lay either in Kern county, where this cause of action arose, or in Los Angeles county, the place of residence of respondent.

In commenting upon venue in an action to recover money paid under a contract, the Supreme Court said: "In denying the petitions for a transfer to this court, we deem it proper to say that we are inclined to agree with the petitioners that the action is one for the rescission of contract, for the prayer of the complaint is for the amount of money already paid and for the cancellation of the

plaintiffs' promissory note. Kelley v. Owens, 120 Cal. 502, 510, 47 P. 369, 52 P. 797. Such an action may be brought in the county where the contract sought to be rescinded was made." Nakata v. Guarantee Mtg. Co., 60 Cal. App. 260, 262, 212 P. 937, 938.

[3, 4] It is not definitely stated in the affidavits submitted by respondent in support of its motion to change the place of trial just where the contract to pay appellant his cost of attempting to operate the pump and of removing it from the well was made and was to be performed, if made at all. It may be fairly inferred from these affidavits that this contract, if made, was made and was to be performed in Los Angeles county. This is contradicted by the affidavit of appellant, but this at best creates a conflict in the evidence which was decided by the trial judge in favor of the contention of respondent. We cannot disturb the ruling of the lower court because of a conflict in the evidence. If the contract for the payment of money was made, was to be performed, and was breached in Los Angeles county, this obligation arose there and the venue of this cause of action was in the courts of that county.

[5] It has been held that, when a complaint has a double aspect, under one of which the defendant has the right to change the place of trial, and under the other he has no such right, it will be construed against the pleader and the case transferred. The same result is reached where there are two causes of action, under one of which there exists the right of transfer, and, where, under the other, no such right exists. Ah Fong v. Sternes, 79 Cal. 30, 21 P. 381. It follows that the order transferring this case was properly made.

Order affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

131 Cal.App. 228

PEOPLE v. DEAN et al.

Cr. 2293.

District Court of Appeal, Second District, Division 2, California.

April 14, 1933.

1. Licenses ⇐39.

One selling securities issued by another is bound to investigate whether issuer secured permit (Gen. Laws 1931, Act 3814, §§ 3, 6, 17, 18).

2. Licenses ⇐42(4).

In prosecution of one selling securities, issued by another, for violating Securities Act, state having shown sale of securities within act, burden was on defendant to prove issuer secured permit (Gen. Laws 1931, Act 3814, §§ 3, 6, 17, 18).

Appeal from Superior Court, Los Angeles County; Elliot Craig, Judge.

W. G. Dean and another were charged with certain offenses, and motion of defendant Seidlitz to set aside each of counts was granted as to all counts and that of defendant Dean as to certain counts, and the State appeals from the orders of dismissal.

Order granting motion to dismiss as to defendant Seidlitz affirmed, and as to defendant Dean reversed as to certain counts.

U. S. Webb, Atty. Gen., and John L. Flynn, Deputy Atty. Gen., for the People.

C. J. Morley, of Los Angeles, for respondent Dean.

Robert E. O'Neill, of Los Angeles, for respondent Seidlitz.

ARCHBALD, Justice pro tem.

Defendants were jointly charged in count I of an information with the crime of grand theft, and in counts II and III thereof with a violation of the Corporate Securities Act. They severally moved to set aside each of said counts on the ground that they were not legally committed, in that the evidence introduced before the committing magistrate failed to show that the offenses charged were committed. The trial court granted the motion of defendant Seidlitz as to all counts and that of defendant Dean as to counts II and III. Plaintiff has appealed from such orders of dismissal.

The evidence taken before the committing magistrate, except in so far as the exhibits are concerned, is not before us. The record in the superior court on the matter of the motions is, however, and it appears therefrom that the theory under which count I was framed was that there was a conspiracy to commit the act between the two defendants. The trial court stated at the hearing that there was no evidence connecting the defendant Seidlitz with the transaction, and appellant concedes that the dismissal of such defendant as to count I was proper.

It was stipulated at the hearing in effect that there was no evidence introduced at the preliminary hearing showing that no permit was issued by the corporation commissioner permitting the securities in question to be sold.

Count I of the information charges the sale of a security to one Walter F. Sagar without permission of the corporation commissioner so to do, and count II alleges a similar sale to one A. R. Greenslit. Section 3 of the Corporate Securities Act (St. 1917, p. 673; vol. 2,

Deering's Gen. Laws, 1931, pp. 1924, 1928) prohibits the sale of any security by the issuer thereof without a certificate having first been issued by the corporation commissioner permitting the same. Section 6 of the act prohibits any one from acting as agent or broker without first having secured a certificate from such commissioner authorizing such action. Section 17 makes it unlawful for any company, which includes any corporation, etc., or individual, issuing securities, either directly or indirectly, without such a permit, or contrary to the conditions of a permit if one has been issued, to issue or sell any security; and section 18, so far as material here, provides that "Every officer, agent, or employee of any company and every other person, who knowingly authorizes, directs, or aids in the issue or sale of, or issues or executes, or sells, or causes or assists in causing to be issued, executed, or sold, any security * * * contrary to the provisions of this act * * * is guilty of a public offense," and shall be punished as provided therein. Appellant admits that respondents are not charged either as being issuers of securities involved or as acting as agents or brokers for the issuer, but of violating section 18 of the act in selling a security for which no permit was obtained authorizing the issuance thereof. It is appellant's contention that, having shown the sale of a security coming within the meaning of the act, the burden of negativing the issuance of such a permit was not required of the prosecution to support a commitment, but that the burden was upon defendants to prove the affirmative thereof as a matter of defense.

The general rule of evidence respecting the proof of negative averments is laid down in the case of Commonwealth v. Boyer, 7 Allen (89 Mass.) 306, at page 307, as follows: "When the defendant is, in the first instance, shown to have done an act which was unlawful unless he was distinctly authorized to do it, the proof of authority is thrown upon him." In the case of People v. Boo Doo Hong, 122 Cal. 606, 55 P. 402, 403, the defendant was charged with unlawfully practicing medicine without a license. The evidence showed that defendant had been practicing medicine at Red Bluff, "but no evidence was introduced on either side showing, or tending to show, that defendant had or had not a certificate to so practice, as required by law." The court instructed the jury that the burden was upon the defendant to establish that he had such certificate, and that, if he failed to prove such fact, it must be taken as true that he did not have one. Such instruction was challenged, and it was urged that the verdict was not justified because in a criminal case the defendant is presumed to be innocent until proven guilty beyond a reasonable doubt; that such presumption continues throughout the trial; that, inasmuch as the information charged that defendant had practiced medicine without having a certificate so to do, the burden was upon plaintiff to make such proof; and that, not having done so, the defendant should have been acquitted. In regard to such contention, the Supreme Court said: "The general rule is undoubtedly as above stated, but there is a well-recognized exception to the rule, where there is a negative averment of a fact which is peculiarly within the knowledge of the defendant. * * * We think the rule upon this subject generally recognized and followed the correct one, and therefore conclude that the court did not err in giving the instruction complained of, and that the verdict was justified by the evidence." Appellant urges that such rule applies in the instant case. Respondents admit the existence of the rule, but say that it does not apply to them inasmuch as they did not issue the securities; that the burden was not upon them to obtain the permit and hence, the matter of its issuance not being to them as individuals as in the case of a license to practice medicine, dentistry, etc., it was not a fact peculiarly within the knowledge of either of them. They also urge that, as any permit was not issued to them, but to the issuer of the security, the means of proving the fact are as much within the control of plaintiff as of them, in which case the burden is upon the party averring the negative. Jones Com. on Ev. vol. 2, § 494, p. 882.

The security involved in count II appears to have been issued by the "South Vulture Gold Mining Co., Ltd., Trustees of a Common Law Estate," and is for "5,000 equities" of the "nominal par value of $1.00 each." The signature on the security appears as follows: "South Vulture Gold Mining Co., Ltd., Trustees of a Trust Estate Harry J. Mumma, Vice President Wm. G. Dean Secretary." In the lower left-hand corner appears a gilt seal with the name of the company imprinted thereon, and in the center thereof the words "Trustee's Seal." Apparently preceding the issuance of this security Sagar signed three agreements in writing by which he subscribed the sum of $300, $100 and $100, respectively, payable to the "Treasurer of the Trustees, Harry J. Mumma, upon demand, for the purpose of assisting in completing a fund to furnish tools, supplies and machinery to enable said group of [unemployed] mining workers to make efficient recovery of the gold values in the ores obtained from above named properties," of which the South Vulture Gold Mining Company, Limited, was purported by the agreements to have obtained control. Such agreements were accepted on behalf of the trustees "by Wm. G. Dean, Secretary of the Board of Trustees." The agreements also provided that Sagar was to receive 1 per cent. of the net profits for each $100 subscribed "from the Net Bullion Returns from the Gold Bar Mine in the Peck Mining District, Yavapai County, Arizona, owned by Mrs. Ray Seidlitz of Los Angeles, which is the first property to be operated by the trustees." It would appear from the little evidence at hand that the subscrip-

tions for the securities issued by the South Vulture Gold Mining Company, Limited, were taken by such agreements, and that, when the amount subscribed was paid in full, the security was issued and delivered. A similar subscription agreement was signed by A. R. Greenslit in the sum of $500 and accepted by Dean for the trustees.

It would appear from the record and evidence before us that the burden was upon the trustees of the South Vulture Gold Mining Company, Limited, to secure a permit before the securities issued or to be issued could be legally sold. Under that situation, was the fact whether they had done so peculiarly within the knowledge of respondents?

[1, 2] Respondents urge that, if the permits were granted by the commissioner, to them it might be in line with the cases cited involving the practice of medicine, dentistry, and optometry, as well as those involving the sale of intoxicating liquors without a license, but it is urged that the rule does not apply where the securities were issued by some one else, who may have obtained the license, as in such case the fact is one "which may or may not be peculiarly within the knowledge of a given defendant," and that the plaintiff can as conveniently obtain such knowledge by going to the office of the corporation commissioner as can the defendant. Possibly so, but the purpose of the act is to put the burden upon one selling a security to see that it can be lawfully sold. It is to prevent imposition on the public, which has the same right to investigate before it buys that one selling a security has before he sells. The law, however, puts the burden of such investigation on the party selling, and it is no excuse if he fails to ascertain if such security cannot in fact be legally sold. He is bound to make such investigation, if the security is not issued by him, before attempting to make a sale thereof, and we may well presume that he did so, as it would not seem reasonable to presume that, knowing the law as he must, he would go ahead with the sale without an independent investigation.

In the case of Anderson v. Board of Dental Examiners, 27 Cal. App. 336, 149 P. 1006, 1007, the petitioner applied for a writ to review the proceedings of such board in the matter of the suspension of his license. He employed one Munn to assist him in his practice, and permitted him to use his offices and instruments in the practice of dentistry. It was contended that there was no evidence introduced showing that petitioner "ever knew, that said Munn was not duly licensed to practice dentistry." As to such contention the court said: "The respondent contends, and we think correctly, that if it be the fact that the said Munn was not the possessor of such license to practice the profession of dentistry as would make him an available subject of employment by the petitioner for the purposes for which the evidence shows he was utilized in the latter's offices, or to have permission to use said offices and the paraphernalia thereof for the practice of dentistry, which the evidence sufficiently shows he did, the duty was cast upon the petitioner to ascertain that fact before taking Munn into his service for such purposes, or permitting him to make use of his offices and appliances for the practice of dentistry, and hence his knowledge of the fact, if it be a fact, is to be assumed." It is true the court also held that the board of dental examiners could take judicial knowledge of its own records as to whether such license was issued or not, but it does not appear that the board exercised such right, and the case seems to say that the burden of proof was on the petitioner by reason of his duty to investigate. We think the same rule should be applied to one who sells a security coming within the meaning of the Corporate Securities Act. Otherwise, by going blindly ahead when trouble arises, he forces the state to prove a negative which it is his duty to affirmatively ascertain before he can lawfully sell the security. The state in its prosecutions under the act is not putting the wronged victim back in the position he was before the unlawful sale was made. That wrong is still not righted, even after a successful prosecution, and we are not willing to hold that the party whose duty it was to save all that loss and damage can, by closing his eyes to facts it was his duty to ascertain before damaging some innocent third person, force the prosecuting officer to do something he should himself have done and to prove something he is bound to know under the law, if he acts legally.

A great deal of argument is made as to the accessibility of the records of the corporation commissioner to the plaintiff when a case is tried in Los Angeles, where the commissioner maintains an office. To prove the negative alleged, regardless of the accessibility of the records, requires a search by the commissioner of his entire records in order to ascertain if as a matter of fact a permit was not issued, and then to prove the result of such search by himself or his deputies, all of which costs the state considerable money in loss of time and inconvenience to the office which it can ill afford to bear and which it would seem it should not be compelled to suffer where a defendant himself has, or should have, peculiar knowledge as to the fact.

At the hearing on the motion to dismiss, the district attorney stated that the theory under which the prosecution had proceeded as to defendant Seidlitz was that of conspiracy between the two defendants, and that "we felt that if the defendant Seidlitz was at all culpable under the second two [counts of the information] she was under the first one"; so it would seem that as to that defendant un-

der such admission, all three counts were properly dismissed, regardless of the decision on the point raised by such defendant.

The order granting the motion to dismiss as to respondent Seidlitz is affirmed. As to respondent Dean it is reversed as to counts II and III.

We concur: WORKS, P. J.; STEPHENS, J.

131 Cal.App. 177

PEOPLE v. CARTER et al.

Cr. 2333.

District Court of Appeal, Second District, Division 1, California.

April 12, 1933.

Hearing Denied by Supreme Court May 11, 1933.

1. Statutes ⇐158.

Repeal of statute by implication is not favored.

2. False pretenses ⇐2.

Theft statute *held* to have superseded or repealed identical provisions of prior statute dealing with criminal offense of obtaining money or property by false pretenses (Pen. Code, § 532, and § 484, as amended by St. 1927, p. 1046, § 1).

3. False pretenses ⇐2.

Repeal by implication of statute dealing with offense of obtaining property by false pretenses *held* not to carry with it repeal of statute dealing with sufficiency of evidence to support conviction for such offense; hence, where charge of grand theft was based on alleged obtaining of property by false pretenses, defendant was entitled to instruction based on the evidence statute (Pen. Code, §§ 532, 1110, and § 484, as amended by St. 1927, p. 1046, § 1).

4. False pretenses ⇐52.

Where grand theft charge against purchaser was based on alleged obtaining of property by false pretenses, that purchaser stated he had no intention of paying purchase price note which was genuine *held* not to render note "false token" so as to defeat purchaser's right to instruction under statute regarding sufficiency of evidence (Pen. Code, § 1110 and § 484, as amended by St. 1927, p. 1046, § 1).

[Ed. Note.—For other definitions of "False Token," see Words and Phrases.]

5. Criminal law ⇐1173(2).

In grand theft prosecution for obtaining property by false pretenses, that jury were instructed that they were sole judges of weight of evidence and credibility of witnesses *held* not to render failure to give sufficiency of evidence instruction harmless (Pen. Code, § 1110, and § 484, as amended by St. 1927, p. 1046, § 1).

6. Criminal law ⇐1173(2).

In grand theft prosecution for obtaining property by false pretenses, error in failing to give statutory sufficiency of evidence instruction *held* to require reversal (Pen. Code, § 1110, and § 484, as amended by St. 1927, p. 1046, § 1; Const. art. 6, § 4½).

Appeal from Superior Court, Los Angeles County; Stephen G. Long, Judge.

Irving H. Carter and Elzie I. Carter were convicted of grand theft, and they appeal.

Reversed.

R. E. O'Neill, of Los Angeles, for appellants.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, of San Francisco, for the People.

HOUSER, Justice.

The defendants appeal from a judgment of conviction of the crime of grand theft and from an order by which their motion for a new trial was denied.

Briefly, the evidence adduced on the trial of the action purports to establish the facts which support the conclusion that, by reason of certain false representations or pretenses made by the defendants to the owners of an automobile, the defendants secured possession and ostensible ownership of said automobile, and thereby defrauded the owners thereof of its value.

Appellants predicate prejudicial error on the refusal of the trial court to give to the jury, at the request of the defendants, the following instruction: "Upon a trial for having, with an intent to cheat or defraud another designedly, by any false pretense, obtained the signature of any person to a written instrument, or having obtained from any person any labor, money, or property, whether real or personal, or valuable thing, the defendant cannot be convicted if the false pretense was expressed in language unaccompanied by a false token or writing, unless the pretense, or some note or memorandum thereof is in writing, subscribed by or in the handwriting of the defendant, or unless the pretense is proven by the testimony of two witnesses, or that of one witness and corroborating circumstances. * * *"

In support of their position with reference to the error in question, appellants rely principally upon the provisions of section 1110 of the Penal Code, which, in very nearly the identical language of the refused instruction, provides as follows: "Upon a trial for having,

with an intent to cheat or defraud another designedly, by any false pretense, obtained the signature of any person to a written instrument, or having obtained from any person any labor, money, or property, whether real or personal, or valuable thing, the defendant cannot be convicted if the false pretense was expressed in language unaccompanied by a false token or writing, unless the pretense, or some note or memorandum thereof is in writing, subscribed by or in the handwriting of the defendant, or unless the pretense is proven by the testimony of two witnesses, or that of one witness and corroborating circumstances. * * *"

On the part of respondent, it is argued that, since the prosecution of the action against the defendants was authorized by the provisions of section 484 of the Penal Code, which section as now constituted in effect is a merger or a consolidation into the single crime of "theft" of various criminal offenses formerly defined and denounced by statutes enumerated by different respective sections of the Penal Code, including section 532 thereof, which deals specifically with the offense of "obtaining money, property, or labor by false pretenses," the rule of pleading as announced in section 952 of the Penal Code that "in charging theft it shall be sufficient to allege that the defendant unlawfully took the labor or property of another" carries with it the requirement of evidence necessary for conviction in ordinary cases of larceny (or theft) only. In other words, the contention of the respondent is that the merger or the consolidation into section 484 of the Penal Code of the provisions of section 532 thereof, relating to obtaining property by false pretenses, had the effect not only to repeal the latter statute, but as well to render void and of no effect the provisions of section 1110 of the Penal Code, which specify what evidence shall be necessary to support a conviction of the criminal offense of obtaining money or property by false pretenses.

It is undeniable that preceding the date when the amendment of 1927 to section 484 of the Penal Code became effective (Stats. 1927, p. 1046, § 1), in a prosecution of a defendant for an alleged violation by him of the provisions of section 532 of the Penal Code, for obtaining money or property by false pretenses, he would have been entitled to have had an instruction given to the jury in substance in the language of section 1110 of the Penal Code; or such an instruction as was offered by the defendants and refused by the court in the instant action. The question therefore with which this court is confronted is whether by what may be termed the re-enactment of section 532 of the Penal Code, and by a renaming of the offense therein defined, the former rights and safeguards afforded a defendant by the provisions of section 1110 of the Penal Code were impliedly repealed.

[1] It is a generally understood principle that the repeal of a statute by implication is not favored in the law. 23 Cal. Jur. 694 et seq. However, it has been held that, even in the absence of a clause in a statute by which an earlier statute which assumedly deals with the same subject as the later one is expressly repealed, if it clearly appear that the later statute is intended as a complete revision or restatement of, or a substitute for, the earlier statute, the latter will be deemed to have been superseded by the later act, even though no inconsistencies or repugnancies exist as between the two statutes. 23 Cal. Jur. 694, 701; Smith v. Mathews, 155 Cal. 752, 758, 103 P. 199; Mack v. Jastro, 126 Cal. 130, 132, 58 P. 372; Jewett v. City Transfer & Storage Co. (Cal. App.) 18 P.(2d) 351. But the decisions also clearly indicate that, unless the object or the purpose of the quasi repealing statute is identical with that of the statute claimed to be so repealed, the effect is not that a repeal has been effected; but, to the contrary, unless, in addition thereto, such statutes are repugnant one to the other, or that the provisions of the later statute are inconsistent with those of the earlier statute, each of such statutes will remain as a declaration of the law which purportedly is declared therein. 23 Cal. Jur. 693 et seq.; section 325, Pol. Code.

From a consideration of the language employed in section 484 of the Penal Code, as amended in 1927, with the language contained in the formerly existing several statutes by which is denounced the respective crimes of larceny, embezzlement, and obtaining money or property by false pretense, little, if any, doubt may be seriously entertained regarding the fact that the prime intention of the Legislature in enacting the statute of 1927 was to consolidate into a statement of one criminal offense, consisting of each of several complete parts thereafter to be known as theft, the various criminal offenses theretofore known and recognized by the names of larceny, embezzlement, and obtaining money or property by false pretense. People v. Plum, 88 Cal. App. 575, 582, 263 P. 862, 265 P. 322.

[2, 3] A comparison of the language contained in section 532 with that employed in section 484, as the latter was amended by the statute of 1927, demonstrates the fact that, to the extent that section 484 deals with the criminal offense of obtaining money, property, or labor by false pretense, the two statutes are nearly identical one with the other. So limited, and considered thus either as an entirety, or in any one of the said several provisions of each of such statutes, no repugnancy nor inconsistency may be discovered to exist between them. The object or purpose of the two statutes is identical one with the other. And, to the extent indicated by the sameness or the similarity of language

and construction of the two statutes, it would seem incontrovertible that the applicable provisions of section 484 have superseded, or in effect repealed, the identical provisions of section 532.

An examination of the entire statute by means of which the merger or the consolidation into one designated offense of the several offenses, to which reference hereinbefore has been had, was effected, discloses the fact that, in addition to the provision therein by which such merger is consummated, the act embraces an amendment of each of several other penal statutes, all relating to the general subject of stealing, or related criminal offenses, and the punishment which may be imposed for various violations of such statutes. But nowhere within such amendatory statute, either dealing directly therewith, or by implication, may be found any indication that the rules of evidence which relate to, or have controlling effect in, establishing the necessary fact either that a crime has been committed, or that, if committed, any particular person is guilty thereof, were under consideration. On the other hand, section 1110 of the Penal Code which, as hereinbefore stated, supplies the authority for the giving to the jury of the instruction here under consideration, is entirely different in its purpose. It relates not directly to the commission of the criminal offense of obtaining money or property by false pretense, but deals particularly with the question of the sufficiency of the evidence necessary to support a conviction of one charged with the commission of such an offense. That particular subject-matter is neither treated, nor touched upon, either by section 532, or by section 484 as amended; and, although not unmindful of the fact that in proper circumstances, and for certain specified purposes, section 532 and section 1110 might be construed as a single statute, for the purpose here involved, that is, the determination of whether a repeal by implication of section 532 carried with it a repeal of section 1110, in consideration of and in reliance upon the authorities to which attention hereinbefore has been directed, this court is of the opinion that on the trial of a defendant for the commission of the offense formerly denounced by the terms of section 532 of the Penal Code, the provisions of section 1110 are still available to him, and that, at his request, he is entitled to have an instruction given to the jury in accordance therewith. If not directly, such a conclusion inferentially has been reached by the appellate tribunals of this state, especially in the cases of People v. Leach, 106 Cal. App. 442, 461, 290 P. 131, and People v. Fisher, 116 Cal. App. 243, 246, 2 P.(2d) 564. See, also People v. Knocke, 94 Cal. App. 55, 62, 270 P. 468; People v. Munson, 115 Cal. App. 694, 697, 2 P.(2d) 227.

[4] One of the alternative provisions expressed in section 1110 of the Penal Code as a necessary condition precedent to a conviction of the offense of which defendants were charged is that the false pretense in question must be accompanied by a "false token." On the trial of the action, it appeared that, in obtaining the automobile which was the property of which the complaining witness was alleged to have been defrauded, the defendants gave to such witness a promissory note, signed by each of the defendants and one other person. In such circumstances, and because the evidence showed that on one occasion preceding the date of the trial one of the defendants admitted that "he never had any intention of paying the note," it is urged by the respondent herein that such promissory note was a "false token," from which assumed fact it is argued that the defendants were not entitled to have the instruction here under consideration given to the jury. But, aside from other considerations with reference thereto, it is clear that, whatever may have been the intention of the defendant who made such admission, the note itself was not false. To the contrary, it was genuine in all particulars, and, from aught that appears, constituted a binding obligation upon the persons who executed it. People v. Gibbs, 98 Cal. 661, 664, 33 P. 630.

[5] Neither is this court impressed with the merit of the further contention by respondent in substance that, because the jury was instructed that it was the sole and exclusive judge of the effect and value of the evidence and of the credibility of the several witnesses who testified on the trial of the action, no prejudice resulted to defendants from a denial of the instruction to which consideration hereinbefore has been given.

[6] Finally, respondent suggests that an application of the provisions of section 4½ of article 6 of the Constitution indicates that the judgment herein should be affirmed. By one of the terms of section 1110 of the Penal Code it is provided that a defendant cannot be convicted, "unless the pretense is proven by the testimony of two witnesses, or that of one witness and corroborating circumstances. * * *" From a consideration of such provision, together with the evidence adduced on the trial, it will become apparent that to give effect to the constitutional provision invoked by the respondent would require either that this court ignore at least that part of the statute to which attention has been directed, or that it invade the province of the jury in its legally exclusive right to pass upon the weight of the evidence and the credibility of the several witnesses. It may be that defendants are guilty of the offense of which they were convicted; but, even assuming such status to be correct, if necessary or unavoidable, it is far better

that they escape punishment than that the liberty of some innocent person may hereafter be jeopardized by reason of the establishment of a legal principle in opposition to a thoroughly seasoned rule which looks solely to the protection of those innocent persons who may be either the victims of circumstance or of the spleen of some careless or vindictive individual. Following the sale or the exchange of property, it is not unusual to observe that one of the parties to the transaction becomes much dissatisfied with his bargain. It is an easy thing to charge fraud or false pretense as an inducing cause to a bad bargain; and sometimes the accused, although entirely blameless, has great difficulty in disproving the accusation. In the wisdom of the law, certain safeguards, such as those enumerated in section 1110 of the Penal Code, have been ordered for the protection of the innocent. They should not lightly be cast aside.

The judgment and the order by which the motion for a new trial was denied are reversed.

We concur: CONREY, P. J.; YORK, J.

131 Cal.App. 261

In re LARABEE.

Cr. 1690.

District Court of Appeal, First District, Division 1, California.

April 17, 1933.

Hearing Denied by Supreme Court May 15, 1933.

1. Habeas corpus ⇐83, 85(1).

Where warden's return in habeas corpus proceeding set forth commitment embodying form of judgment, but petitioner did not file traverse, or request that petition be considered traverse, or offer evidence in support of petition, petitioner failed to sustain burden of proving want of jurisdiction of court issuing commitment.

2. Habeas corpus ⇐113(3).

State had right of appeal in habeas corpus proceeding where, notwithstanding valid commitment, court remanded prisoner from warden's custody to that of sheriff (Pen. Code, § 1506).

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Petition for writ of habeas corpus by Jacques Larabee, opposed by the People. From order remanding petitioner to custody of Sheriff of Los Angeles County, the People appeal.

Motion to dismiss appeal denied, and order appealed from reversed.

U. S. Webb, Atty. Gen., and Wm. F. Cleary, Deputy Atty. Gen., for the People.

Joseph Rosenthal, of Los Angeles, for respondent.

KNIGHT, Justice.

Petitioner is imprisoned in the state prison at San Quentin pursuant to a commitment issued by the superior court in and for Los Angeles county, based on a conviction of grand theft; and, while thus imprisoned, he applied to the superior court in Marin county for and was granted a writ of habeas corpus. At the conclusion of the hearing, the court made an order remanding petitioner to the custody of the sheriff of Los Angeles county, and from said order the state has taken this appeal.

As grounds for the issuance of the writ, petitioner alleged in his verified petition that the form of judgment embodied in the commitment was void for the following reasons: That neither the judgment nor the record concerning it showed that petitioner was present at the time of the pronouncement of judgment, or that the clerk of the court informed him of the nature of the charge, of his pleas thereto, or the verdict rendered thereon; and that he was not asked by the court or by any one else whether he had any legal cause to show why the judgment should not be pronounced against him. Furthermore, it was alleged as a fact that at no time prior to the pronouncement of judgment, or at all, was he informed of the nature of the charge against him, of his pleas thereto, or the verdict thereon; nor was he at any time or at all asked if he had any legal cause to show why said judgment should not be pronounced.

[1] In his return to the writ, the warden set forth a copy of the commitment embodying the form of judgment; but petitioner did not file a traverse to the return, nor request that his petition be considered as a traverse thereto; nor did he offer any evidence, oral or documentary, in support of the allegations of the petition. It is held in the case of People v. Sherman (Cal. App.) 15 P.(2d) 881, 882, that under the foregoing circumstances, the petitioner fails to sustain the burden resting upon him to prove a want of jurisdiction on the part of the court issuing the commitment, and that therefore, in the state of the record above described, the relief sought should be denied. That case, which involved identical facts and the same contentions, was decided after the present proceeding was heard and determined in the trial court; and the reviewing court there said: "On this appeal the petitioner argues that the judgment commitments [there were two in that case] should show on the face that he was present when

they were pronounced and that they should affirmatively show that he had been asked if he had any legal cause why sentence should not be pronounced. The statute (section 1207, Pen. Code) does not require the judgment to state either of those matters. It does require a brief statement of the offense and [as in the present case] that was done. The same section provided for a judgment roll to consist of (1) The indictment or information, and a copy of the minutes of the plea or demurrer, and all rulings thereon. (2) A copy of the judgment. The minutes of the arraignment for sentence are not included in the judgment roll under this section." And the court then goes on to say: "* * * The burden was on petitioner to show want of jurisdiction in the judgments, and 'that his imprisonment or detention is unlawful, or that he is entitled to his discharge.' Section 1484, Pen. Code. The petitioner did not meet this burden. He made no showing whatever. Hence, since [as in the present case] the judgment commitments are valid on the face, issued from a court having jurisdiction, and recite all that the Code requires them to recite. they are the valid 'warrant, or other written authority * * *' (section 1480, Pen. Code) under which the warden retains the prisoner in custody."

[2] Petitioner makes no attempt to differentiate the above case from the present one, nor to refute the contention made by the state as to the merits of the appeal. It is argued, however, that the state is without a right of appeal from the order made by the trial court because under the terms of said order petitioner was "remanded to the custody of the Sheriff of Los Angeles County"; and upon that ground petitioner moves for a dismissal of the appeal. We are unable to sustain such view. As will be seen from the wording of section 1506 of the Penal Code, pursuant to which the appeal was taken, the state may appeal in all cases wherein a defendant is discharged "after his conviction, in all criminal cases prosecuted by indictment or information in a court of record; * * *" and obviously the plain effect of the order made by the trial court herein was to discharge the prisoner "after his conviction" from the custody of the warden of the state prison, by whom, so far as this proceeding shows, he was then being lawfully imprisoned under a valid commitment; and the fact that the trial court at the same time ordered that the prisoner be remanded to the custody of the sheriff of the county from whence he was committed did not have the effect of depriving the state of its right of appeal, for the reason that in the face of a valid commitment the trial court was without power to make such order.

Petitioner's claim that the state is without a right of appeal in this matter is evidently based largely on the mistaken belief that said section 1506 provides (as the same is misquoted on the opening page of his points and authorities) that the state may appeal only where the final order discharges a defendant "*from* his conviction." But the statute is not so worded. It provides that such appeal may be taken from a final order discharging a defendant "*after* his conviction" (all italics ours), which, as will be seen, is quite a different matter.

The motion to dismiss the appeal is denied, and the order appealed from is reversed.

We concur: TYLER, P. J.; CASHIN, J.

131 Cal.App. 71

STAHELI v. CITY OF REDONDO BEACH.

Civ. 7534.

District Court of Appeal, Second District, Division 1, California.

April 7, 1933.

1. Municipal corporations ⇐218(6).

If contract for wharf engineering services was valid, action of city trustees in declaring office of wharf engineer vacant was ineffective as regards rights of engineer thereunder.

2. Officers ⇐1.

Whether position is public office depends not on what office is called, but on power granted and wielded, duties performed, and other circumstances.

3. Municipal corporations ⇐126, 217(1).

Resolution fixing compensation of city engineer and appointing plaintiff to fill duties of city engineer and to receive retainer for duties prescribed did not create "public office," but there arose instead contract with individual.

Resolution provided that city engineer should receive $175 per month as retaining fee for general city engineering and city engineering advice, which included the establishment of grades and other matters, and that for wharf or pier engineering, or any work other than general engineering and city engineering advice, his compensation should be fixed at a later date or with ordering of engineer to do such work, but resolution did not definitely appoint plaintiff as city engineer.

[Ed. Note.—For other definitions of "Contract," see Words and Phrases.]

4. Municipal corporations ⇐231(1).

Where plaintiff had been employed to fill duties of city engineer, but was not city offi-

cer, city's contract with plaintiff for wharf engineering services *held* valid.

Plaintiff was appointed wharf engineer under resolution providing that compensation should be $500 on ordering of plans, specifications, or other data and 2½ per cent. of total contract price on award of contract for construction of municipal wharf or pier, and that at completion of wharf or pier plaintiff was to receive 5 per cent. of actual total contract price less amount already paid, and resolution then provided what duties of wharf engineer should be.

5. **Judgment** ⇐585(3).

Judgment in mandamus proceeding by wharf engineer to compel initial payments was not res judicata of issues involved in action for balance of contract price to be due at completion of wharf.

6. **Municipal corporations** ⇐220(8).

In action for balance due under contract for wharf engineering services, evidence that assessment map was prepared by city engineer and employment of inspector after city had declared vacant office of wharf engineer held by plaintiff *held* properly excluded as immaterial.

Appeal from Superior Court, Los Angeles County; Hugh J. Crawford, Judge.

Action by Victor H. Staheli against the City of Redondo Beach. From a judgment for plaintiff, defendant appeals.

Affirmed.

Clyde Woodworth, City Atty., of Inglewood, for appellant.

Leo B. Ward, of Los Angeles, for respondent.

DESMOND, Justice pro tem.

The defendant city appeals from a judgment awarding to plaintiff the sum of $1,071.42, balance claimed as due under a contract calling for services in connection with designing and construction of a pier at Redondo Beach. On February 14, 1928, the board of trustees of Redondo Beach passed a resolution reading as follows:

"Resolution No. 720. A Resolution of the Board of Trustees of the City of Redondo Beach, California, Appointing and fixing the Compensation of Wharf Engineer of said City.

"The Board of Trustees of the City of Redondo Beach, California, do resolve as follows:

"Section 1: First, that Victor H. Staheli be hereby appointed Wharf Engineer of the City of Redondo Beach, California.

"Second, that the compensation to be paid Victor H. Staheli as such Wharf Engineer, by the City of Redondo Beach, California, shall be as follows, to-wit:

"Upon the ordering of the plans, specifications or other wharf or pier data by the Board of Trustees of said city a retaining fee of $500.00 shall be paid.

"Upon the award of contract for the construction of a municipal wharf or pier by the Board of Trustees of said city the said Wharf Engineer shall receive 2½ per cent. of the total contract price of said wharf or pier.

"At the completion of said Municipal wharf or pier, the said Wharf Engineer shall receive a compensation of Five per cent (5%) of the actual total contract price of the construction of such Municipal wharf or pier, less the 2½ % paid the said Wharf Engineer at the time of awarding the contract and the $500.00 retaining fee.

"In the event that plans, specifications and cross-sections are adopted by the Board of Trustees of the City of Redondo Beach and an Improvement Act proceeding or a bond issue instituted for the work contemplated by such plans, specifications and cross-sections, but said proceedings or bond issue fail or are abandoned then two and one-half per cent. (2½%) of the total of the Engineer's estimate cost for the construction of the Municipal Wharf or Pier according to the plans, specifications and cross-sections as submitted to the Board of Trustees at the adoption of same shall be paid by the City of Redondo Beach, as a remuneration for the work done.

"Section 2. That the duties of said Wharf Engineer shall be as follows, to-wit:

"Supervise the designing of (in ink) 'and also to prepare and furnish' the plans, specifications and cross-sections, also the district diagram and assessment map diagram if needed, and also, if so ordered by the said Board of Trustees, to act as supervisor for the construction of the said Municipal Wharf or pier and the inspection of said materials, etc./ (insert in ink) 'and also to furnish and pay for all necessary inspectors for carefully doing such work'/ for the remuneration and compensation as hereinbefore outlined.

"Section 3. That Victor H. Staheli is hereby appointed to act and fill the duties of Wharf Engineer of the City of Redondo Beach, California, and shall receive the retaining fee and compensation as hereinabove prescribed for said office."

Shortly before this resolution was adopted, the board of trustees, at the same meeting, had passed the following resolution numbered 719:

"Resolution No. 719. A Resolution of the Board of Trustees of the City of Redondo Beach, California, Fixing the Compensation and Duties of the City Engineer of Said City.

"The Board of Trustees of the City of Redondo Beach, California, do resolve as follows:

"Section 1: First, that the City Engineer shall receive the sum of One Hundred Seventy-five Dollars ($175.00) per month as a retaining fee for General City Engineering and City Engineering advice which includes the establishment of grades, lines, lighting maintenance assessments, assessment maps, etc.

"Second, That for street improvements, installation of lighting systems, sanitary engineering, drainage engineering, wharf or pier engineering, etc., or any work other than such General Engineering and City Engineering advice as above outlined, his compensation shall be fixed at a later date before or with the ordering of the Engineer to do such work.

"Section 2: That Victor H. Staheli is hereby appointed to act and fill the duties of the City Engineer as hereinbefore mentioned and receive the retaining fee as a compensation for such duties as prescribed for said office.

"Passed and adopted by the Board of Trustees of the City of Redondo Beach, California, and signed and approved by the President of the Board of Trustees of said City and attested by the City Clerk this 14th day of February, 1928."

On February 27, 1928, the city council of the city of Redondo Beach adopted resolution No. 721½ "approving and adopting profile, plan, cross-section and detail, specifications and assessment diagram for the building of a pier in the City of Redondo Beach." These documents had been prepared and furnished by respondent.

A "Resolution of Intention" to order the building of the pier was passed as resolution No. 722 on the same day, and on the following day, February 28, 1928, resolution No. 724 ordered the building of the pier "from the foot of Emerald Street Westerly, Southerly and Easterly in the form of a horse-shoe to the Westerly terminus of Pier Avenue as particularly described in Resolution of Intention No. 722." Resolution No. 725 passed March 16, 1928, directed the work of building the pier to be done under the direction and to the satisfaction of the city engineer, expressly providing in one paragraph as follows: "Now, Therefore, the City Council of said City of Redondo Beach does hereby determine and direct that the aforesaid work shall be done under the direction, inspection and supervision of the City Engineer of said City and the materials used shall comply with the said specifications and be to the satisfaction of the City Engineer of said City, instead of the Superintendent of Streets of said City."

On April 16, 1928, the respondent filed with the board of trustees of the city of Redondo Beach a letter containing the following language: "Gentlemen: I herewith tender to your Honorable Body my resignation as City Engineer of the City of Redondo Beach, but not as Wharf Engineer as set forth in Resolution No. 720 approved and adopted by the Board of Trustees on the 14th day of Feb. 1928, and herewith reserve and retain all the rights and privileges in said resolution contained and itemized therein in full. * * * Yours respectfully, Victor H. Staheli, City Engineer."

On this same day, P. W. Kranz, who on April 4, 1928, had been awarded the contract for building the pier, signed the formal agreement for doing the work with the mayor of the city and the street superintendent of the city of Redondo Beach, acting under the authority granted by the statute governing public work known as the "Improvement Act of 1911" (St. 1911, p. 730). This contract provided that the work should be performed "in good and workmanlike manner under the direction and to the satisfaction of the City Engineer of the City of Redondo Beach, Calif., and with materials complying with the specifications hereinafter mentioned and to the satisfaction of the said City Engineer."

On April 23, 1928, according to the minutes recorded by the city clerk, "Bids were read of the various applicants for the position of City Engineer. Trustee Shea moved that Mr. B. L. Bundy be appointed City Engineer and Building Inspector at the salary of $250 per month." This motion was carried by the vote of all five trustees. On April 30, 1928, the trustees by a unanimous vote declared vacant "the office of wharf engineer held by Victor Staheli." On May 7, 1928, the respondent wrote the board of trustees advising that he had arranged for inspection, at his own expense, of the demolition of the old pier, and that later for a period subsequent to April 22d he had been in San Francisco in connection with the securing of creosoted piles for the new pier, also advising the trustees that he intended to hold the city for the balance due him.

It appeared upon this trial that the plaintiff had experienced difficulty in securing payment of the retainer of $500, which, according to resolution No. 720, was due "upon the ordering of plans, specifications or other wharf or pier data by the Board of Trustees." The president of the board approved the demand February 20, 1928, but payment was refused by the city treasurer on February 27th, and by March 17, 1928, plaintiff had filed a petition for writ of mandate to compel payment of the retaining fee. As a result, the fee of $500 was paid. The respondent also received on April 16, 1928, the day the pier contract was signed, the sum of $1,571.42, 2½ per cent. of the contract price of the pier, $62,856.81; resolution No. 720 providing that such an amount be paid upon the award of the contract. The amount sued for in the present action, $1,071.42, represents the bal-

ance of 5 per cent. of the contract price which by the terms of said resolution No. 720 would be due at the completion of the wharf or pier. It was stipulated that the pier in question was accepted as completed January 28, 1929, prior to the institution of this action.

The appellant contends that resolution No. 720 appointed respondent an officer of the city, to wit, city engineer, and that an independent contract arising out of the resolution empowering him to act as wharf engineer necessarily would be void, under section 886 of the Municipal Corporation Act, reading as follows (Stats. 1883, p. 279):

"*No Officer to be Interested in Any Public Contract.* No officer of such city or town shall be interested, directly or indirectly, in any contract with such city or town, or with any of the officers thereof in their official capacity, or in doing any work or furnishing any supplies for the use of such city or town, or its officers in their official capacity; and any claim for compensation for work done, or supplies or materials furnished, in which any such officer is interested, shall be void, and if audited and allowed shall not be paid by the treasurer. Any willful violation of the provisions of this section shall be ground for removal from office, and shall be deemed a misdemeanor and punished as such."

The most favorable construction that can be placed on plaintiff's situation, according to the view of appellant, is that resolution No. 720 merely defined services to be performed by respondent as city engineer in connection with pier construction and fixed his compensation for such special city engineering services. If this is a correct view of the case, there was no illegality in the contract, but it automatically terminated when the respondent ceased to act as city engineer. From the viewpoint of the appellant, nothing more would be due respondent since he resigned as city engineer April 16th, and the work of supervising construction called for by resolution No. 720 subsequent to the award of the contract was performed by Mr. Bundy, appointed city engineer on April 23, 1928.

Respondent contends, however, that he was not city engineer of Redondo Beach, but was engaged under two independent contracts, and not as a city officer in either one, first, to act and fill the duties of city engineer, not, however, being appointed as such; second, as wharf engineer to perform special services as set out in resolution No. 720.

[1] Redondo Beach was found by the court to be a city of the sixth class. In such cities it was provided in 1928 that the officers should consist of a board of five trustees to be known as the city council, a clerk to be also ex officio assessor, a treasurer, a marshal to be known as chief of police, and who should serve as ex officio tax and license collector, a recorder to be known as the city judge, and such subordinate or other officers as are provided for in the Municipal Corporation Act (see amendment to section 851, Act 5233. Stats. 1927, p. 1094, § 2). Section 852 of the Municipal Corporation Act, as amended in 1927 (Stats. 1927, p. 427), provided as follows: "The board of trustees * * * may also, in their discretion, appoint an attorney, a superintendent of streets, a civil engineer, and such other subordinate officers as in their judgment may be deemed necessary, and fix their compensation. Said officers shall hold office during the pleasure of said board." It is not contended that the office of wharf engineer is a city office; in fact, appellant in its brief says: "The designating of respondent as wharf engineer did not create a new office to which he was appointed in addition to city engineer." In view of the special and restricted service called for by resolution No. 720, merely designing and supervising construction of a municipal pier, we are of the opinion that the employment thereunder of respondent was in all particulars similar to the ordinary contract by which a city engages the services of an expert engineer, frequently called a consulting engineer, to plan and carry to completion a single piece of public work, therefore conclude that respondent as wharf engineer was not a city officer. Bunn v. People, 45 Ill. 397, cited in Patton v. Board of Health, etc., 127 Cal. 388, at page 396, 59 P. 702, 78 Am. St. Rep. 66. "The contract only required him to render such services as might be required of him in the capacity in which he engaged to act (like a lawyer to give professional advice), and if the Supervisors either put it out of his power, or disabled him from rendering these services, we do not see that he is not entitled to the salary agreed upon. The contract having been made by the Board of Supervisors, it was not in their power to abrogate it by rescinding the order under which the plaintiff was appointed, or abolishing the office." McDaniel v. Yuba County, 14 Cal. 445. If, therefore, the contract for wharf engineering services was valid, the action of the trustees April 30, 1928, declaring the "office" of wharf engineer vacant, was ineffective so far as concerned the rights of respondent thereunder.

[2-4] It remains to determine whether resolution No. 719 appointed respondent to a public office, to wit, city engineer. Inasmuch as resolution No. 720 adopted immediately thereafter opened with the words "Victor H. Staheli is hereby appointed Wharf Engineer of the City of Redondo Beach, California," we are struck by the omission of any such language from resolution No. 719, and the significance of the omission is intensified by the phrase appointing respondent "to act and fill the duties of the City Engineer * * * and receive the retaining fee as a compensation for such duties as prescribed for said office." We observe also that by its caption,

resolution No. 720 is one "Appointing and Fixing Compensation of Wharf Engineer of said City," while resolution No. 719 is one merely "Fixing the Compensation and Duties of the City Engineer of said City."

In the case of Kennedy v. City of Gustine, 199 Cal. 251, 248 P. 910, we find a situation where the board of trustees of a city of the sixth class appointed C. C. Kennedy "as city engineer, his compensation to be 7 per cent. of cost of construction work." The agreement under which plaintiff in that case went to work provided: "That for and in consideration of the compensation to be paid by the party of the first part to the party of the second part at the times and in the manner hereinafter provided, the party of the first part hereby employs said party of the second part as city engineer of the said city of Gustine, for the purpose of performing the engineering work and supervising the construction of certain street improvements in said city of Gustine; namely, the construction of curbs, sidewalks, and pavement upon (naming certain streets) during the present and next succeeding calendar year." Construing this agreement and determining liability thereunder, the court said (page 255 of 199 Cal., 248 P. 910, 911): "It is clear, however, that the plaintiff was not an officer of the city, but that he was employed, not to discharge the general duties of the office of city engineer, but only the particular engineering work specified in the contract. * * * Any reference to him in the minutes, or the contract, or in the evidence as 'city engineer' is not controlling. Whether a position or office is a public office depends 'not upon what the particular office in question may be called, nor upon what a statute may call it, but upon the power granted and wielded, the duties and functions performed, and other circumstances which manifest the true character of the position, and make, and mark it a public office, irrespective of its formal designation'" —citing Coulter v. Pool, 187 Cal. 181, 186, 201 P. 120, and other California cases.

Although respondent was employed to fill the duties of the city engineer of Redondo Beach and resolution No. 719 provided as his compensation the sum of $175 per month as a retaining fee for general city engineering and city engineering advice, we are not convinced that the use of those words constituted him individually a city officer, particularly since he was not definitely appointed city engineer, and in view of the fact that almost every conceivable kind of city engineering work as popularly understood is left by the same resolution in the balance to await future development or possibly future disagreement. Since respondent was engaged on a retainer basis to give general engineering advice in the first instance, and later, if required, to give special advice or special service on compensation to be determined, it seems reasonable to say that from this resolution arose a private contract with an individual rather than the creation of a public office.

We find the plaintiff in this case, as in the case of McDaniel v. Yuba County, supra, "engaged to act (like a lawyer to give professional advice)" and this impression is strengthened by the provision that his employment is on the basis of a retainer. As in practically every action where the decision centers upon interpretation of the term "office," we must reach our conclusion by consideration of the surrounding circumstances, giving point to the court's remarks in Patton v. Board of Health, 127 Cal. 388, at page 397, 59 P. 702, 705, 78 Am. St. Rep. 66: "Illustrations might be multiplied, but it would only emphasize what must already be apparent, that the definitions of the term 'office,' while not inaccurate, taken in a general sense, are quite inadequate when applied to particular cases. An examination of adjudicated cases will show that the disagreement among judges has not been so much as to definitions, as in their application to the circumstances of each particular case."

[5] It is urged by respondent that the questions we have undertaken to decide have already been definitely disposed of in the hearing upon the petition for writ of mandate. However, at the time of that hearing, the pier was not completed and balance above the $500 initial payment and 2½ per cent. of the contract price was not due. Rather than apply the rule of res judicata to consideration of such a contract calling for installment payments, it seems advisable, by means of this opinion, to record our views as applied to the contracts in their entirety.

[6] Appellant complains of the action of the trial court in ruling that evidence relative to preparation of the assessment map and the necessity for employing an inspector after April 23, 1928, was immaterial. In our view of the case, no useful purpose would have been served in showing that the map was prepared by Mr. Bundy and inspection provided by the city, for both these events occurred after the city, on April 30, 1928, had declared vacant the office of wharf engineer held by Victor Staheli, and there was no offer to prove that he was thereafter requested to prepare an assessment map or furnish any inspection.

The judgment is affirmed.

We concur: HOUSER, Acting P. J.; YORK, J.

131 Cal.App. 304

MEDDAUGH v. STROUP.

Civ. 4416.

District Court of Appeal, Third District, California.

April 20, 1933.

1. Appeal and error ⇐994(3).
Appellate court need not pass on witness' credibility on appeal from judgment of court sitting without jury; such question being primarily for trial court.

2. Appeal and error ⇐1010(1).
Judgment on trial court's findings, supported by any testimony in record, must be affirmed.

3. Appeal and error ⇐994(3).
Truth of testimony supporting facts shown by record on appeal was for trial court.

4. Money received ⇐18(3).
Evidence in action for money had and received *held* sufficient to support trial court's findings and judgment for plaintiff.

Appeal from Superior Court, Calaveras County; J. T. B. Warne, Judge.

Action by Serena E. Meddaugh against Ella Stroup. Judgment for plaintiff, and defendant appeals.

Affirmed.

Gumpert & Mazzera, of Stockton, for appellant.

Jos. R. Huberty, of Woodland, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

The findings of the court in this action are to the effect that within two years preceding the commencement thereof the defendant became, and ever since has been, and now is, indebted to the plaintiff in the sum of $1,182.05, as and for money had and received by the defendant from the plaintiff to and for the use and benefit of the plaintiff. That before the commencement of this action the plaintiff demanded the return of said sum, but that the defendant has neglected, failed, and refused to return or pay the same, or any part thereof, to the plaintiff, and that there is now due to the plaintiff from the defendant the sum of $1,182.05. Judgment was entered in accordance with the findings. From this judgment the defendant appeals.

The basis of the appeal is the alleged insufficiency of the evidence to support the findings to which we have just referred.

The record shows that during all the times mentioned in the complaint the plaintiff was the owner of a certain café in the town of San Andreas, known as and called the "Meadow Lark Café"; that on or about November 4, 1928, the plaintiff left San Andreas and entered into a hospital for the purposes of treatment, and remained away until about the 4th of February, 1929; that during the absence of the plaintiff from the town of San Andreas, the defendant took charge and supervision of the money received from the business conducted at the café, depositing the cash in a bank at San Andreas and paying bills. During this time it is alleged that the defendant received and converted to her own use the amount of moneys belonging to the plaintiff.

The record further shows that the defendant, during the period referred to, resided with a friend in the city of Stockton, and was accustomed to drive to San Andreas two or three times a week and collect the moneys received from patrons of the café. There is testimony in the record to the effect that on some of the trips referred to, the defendant exhibited and spoke of moneys in her possession upon her return to Stockton, as being receipts from the café. The record further shows that during the period referred to there were some three or four persons employed in the café, spoken of in the testimony as a "restaurant"; that the money taken in was placed in a cash register and rung up as received. It appears that a witness by the name of Irene Bible Wise was accustomed to take the money out of the cash register at the close of each day's business and secrete or place the same in an upper room used as a bedroom of the building in which the café was located; that whenever the defendant arrived at San Andreas this money would be turned over to her. It does not appear that this money was counted by the defendant when received, or any receipt thereof given by her to the witness Wise. Practically the whole argument of the appellant is devoted to the testimony of the witness Wise, and the arguments based thereon that the witness Wise was and is unworthy of belief; that her testimony is contradictory and in some particulars incredible.

It is further insisted that there is no testimony supporting the findings of the trial court.

[1, 2] We do not need to pass upon the question as to the credibility of the witness Wise, as that was primarily for the trial court. If there is any testimony in the record which, if believed by the trial court, supports the findings, the judgment in the action must be affirmed.

[3, 4] As stated by the respondent the following facts are undisputed: The defendant went to San Andreas two or three times a week and received currency and checks from Irene Bible Wise for deposit in the bank at

San Andreas. There is no dispute that the defendant received proceeds from the business conducted at the café, and brought the same with her to Stockton; that she exhibited checks and currency thus received to her companion, Mrs. Ball, stating that it was proceeds of the Meadow Lark Café, which had been received by the defendant for the purpose of deposit in the Central Bank of Calaveras, at San Andreas. There is no dispute that the defendant was the only person who took or received money from the business for the purposes of deposit.

The records also show, and there is no dispute of the fact, that between December 27, 1928, to and including February 4, 1929, defendant deposited only two checks, namely, one for $8.80, and one for $18.25, and during the same period of time the receipts from the business conducted at the café amounted to the sum of $1,447.71. It is likewise undisputed that the defendant did not pay any of the principal items of expense or overhead charges incurred in the conduct of the café business during said period, and that the plaintiff was compelled and forced to pay for supplies obtained and bills incurred during said period the sum of $1,460. There is no dispute that the report of the certified accountant who examined the records and business of the café, showed a deficit incurred during the time mentioned in the complaint, of $1,411.48, against which the defendant, Stroup, showed receipts or a credit in the sum of $229.43, leaving a balance due of $1,182.05, being the amount of the judgment.

It was for the trial court to determine the truth of the testimony supporting what we have just said. Being accepted by the trial court as true, the findings and judgment are amply supported.

The judgment is affirmed.

We concur: PULLEN, P. J.; R. L. THOMPSON, J.

131 Cal.App. 296

CARTER v. TURNER.

Civ. 1201.

District Court of Appeal, Fourth District, California.

April 18, 1933.

1. Appeal and error ⇐1197.

Order directing trial court to take evidence on question of value of properties involved, effect of which was to remand case for new trial on issue of damages, authorized trial court to enter judgment.

2. Fraud ⇐60.

As regards damages for misrepresentations in sale of second trust deed and note, trust deed had no value at time of transfer, where land securing it was upon foreclosure sold for exact amount of first mortgage.

3. New trial ⇐172.

Finding, upon prior trial, that maker of note involved in real estate transaction was insolvent at time note was transferred, would not support finding, upon retrial on issue of damages for fraud, that note was worthless.

4. Fraud ⇐58(1).

Evidence upon retrial on issue of damages for fraud in real estate transaction failed to sustain finding that note involved would have been worth $12,000 if representations concerning it had been true.

Appeal from Superior Court, Tulare County; Frank Lamberson, Judge.

Action by George A. Carter against Rodney L. Turner. From a judgment for plaintiff, defendant appeals.

Reversed, and cause remanded for a new trial on issue of damages alone, with directions.

Frederick W. Welsh, of Bakersfield, for appellant.

Farnsworth, Burke & Maddox, of Visalia, for respondent.

BARNARD, Presiding Justice.

On June 19, 1919, as a part of a real estate deal, the defendant transferred to the plaintiff two parcels of real property, together with a note for $12,000 executed by one J. B. Pilcher and secured by a second trust deed on another piece of land. On the first trial of this action, before Judge Wallace of Tulare county, the court found that the defendant had made certain false representations in connection with the value of the note referred to. Upon appeal the judgment was affirmed in all respects except one. It was held that an improper measure of damage had been applied, and the case was referred back to the trial court with directions to take such testimony as might be necessary to establish the relative value of the properties at the time of the transfer and to report the same back to the Appellate Court. Carter v. Turner, 90 Cal. App. 193, 265 P. 870. Later, the provision for reporting the matter back to the Appellate Court was stricken out and the remittitur, as issued, directed the trial court "to take such testimony as may be necessary to establish the relative value of the properties at the time of the transfer."

Judge Wallace having died in the meantime, further proceedings were had before

Judge Lamberson and a new judgment was entered, from which this appeal is taken.

[1] It is first contended that the order directing the trial court to take evidence upon the question of the value of the respective properties did not authorize the trial court to enter any judgment. While the order made did not specifically direct the trial court to enter a new judgment, the effect of the order was to remand the case for a new trial upon the issue of damages alone. A new trial on this issue having been ordered, it necessarily follows that the court had jurisdiction to enter judgment thereon. In re Mahon, 71 Cal. 586, 12 P. 868; Downing v. Rademacher, 138 Cal. 324, 71 P. 343; Fischer v. Lukens, 41 Cal. App. 358, 182 P. 967.

[2, 3] It is next contended that certain findings are not supported by the evidence. Upon the rehearing of this matter, it was necessary for the trial court to determine the value of the two parcels of land and the note and trust deed at the time they were transferred to the respondent in 1919, and also what would have been the value thereof at that time had they been as represented. Evidence was taken with respect to the value of the two parcels of land so conveyed and findings made in connection therewith, which are not attacked. A further finding was made to the effect that the Pilcher note and trust deed were, on the date of the transfer, of no value whatever. It is appellant's contention that this finding is not supported by the evidence. The court found that on the date of the transfer the land covered by the trust deed securing this note had a value in the exact amount of the first mortgage against it. It appears that the land was later sold for that amount upon foreclosure of the prior mortgage. This finding is not attacked and disposes of any question as to the value of the second trust deed securing this note, on the date of the transfer. With respect to the value of the note itself, aside from the trust deed, our attention is called to no evidence, and we can find none in the record, which supports the finding complained of. The respondent makes no effort to point out any evidence tending to show that the note in question was valueless at the date of the transfer, but relies entirely upon a finding made by Judge Wallace on the first trial, to the effect that Pilcher was insolvent. The original finding referred to nowhere appears in the record before us, and our only knowledge of the same comes from a statement in the opinion on the original appeal, to the effect that a finding that Pilcher was insolvent is sustained by the evidence. If it could be assumed that upon retrying the issue as to the amount of damages sustained the court could adopt a finding made on the prior trial upon a matter material to that issue, the former finding here relied upon, so far as appears from the record before us, is entirely insufficient to justify or support a finding to the effect that the note in question was entirely worthless at the time of the transfer. If it could be taken as a fact that Pilcher was insolvent and, further, that he was insolvent at the date of the transfer in question, it does not necessarily follow that the note was entirely worthless at that time. Even if a man is insolvent, he may have assets sufficient to cover a large proportion of his obligations. Regardless of anything here appearing, the note referred to may have had a substantial value at the time. We are forced to conclude that the record contains no evidence to sustain the finding attacked, and that the absence of necessary evidence is in no way cured by anything appearing in the record.

[4] A further attack is made upon a finding to the effect that if the representations made concerning the Pilcher note had been true, said note, on the date of the exchange, would have been worth $12,000. This was a matter material to the issue upon which a rehearing was ordered. No evidence tending to support such a finding appears in the record.

The judgment is reversed, and the cause remanded for a new trial on the issue of damages alone, with directions: To take evidence as to the actual value of the real property and note and trust deed conveyed to the plaintiff, as of the date of the transfer; to take evidence as to what would have been the value of said items on that date, had the misrepresentations made been true; and to make findings and enter judgment accordingly.

We concur: MARKS, J.; JENNINGS, J.

131 Cal.App. 153

CRESCENT CITY v. DODD, City Clerk.

Civ. 4854.

District Court of Appeal, Third District, California.

April 10, 1933.

Mandamus ⇐78.

Mandamus did not lie where determination of boundaries of city was involved, where complete method for determining boundaries was given by statute, boundaries involved collateral issues, and real questions involved required taking of testimony (St. 1921, p. 1607).

Application by Crescent City for a writ of mandate to be directed to G. Fletcher Dodd,

as City Clerk and ex officio Assessor of Crescent City.

Writ dismissed.

For prior opinion, see 18 P.(2d) 999.

H. A. Postlethwaite, of San Francisco, for petitioner.

G. Fletcher Dodd, of Crescent City, in pro. per.

PER CURIAM.

Since the submission of this cause which was instituted for the purpose of determining the location of the boundary lines of the city of Crescent City, there has come to our attention the act of the Legislature approved June 3, 1921 (St. 1921, p. 1607, Act 896, p. 414, Deering's Gen. Laws of Cal.), providing a proceeding or method for determining the boundary lines of cities, towns, and counties which may be indefinite or uncertain from any cause. This act furnishes a full and complete remedy to cities, and by its provisions allows a full and complete investigation as to indefinite or uncertain boundaries, allows the introduction of testimony and maps, and gives a direct method of determining the true boundaries of cities, towns, and counties.

Under such circumstances, where a complete remedy is afforded, the court is of the opinion that a proceeding in mandamus should not be entertained where the boundary lines of cities are sought to be determined, when such boundary lines are really a collateral issue. Besides, the real questions involved require the taking of testimony which may more properly be taken and introduced in the trial courts.

Being of the opinion that the alternative writ in this proceeding was inadvertently issued, it is hereby ordered that the same be, and it is hereby, dismissed.

131 Cal.App. 786

Richard HANSEN, Petitioner, v. G. Fletcher DODD, as City Clerk and ex-officio Assessor of City of Crescent City, Respondent (John J. Duffy, Intervener).

Civ. 4855.

District Court of Appeal, Third District, California.

April 10, 1933.

Application for writ of mandate prayed to be directed to respondent, as City Clerk and ex officio Assessor of Crescent City, requiring him to assess property within the exterior boundaries of said city as described in a certain ordinance adopted by the city council of said city in 1885.

Writ denied.

Prior decision, 18 P.(2d) 1001.

Samuel W. Gardiner, of San Francisco, for petitioner.

G. Fletcher Dodd, of Crescent City, in pro. per.

Puter & Quinn, of Eureka, for intervener.

PER CURIAM.

This proceeding has for its purpose the question as to the true boundary lines of the city of Crescent City, and therefore, for the reasons set forth in action No. 4854, entitled Crescent City, a Municipal Corporation, Petitioner, v. G. Fletcher Dodd, City Clerk, Respondent, 21 P.(2d) 140, is hereby dismissed.

131 Cal.App. 277

JACOBSEN et al. v. VAUGHN.

VAUGHN et ux. v. JACOBSEN et ux.

Civ. 767.

District Court of Appeal, Fourth District, California.

April 17, 1933.

1. **Automobiles ⇐245(80).**

Motorist's contributory negligence in intersectional collision, in failing to look to right as she entered intersection, *held* for jury.

2. **Damages ⇐171.**

Evidence of plaintiffs' poverty relating to what husband did with children while wife was incapacitated *held* competent on issue of loss of wife's services.

3. **Automobiles ⇐245(91).**

In action for injuries received in intersectional automobile collision, whether defendant had last clear chance to avoid collision *held* for jury.

4. **Negligence ⇐83.**

"Last clear chance" doctrine applies only when defendant charged with negligent infliction of injury, knowing plaintiff's peril, could, and injured plaintiff could not, have avoided injury.

Entire doctrine of "last clear chance" has reference to a situation in which a party may have been negligent in getting into a perilous situation; if that negligence continues in the sense that the party does not avail himself of an opportunity open to him to escape from the perilous situation, the doctrine cannot benefit him, but, though his peril be created by

his own negligence, if he has no opportunity to escape, while the other party, knowing his situation, does have the opportunity to avoid the injury, the doctrine applies.

[Ed. Note.—For other definitions of "Last Clear Chance," see Words and Phrases.]

Appeals from Superior Court, Fresno County; T. R. Thomson, Judge.

Actions by Mae Ballard Jacobsen and husband against H. S. Vaughn, and by H. S. Vaughn and wife against Chris Jacobsen and wife, which were consolidated and tried together. From judgments in favor of the Jacobsens, the Vaughns appeal.

Affirmed.

Ray W. Hays, of Fresno, for appellants.

Wakefield & Hansen and Conley, Conley & Conley, all of Fresno, for respondents.

BARNARD, Presiding Justice.

On October 10, 1930, an automobile driven by H. S. Vaughn collided with an automobile driven by Mae Ballard Jacobsen at the intersection of Whites Bridge road and Chateau-Fresno avenue in Fresno county, resulting in serious injuries to Mrs. Jacobsen. Whites Bridge road runs east and west, having a 16-foot pavement along its center. Chateau-Fresno avenue runs north and south; its central portion being 13½ feet wide. On the occasion in question, Mrs. Jacobsen was proceeding south on Chateau-Fresno avenue, and Vaughn was proceeding east on Whites Bridge road. When Mrs. Jacobsen was almost across the paved portion of Whites Bridge road, her car was struck on its right-hand side by the front end of the Vaughn car. The two cars came to rest, side by side, near the southeast corner of the intersection; the Jacobsen car being overturned while the Vaughn car remained upright. It appears from the evidence that Vaughn's view to his right, as he approached this intersection, was obstructed, and that his view to his left was partially obstructed by a pumping plant, a short distance north of Whites Bridge road and west of Chateau-Fresno avenue, and by weeds growing along an irrigation ditch. An action filed by the Vaughns and one filed by the Jacobsens were consolidated and tried together before a jury. From judgments in favor of the Jacobsens the Vaughns have appealed.

[1] It is first urged that Mrs. Jacobsen was guilty of contributory negligence, as a matter of law, in exceeding the speed limit, in failing to look, and in not driving upon the right half of the highway while crossing the intersection. In reference to the speed at which she was traveling, Mrs. Jacobsen testified that she entered the intersection at fifteen miles per hour. At another time she stated that her speed might have been a little more or a little less than the figure named. With reference to which side of the road she was on, the evidence most favorable to appellants' contention indicates that she was traveling about the center of the oiled portion of Chateau-Fresno avenue. Other evidence would indicate that she was nearer her right-hand side of that road. If, as claimed, a portion of her car was on her left-hand side of the center of that road, the only effect would have been to give Vaughn more time to avoid the accident, and such a situation could not be held to conclusively show contributory negligence under the circumstances here appearing. The main negligence relied on in this connection is the failure of Mrs. Jacobsen to look to her right as she entered the intersection. She testified that at a point which she estimated to be about 200 feet north of the intersection she looked to her right and saw no car approaching. Immediately thereafter, she looked to her left and saw another car approaching from the east on Whites Bridge road. She admitted that she did not again look to the right as she entered the intersection. The driver of the car last referred to, which was going west on Whites Bridge road, testified that he saw both of the cars involved in this accident, and that, had he not stopped, he would have arrived in the intersection just as these cars struck. The jury could well have inferred that this car was very close to the intersection when Mrs. Jacobsen observed it. Her statement as to how far north of the intersection she was when she looked to the right was only an approximation, and could not be exact. With reasonable allowances for variation in this distance and for her position when she looked to her left and observed the car approaching from the east, with a question as to the exact speed at which the respective cars were moving, and with the further fact that the driver of this other car would apparently arrive in the intersection at the same time, it is easily possible that her failure to again look to her right was caused by what she saw and the apparent necessity of avoiding a collision with that car. Having taken some precaution, the question as to whether she did all that a reasonable person would have done under the circumstances was one for the jury. Even if she could be said to have been negligent as a matter of law, it does not follow, as a matter of law, that this negligence was a proximate cause of the accident. Taking the entire circumstances, including the evidence as to what was done by the driver of the Vaughn car, we think the question of contributory negligence was one of fact rather than one of law.

[2] The second point raised is that the court erred in admitting evidence of the poverty of the Jacobsens. The evidence re-

ferred to related to what Mr. Jacobsen did with their children while his wife was laid up through her injuries. This evidence was responsive to one cause of action in the complaint, in which Mr. Jacobsen sought damages for loss of his wife's services. Not only was the evidence admissible but, considered in itself, it is not subject to the criticism made.

[3, 4] It is earnestly urged that the court erred in giving to the jury an instruction embodying the doctrine of the last clear chance. It is contended that the general circumstances did not warrant the giving of such an instruction and also that the doctrine was not available to Mrs. Jacobsen, since her negligence, in not keeping a proper lookout, continued down to the very moment of the collision. In considering these contentions, certain other evidence is material. Mr. Vaughn testified that, when he was about one-eighth of a mile west of this intersection, traveling about twenty-five or twenty-seven miles an hour, he observed the Jacobsen car coming south on Chateau-Fresno avenue and about the same distance from the intersection; that, when he saw that car, he took his foot from the accelerator and slowed down, entering the intersection between fifteen and seventeen miles an hour; and that, when he entered the intersection, he saw the Jacobsen car to his left. At one time he testified his car was within the intersection and the other car also was within the intersection, but just north of the paved portion of Whites Bridge road at the time he saw it. At another time he placed his car some fifteen feet west of the intersection and the other car about twice that distance north of the intersection at the time he observed it. Again, he testified that as he was crossing a culvert, which is 16 feet west of the intersection line, he saw the other car approximately 20 feet north of the intersection. This culvert is between 35 and 40 feet from the point where the collision occurred. A signed statement made by Vaughn immediately after the accident was introduced, in which he stated that he was traveling on Whites Bridge road at the rate of approximately 30 miles per hour, "and when near Chateau-Fresno avenue I noticed car No. 2 approximately 15 feet from entering the paved portion of Whites Bridge road. I figured the driver of car No. 2 was going to stop so I kept on going." The driver of the car which was proceeding west on Whites Bridge road testified that, when Mrs. Jacobsen's car entered the highway, Vaughn's car was possibly ten rods down the highway. At other times this witness fixed the distance at which Vaughn's car was down the highway as two or three car lengths, and as possibly 30 or 40 feet. He also testified that the front wheel of Mrs. Jacobsen's car was within a foot of being off the highway to the south, at the time it was struck. There is evidence that Vaughn's car left skid marks on the pavement for a distance of about 20 feet before the point of collision, and of other skid marks indicating that the Jacobsen car was shoved sideways from the point of impact. Mrs. Jacobsen testified that she did not see the Vaughn car prior to the collision. It appears that Vaughn saw the other car when some distance away; that he slackened his speed; that he was watching the road on both sides; that he approached the intersection at from fifteen to seventeen miles an hour; that he again saw the other car some distance before he entered the intersection; that he "figured" it would stop and so kept on going; that he observed that Mrs. Jacobsen did not slacken her speed or change her course; that she entered the intersection first and was proceeding across it; that he proceeded 35 or 40 feet after seeing her car but with his brakes on for one-half of this distance; and that he struck the other car when it had nearly crossed the pavement. There is some evidence justifying the inference that, at the time Mrs. Jacobsen entered the intersection, the Vaughn car was farther therefrom than indicated by his testimony. We think this evidence was sufficient to justify the submission to the jury of the question as to whether Vaughn had an opportunity to avoid the accident. Palmer v. Tschudy, 191 Cal. 696, 218 P. 36, 38; Atkins v. Bouchet, 86 Cal. App. 294, 260 P. 828.

Appellants further argue that the doctrine of the last clear chance was not available to Mrs. Jacobsen because she was negligent in not looking and that this continued up to the moment of the impact. They rely upon such cases as Young v. Southern Pacific Co., 189 Cal. 746, 755, 210 P. 259, 262, and Garrison v. Pearlstein, 68 Cal. App. 326, 330, 229 P. 348. In the first of these cases the court said: "This exception to the general rule, however, has no application to a situation where, by their mutual carelessness, an injury ensues to one of two parties, both of whom are contemporaneously and actively in fault down to the very moment of injury."

There is a distinction between the negligence of a party through which he is placed in a position of peril and a further or continued negligence through which he fails to take measures to escape which are available to him. The entire doctrine has reference to a situation in which a party may have been negligent in getting into a perilous situation. If that negligence continues, in the sense that the party does not avail himself of an opportunity open to him to escape from the perilous situation, the doctrine cannot benefit him. On the other hand, though his peril be created by his own negligence, if he has no opportunity to escape, while the other party, knowing his situation, does have the opportunity to avoid the injury, the doctrine applies. As was further said in Young v. Southern Pacific Company, supra: "Obviously, if both parties to an accident could, by the exercise

of ordinary care, have avoided it, neither can be said to have had the last clear chance. It is only when a defendant charged with the negligent infliction of the injury, knowing plaintiff's peril, could and the injured plaintiff could not have avoided the injury that the defendant is liable. The liability is placed upon the party inflicting the injury only if immediately before the actual infliction of the injury the injured person was in such a situation as to be unable, by the exercise on his part of reasonable and ordinary care, to extricate himself, and vigilance on his part would not have averted the injury."

In Palmer v. Tschudy, supra, the court said: "The rule does not require that the inability of the plaintiff to escape the danger shall be due to a situation which renders it physically impossible for her to do so. It applies equally when she is wholly unaware of the danger and for that reason unable to escape it. But the rule also requires that if she is aware of the danger, or becomes aware of it, she must thereafter exercise ordinary care for her own protection."

Under the circumstances shown, we think the giving of the instruction complained of was warranted.

In our opinion the decisions of the jury upon questions of fact properly submitted to it are controlling here.

The judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.

BROOKS v. CITY OF GILROY.*

Civ. 8485.

District Court of Appeal, First District, Division 1, California.

April 12, 1933.

Rehearing Denied May 12, 1933.

Hearing Granted by Supreme Court June 8, 1933.

1. Municipal corporations ⇐214(1).

Where city has regularly appointed and acting city engineer, city cannot, under 1911 Improvement Act, appoint or contract with other engineers for street improvement work (St. 1911, p. 751, § 41).

St. 1911, p. 751, § 41, provides that city engineer, or, where there is no city engineer, the county or city and county surveyor, shall do engineering work under the act, and that, in all cities where there is no city engineer, city council is authorized and empowered to appoint suitable person to discharge the duties laid down as those of city engineer, and to fix compensation for such services.

2. Municipal corporations ⇐57.

Delegated powers must be strictly construed and held as limitations of authority.

3. Municipal corporations ⇐214(1).

Where city had a city engineer, city's contract with another to perform engineering and other work in connection with street improvements under 1911 Improvement Act *held* void, precluding recovery (St. 1911, p. 751, § 41).

4. Municipal corporations ⇐220(8).

Where city's contract employing engineer for street improvement work was void because city had a city engineer, there could be no recovery on quantum meruit (St. 1911, p. 751, § 41).

5. Municipal corporations ⇐57.

When act by city is authorized under certain conditions, act is unauthorized in absence of conditions given.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by D. C. Brooks against the City of Gilroy. From a judgment in favor of plaintiff, defendant appeals.

Reversed, with directions.

D. T. Jenkins, of San Jose, and Walter G. Fitzgerald and E. D. Crawford, both of Gilroy, for appellant.

Kirkbride, Wilson & Brooks, of San Mateo (John D. Willard, of San Mateo, of counsel), for respondent.

PARKER, Justice pro tem.

The action was to recover on a claim for services rendered by plaintiff's assignor. Judgment went for plaintiff, and defendant appeals. The assignor of plaintiff is one Charles E. Sloan, and, as it is upon his contract and his services that the issue arises, we shall hereinafter refer no further to the nominal plaintiff and respondent, but treat the cause as though Sloan was an actual party to the suit. A summary of the facts as found by the trial court will aid the discussion.

On January 9, 1924, the city of Gilroy, through its common council, employed and engaged Sloan as city engineer to render certain professional engineering services to and for said city in and about the doing of certain contemplated street improvement work. At the time of said employment, the city was contemplating the paving and improvement of certain streets in said city, pursuant to the provisions of the Improvement Act of 1911 (St. 1911, p. 730 as amended) and Improvement Bond Act of 1915 (St. 1915, p. 1441 as amended). Pursuant to said employment, the said Sloan performed and rendered

*For subsequent opinion see 29 P.2d 212.

services of the reasonable value of $11,621.12, and no part thereof was paid. The foregoing sufficiently outlines the general nature of the action. As specific contentions arise, we may revert to the facts alleged and found.

The finding of the court is that Sloan was employed as city engineer on January 9, 1924, that on that date the contract of employment was agreed to by Sloan and the city, and that Sloan thereupon proceeded in performance. On January 9, 1924, the city of Gilroy had a city engineer in the person of one H. B. Fisher. Appellant contends that, by reason of this fact, the city had no power to employ Sloan. In support of the contention is cited section 41 of the Improvement Act of 1911. This section provides: "The city engineer * * * shall be the proper officer to do the surveying and other engineering work necessary to be done under this act, and to survey and measure the work to be done under contracts for grading and macadamizing streets, and to estimate the costs and expenses thereof. * * * He shall also keep a record of all surveys made under the provisions of this act, as in other cases. In all those cities where there is no city engineer, the city council thereof is hereby authorized and empowered to appoint a suitable person to discharge the duties herein laid down as those of city engineer, and all the provisions hereof applicable to the city engineer shall apply to such person so appointed. Said city council is hereby empowered to fix his compensation for such services." As stated, on January 9, 1924, the city of Gilroy did have a city engineer. The offer of Sloan, which was accepted (the offer and acceptance constituting the found contract under which services were rendered), is as follows: Sloan was to prepare all of the plans, specifications, and other engineering work incidental and necessary in connection with the city's contemplated improvement work; he was to make complete survey of grade or establish grade as required; he was to prepare contracts, calls for bids and other necessary papers in connection with letting of contracts, and, after the contract had been let, was to furnish the necessary engineering service and inspect the work during construction. After the completion of the work, he was to make the assessment, distribute the costs, and prepare the auditor's record of annual payments and interest on unpaid assessments. He was to prepare the treasurer's record of improvement bonds and coupons. He was to attend all meetings of the city council during the street proceedings program and co-operate with the city attorney in the preparation of all resolutions, notices, etc., necessary for publication in connection with the work. Obviously, Sloan was to have entire charge of the work, assuming not only the duties of city engineer, but many other duties not chargeable to that office. He was to be the "without which not." All of the duties of city engineer under the Improvement Act devolved upon Sloan.

[1] We have hereinbefore cited and quoted section 41 of the Improvement Act of 1911. We note the opening clause of the section as follows: "* * * Where there is no city engineer, the * * * county surveyor, shall be the proper officer to [discharge the duties imposed upon the city engineer] under this act." Then in the latter part of the same section, we read: "In all those cities where there is no city engineer, the city council thereof is hereby authorized and empowered to appoint a suitable person to discharge the duties herein laid down as those of city engineer, and all the provisions hereof applicable to the city engineer shall apply to such person so appointed." An apparent conflict appears within the section. There are many recognized aids to construction which might harmonize the variance, but we deem it unnecessary to undertake such a task. Each portion of the section does, however, stress the thought that the duties imposed by the act on the city engineer are duties to be performed by that officer and by no one else, save in the excepted cases. The most liberal interpretation of the section would be that the council has the option, either to permit the county surveyor to become, as it were, ex officio city engineer, or to appoint some other suitable person to discharge the duties of the office. Again, it may be construed as meaning that the county surveyor shall act only as each paving matter or general improvement matter arises. And still again it would seem reasonable to assume that the Legislature had in mind two distinct conditions often found in smaller cities. In some of such cities, while the charter provides for a city engineer, no one is appointed to such office, or there is a vacancy. In other cities the charter makes no provision at all for such an office or officer. In the first class we could assume the legislative intent to be that, if there were no person competent or available under the charter, the council might delegate the duties to the county surveyor. In the second class, where the charter makes no provision for a city engineer, the council would be virtually empowered to create the office, as it were, by appointing some suitable person to discharge the duties that would devolve ordinarily upon the city engineer. Any construction leads to the same conclusion as to the powers of the council. Where there is a city engineer, the council has no power, either of appointment or contract, involving similar duties.

Where a city has a regularly appointed and acting city engineer, the council has no power or authority to shift the duties of the office by contract. If this power vested in a city council, there is no good reason why such council could not ignore all the provisions of its charter and set up some wild or violent form of

dictatorship. In the record before us we note that respondent does not attempt to defend the action of the council in appointing Sloan on January 9, 1924, to do the work. Respondent urges the fact that on February 11th the office of city engineer was declared vacant and that thereafter the city entered into a contract with Sloan. But the express finding of the trial court, here unassailed, is that the great part of the services were rendered before the date of February 11th; likewise is there a specific finding that the compensation was fixed on January 9, 1924. This finding was pertinent and responsive to the issues inasmuch as it was the city's contention that no compensation had been fixed until after the work was done.

[2] Throughout the instant case there runs a question of sound public policy relating to the construction of powers vested in a common council. Consonant with accepted ideas of a representative form of government, whether it be national, state or local, is the thought that delegated powers are to be strictly construed and held as limitations of authority. In the instant case the city council, in its purported agreement with Sloan, practically turned over to him the entire matter of improvements, not only the engineering work but also the duties of the treasurer, auditor, and city attorney. The police, fire, and health departments were left to struggle along as best they could until perhaps another, even greater, should enlighten the horizon. We need not delate on the potential harm in sanctioning unauthorized acts of a city council. It presents the paradoxical situation of being bad even if the result, in a relative sense, could be classed as good.

[3] We hold that on January 9, 1924, when the council of the city of Gilroy engaged Sloan to discharge the duties of city engineer, it exceeded its authority, and its act was void. Respondent cites us to the case of Kennedy v. City of Gustine, 199 Cal. 251, 248 P. 910. We find little in the cited case which is helpful on the point involved. The Kennedy-Gustine Case involves the appointment or engagement of an engineer to perform the duties of city engineer in a city where there was no city engineer. The court, in its opinion, stresses the fact and we must conclude that the opinion rendered was in the light thereof.

The specific finding which supports the judgment is that the city of Gilroy on January 9th engaged the services of Sloan to do and perform certain specified engineering work as city engineer; that such work was performed under the Improvement Act of 1911 and that on said January 9, 1924, the city of Gilroy agreed to pay for said services as per a certain contract, and on that date the compensation was fixed. The judgment is predicated upon the facts found in relation to the action of the city council as of January 9, 1924. At this time the city council was totally without power to enter into such a contract, and therefore the findings do not support the judgment.

As hereinbefore stated, the respondent presented his claim to the city of Gilroy and bases the present action upon a contract of employment alleged as of March 17, 1924. The trial court specifically found against this claim, and did fasten the contract and the status of the claimant as arising under the action of January 9, 1924. It might well be that respondent concedes the invalidity of the proceedings of the last-named date, and for that reason seeks to avoid the question, yet there is no attack upon the trial court's finding. It follows, therefore, that the finding will not support the judgment for the given reason that there was no authority in the city council to enter into the contract, and no liability rests on the city from such an unauthorized act.

[4] The complaint counts on a quantum meruit, and in response thereto the court found that within two years previous to the filing of the complaint the defendant city of Gilroy became indebted and was and is now indebted to Sloan in the sum of $11,621.12; the same being the reasonable value and worth of certain engineering services rendered said defendant city of Gilroy, which said defendant city promised and agreed to pay, and no portion or part thereof has been paid. The common count must rest upon the power of the city council to contract. Under the conditions here present, there can be no recovery for the alleged reasonable value of services rendered under a void contract. 18 Cal. Jur. p. 1002, § 273; Zottman v. City and County of San Francisco, 20 Cal. 96, 81 Am. Dec. 96; Morgan v. City of Long Beach, 57 Cal. App. 134, 207 P. 53. Following the general rule, it is said in Los Angeles Dredging Co. v. City of Long Beach, 210 Cal. 348, 353, 291 P. 839, 842, 71 A. L. R. 161: "* * * Contracts wholly beyond the powers of a municipality are void. They cannot be ratified; no estoppel to deny their validity can be invoked against the municipality; and ordinarily no recovery in quasi contract can be had for work performed under them." See, also, City of Pasadena v. Estrin, 212 Cal. 231, 298 P. 14; Strauch v. San Mateo Junior College Dist., 104 Cal. App. 462, 286 P. 173.

Many other points are presented by both appellant and respondent, but the findings, here unassailed, base the judgment upon the employment of January 9, 1924. Not once, but often throughout the findings, the trial court fixes this as the date of the employment, and affirms and reaffirms that the compensation was fixed and agreed upon as of that date. We are not inclined to question the finding sua sponte, and to seek to find in the record evidence that might tend to overcome the force thereof. Many interesting questions lurk in the record, but, as each one

hinges about a determination of disputed fact, we cannot enter into an analysis thereof with a view of establishing the law of the case. If plaintiff has any claim against the city of Gilroy, it is not under the contract found, and the transcript of proceedings and testimony taken is not in a state to permit us to make additional or different findings.

Throughout the brief of respondent there is not even a suggestion of contention that there was no city engineer of Gilroy on January 9th, nor is there any attempt made to uphold the validity of a contract made at a time when said city had a city engineer. Respondent's main argument predicates itself upon the claim that the contract between Sloan and the city of Gilroy was at a later date when, admittedly, there was no city engineer.

[5] We are mindful of the modern trend of local governing bodies to justify the means by the end. In most instances a desire of public improvement fostered in civic pride is the prevailing characteristic of the local officers. Yet these officers, commendable as their efforts may seem, are controlled by the plain provisions of the law. There may be many things desirable and no purse with which to defray the costs. These costs fall eventually upon the taxpayer who has been assured that his liability is only as measured by the controlling law. If members of a city council were given free hand to saddle upon a community all manner and amount of indebtedness, regardless of the law, the net result might be disastrous rather than beneficial, and a concrete illustration is here presented. It is needless to speculate upon all the possible harm that may follow from a disregard of the plain provisions limiting the power of the city council in cities wherein there is no city engineer; needless also to enlarge upon the demands of a sound public policy. Without citing specific instances, municipal improvement often presents a disheartening picture of reckless extravagance and official misconduct. One deviation from the law has sanctioned another until this branch of the law has become highly specialized under a scheme of procedure which seeks the goal of complete nullification of the written law, and in lieu thereof a complicated structure of expedient evasion. It would seem that the matter of improving a street or highway, coming as close as it does to the individual, should be a matter of easy attainment and no difficulty. The policy of the law and the decisions of the courts since the earliest days have together sought to reach this point; yet to-day the questions surrounding public improvement involve the most technical rules of interpretation and construction, often in an honest attempt to protect and preserve the taxpayer, creating a condition of seeming oppression. Throughout the decisions, however, we find one definite rule crystallized into the phrase, "the mode is the measure of the power." A corollary thereto is the rule that, when an act is authorized under certain given conditions, it is unauthorized in the absence of the conditions given.

From the foregoing we conclude that the contract between the city of Gilroy and Sloan as of January 9, 1924, was void and of no effect. The undisputed evidence being that on that date the city of Gilroy had a city engineer, the trial court should have so found. Incorporating this finding into the record, the entire findings then support but one judgment, namely, a judgment for defendant.

The judgment is reversed, with directions to take evidence if necessary on this one fact, and, if found in favor of defendant's contention, to enter judgment for the defendant.

We concur: TYLER, P. J.; KNIGHT, J.

131 Cal.App. 116

BANK OF AMERICA OF CALIFORNIA v. UNIVERSAL FINANCE CO. et al.

Civ. 7691.

District Court of Appeal, Second District, Division 2, California.

April 8, 1933.

Hearing Denied by Supreme Court June 5, 1933.

1. Banks and banking ⇐156.

Acceptance and payment of depositor's checks, drawn when account was insufficient to pay checks without crediting account with deposited check drawn by one on another bank, changed relationship between depositor and bank of deposit from that of principal and agent to that of debtor and creditor, as respects forwarding check for collection (St. 1909, p. 87, § 16c, as added by St. 1925, p. 513, § 5).

2. Bills and notes ⇐356.

When bank accepted depositor's checks drawn on amount of deposited check drawn by one on another bank, without notice of any infirmity in it, bank of deposit became holder thereof in due course, with right to recover full amount of check from maker who stopped payment (St. 1909, p. 87, § 16c, as added by St. 1925, p. 513, § 5).

3. Estoppel ⇐72.

As between maker who issued check when bookkeeping entry was all that was necessary, and who failed to give timely notice of intention to stop payment after knowing that bank of deposit was faced with overdraft by depositor even by crediting check to depositor's account, and such bank which ac-

cepted check without notice of any infirmity in it, loss must fall on maker whose action was primary cause of loss (St. 1909, p. 87, § 16c, as added by St. 1925, p. 513, § 5).

4. Estoppel ⊜72.

Where one of two innocent parties must suffer, burden should be borne by one whose action was primary cause of loss.

Appeal from Superior Court, Los Angeles County; F. M. Jamison, Judge.

Suit by the Bank of America of California against the Universal Finance Company, Moe Jacobs, as executor of the last will and testament of Max Jacobs, doing business under the fictitious name and style of the Universal Finance Company, and others. From a judgment in favor of plaintiff, the second named defendant appeals.

Affirmed.

Hearing denied by Supreme Court; THOMPSON, J., dissenting.

Overton, Lyman & Plumb, of Los Angeles, for appellant.

Freston & Files, of Los Angeles (Ralph E. Lewis, of Los Angeles, of counsel), for respondent.

ARCHBALD, Justice pro tem.

Plaintiff brought suit on a check issued by defendant upon which the latter had stopped payment. From a judgment in favor of plaintiff, defendant has appealed.

There is no serious conflict in the evidence introduced, which substantially shows that Sammis-McBrien Company was a partnership engaged in the business of selling automobiles in San Diego; that appellant, as executor of the last will and testament of Max Jacobs, doing business under the fictitious firm name and style of Universal Finance Company, was engaged in financing the purchase and sale of automobiles in Los Angeles, and on July 17, 1929, and for a period of some two years prior thereto, had purchased automobiles and delivered them to said partnership to be sold by it, and had purchased from said partnership conditional sale contracts made and entered into by and between the partnership and parties to whom it had sold such automobiles. Sammis-McBrien Company had apparently sold an automobile so placed with them by the finance company, and on the 17th of July, 1929, Mr. Sammis went to the office of the finance company with the contract, presented the partnership's check for $2,250, on respondent branch bank in San Diego, in payment of the car so sold, and in return received the finance company's check on the California Bank of Los Angeles for the same amount, in payment for the contract. This check was deposited by Sammis-McBrien Company with the respondent's San Diego branch on the same day, and was credited by the bank to the account of the company. It appears that on certain contracts which the finance company had purchased from Sammis-McBrien Company no certificates of ownership issued by the motor vehicle department of the state had been received. These had been demanded by the finance company, and not yet having been furnished, Mr. Jacobs and Mr. Moss of the company went to San Diego on the night of July 17, 1929, and called on Sammis-McBrien Company the next morning, asking for an explanation. In the course of the conversation which ensued, Jacobs and Moss learned that some half dozen of the contracts held by them were fictitious. The check book of Sammis-McBrien Company was also examined and showed that the check of the finance company above referred to had been deposited; and the balance, after deducting the amount of checks drawn on the account, "indicated that when * * * our check would come through it would be an overdraft." It was then mutually agreed that, "in view of the fact that this exchange of checks was purely a matter of bookkeeping, because that transaction might have been handled without any exchange of checks whatever," payment would be stopped on both checks. In accordance with such agreement, the finance company notified the California Bank to stop payment on the check it had issued, and Sammis-McBrien Company did likewise with the San Diego branch of respondent bank as to the check issued by it in favor of the finance company. On the morning of July 17, 1929, the balance of Sammis-McBrien Company in their account with respondent's branch was $2,746.97, which, together with the check of the finance company and two small items deposited with it, made a total of $5,008.97. Against this total there was drawn on the 17th of July seven items aggregating $3,827.55, leaving a balance of $1,181.12 to that company's credit in said bank on the morning of July 18. On the latter date a check for $1,373.50 was charged to the account, leaving an overdraft of $192.08. It is apparent that this situation was disclosed to the representatives of the finance company on the morning of the 18th when the check-book of the Sammis-McBrien Company was exhibited to them. The California Bank returned the check which the finance company had issued to Sammis-McBrien Company to respondent's San Diego branch after payment was stopped, and suit was eventually brought thereon by respondent.

Appellant contends that under section 16c of the Bank Act (Stats. 1925, p. 513, § 5, vol. 1, Deering's Gen. Laws 1931, p. 232, Act 652) a bank as a matter of law can only act as the agent of a depositor in forwarding a check for collection in the absence of a written agreement between the parties changing such relationship of principal and agent; that,

no such written agreement having been shown in this case, such relationship prevailed at all times between respondent and the Sammis-McBrien Company; and, the contract between the finance company and said Sammis-McBrien Company having been rescinded, respondent bank was bound thereby.

Section 16c of the Bank Act, so far as material here, reads:

"Any credit allowed by any bank organized under the laws of * * * this state, for any check, * * * drawn * * * on * * * any other bank, * * * shall be only provisional, subject to final payment and to the receipt by the bank in which it is deposited of the funds in actual money, or in solvent credit on the books of any federal reserve bank, or on the books of any bank designated as a depositary by the forwarding bank; provided, * * * that when such check * * * is drawn on * * * any other bank * * * it * * * may be forwarded for the purpose of collection directly to the bank on or by which it is drawn, or at which it is made payable, or to any federal reserve bank, or to any other bank in the usual course of business; and in payment thereof there may be accepted either money or the check or draft of the bank on or by which it is drawn, or at which it is made payable, or the check or draft of any bank to or through which it has been forwarded for collection, or credit therefor may be accepted with any federal reserve bank, or with any bank designated as a depositary by the forwarding bank.

"In forwarding for collection any check * * * or receiving payment therefor, in any manner aforesaid, the bank shall not be liable in the event of the insolvency or other default or for any act or omission, of any other bank employed directly or indirectly in handling the collection of such check, note or other instrument, or of any bank on or by which the draft received in payment is drawn; nor for the payment of any check, or draft, or credit as may have been accepted in payment therefor; nor for the loss or destruction of, or inability to repossess itself of any check, note or other instrument in transit or in the possession of others. Until the proceeds of any check, note or other instrument providing for the payment of money shall have been actually received by the bank allowing such credit, in actual money, or in solvent credit on the books of any federal reserve bank, or on the books of any bank designated as a depositary by the forwarding bank, such check, note or other instrument may be charged back to, or collected from, the depositor from whom it was received regardless of whether or not the check, note or other instrument itself can be returned. * * * Any provision of this section may be modified or set aside by an agreement in writing between any such bank and any party from whom any check, note or other instrument is received for collection, deposit, or other purpose."

Prior to the adoption of the section above quoted from, the rule in California had been for many years, at least, that, upon the deposit of a check by a customer in the ordinary course of business of the bank, the title to the check vested in the bank, creating the relationship of debtor and creditor, upon the implied contract on the part of the customer, however, to repay the amount of the instrument to the bank in case it was returned to the latter unpaid. Plumas County Bank v. Bank of Rideout, 165 Cal. 126, 131 P. 360, 47 L. R. A. (N. S.) 552. The difficulties banks of deposit were caused by this rule apparently led to the adoption and use of a form of deposit slip or passbook in which it was stated in effect that the acceptance and credit of such a check was for the purpose of collection only and that the bank was not liable until the collection was made. The record in the case of National Bank of California v. Miner and First National Bank, 167 Cal. 532, 140 P. 27, sets out the lengthy agreement printed in its passbooks by the plaintiff in such case, which changed the relation existing under the laws of California between the bank and a general depositor to that of principal and agent, and which provided, in addition, that the bank of deposit should not be liable for the default of any bank, person, or subagent used in making such collection, or for loss in transit, or "until the proceeds in actual money shall come into its possession." That some of the banks were still using the old deposit slips with a similar agreement after the adoption of section 16c is shown by the record in the case of Merced Security Savings Bank v. Bent Bros., 207 Cal. 652, 279 P. 765, in which a deposit slip of one of the banks involved contained substantially identical terms. In 1924 the case of Luckehe v. First National Bank of Marysville, 193 Cal. 184, 223 P. 547, laid down the rule that an agent authorized merely to collect a demand cannot bind his principal short of actual collection and receipt of the money. In such case a certificate of deposit issued by the First National Bank of Gridley was delivered to the plaintiff in the case, who indorsed it to the Marysville Bank and in exchange received an interest-bearing certificate of deposit in his name. The Marysville Bank sent the certificate of deposit received by it to its correspondent, the Rideout Bank in Gridley, for collection, which bank presented it to the bank of issuance at Gridley the afternoon of the day it was received. Instead of demanding cash in exchange for it, the Rideout Bank accepted from the First National Bank of Gridley a draft on the Anglo & London-Paris National Bank of San Francisco, which it mailed to the Marysville Bank, which in turn indorsed and mailed it to its San Francisco

correspondent, by whom it was presented for payment to the Anglo & London-Paris National Bank, when it was dishonored. The draft was returned to the Marysville Bank, which notified plaintiff of its rejection. On the same day the First National Bank of Gridley closed its doors. Plaintiff demanded payment of the certificate of deposit issued him by the Marysville Bank, and upon refusal thereof brought suit, with the result that judgment went for the defendant bank in the trial court, which was reversed by the Supreme Court in an opinion declaring the rule of law first stated. That case involved the relationship of principal and agent, as the parties all agreed that the certificate of deposit was taken for the purpose of collection only, and impressed the banks with a new danger to them in making collections in the usual course of banking business as generally conducted.

Another case of interest to banks was handed down by the Supreme Court of the United States in the same year, viz. Federal Reserve Bank of Richmond v. Malloy, 264 U. S. 160, 44 S. Ct. 296, 68 L. Ed. 617, 31 A. L. R. 1261. The state of Florida adopted a law in 1909 (chapter 5951) providing that, when any check, draft, or other negotiable instrument is deposited in a bank for credit, it shall be considered due diligence on the part of the bank in the collection thereof to forward same without delay in the regular course of business, and that the maker, indorser, guarantor, or surety of any such instrument "shall be liable to the bank until actual final payment is received." The check in question in the case cited was for the sum of $9,000, drawn upon the Bank of Lumber Bridge, N. C. It was sent on in the usual course of collection by the bank of deposit, the Perry Banking Company, of Perry, Fla., and reached the Federal Reserve Bank at Richmond, which in turn forwarded it direct to the Lumber Bridge Bank for payment, receiving a draft therefor on a bank in Greensboro, N. C., which bank in turn notified the Richmond bank by wire that the Lumber Bridge Bank did not have sufficient funds on deposit to pay it. The Richmond bank again took up the matter of payment with the Lumber Bridge Bank, which promised payment but did not make good. The Supreme Court held that the Richmond bank was liable to the depositor of the check, although a collecting agent, for accepting the worthless draft instead of the cash, notwithstanding a regulation of the Federal Reserve Bank which authorized sending a check for collection direct to the drawee bank.

[1] There can be little doubt that the two cases referred to called the attention of bankers in California to another serious danger, with the result that section 16c of the Bank Act was adopted, which not only enacted into law the relationship created by the agreement banks had theretofore printed, but carried the protection still further to authorize the acceptance by the collecting banks of checks or drafts, as well as money, the sending of the instruments deposited direct to the bank on which they were drawn, and absolved the bank of deposit from liability "in the event of the insolvency or other default or for any act or omission" of any other bank employed in the collection thereof, or for the loss or destruction of the instrument. To protect the bank from the uncertainty of parol testimony which might show the relationship of debtor and creditor or some other change in the liability of the bank, the section provides that any provision of the section may be modified by an agreement in writing between the bank and the party from whom the instrument is received for collection. We fail to see anything in section 16c or in the history leading up to its adoption which makes the last-mentioned provision a declaration of public policy, as urged by appellant, requiring us to hold that the provisions of the section can only be changed by an agreement in writing. We observe no reason why the written checks drawn by the Sammis-McBrien Company on the account containing the deposit of the check issued by appellant (at a time when there was an insufficient balance in said bank to pay the same without giving credit for such check), together with the circumstance of the acceptance of the checks by the bank and payment thereof, does not constitute as high an order of evidence as any "agreement in writing" between the parties could possibly be, and it might well be treated as such an agreement, changing the relationship from that of principal and agent to that of debtor and creditor. Prior to the adoption of section 16c it was customary among banks to change the relationship of principal and agent, resting in agreement, by the acceptance of checks drawn on a provisional deposit, to that of debtor and creditor, the bank then becoming the owner and holder of the check so provisionally deposited. See Bromfield v. Cochran, 86 Colo. 486, 283 P. 45, 68 A. L. R. 722; Old National Bank of Spokane v. Gibson, 105 Wash. 578, 179 P. 117, 6 A. L. R. 247; Jefferson Bank v. Merchants Refrigerating Co., 236 Mo. 407, 139 S. W. 545; McAuley v. Morris Plan Bank, 155 Va. 777, 156 S. E. 418. The checks involved in First National Bank v. Corcoran, 105 Cal. App. 116, 286 P. 1105, were issued after the adoption of section 16c, but no mention is made in the case of such enactment. The relationship of principal and agent, urged as a defense in such case and as preventing the bank from becoming a holder in due course, arose out of the reserved right to receive the checks in question for the purpose of collection only and to charge them back to the depositor in case they were not paid. The amount of the deposit was paid out on the checks of the depositor, and in a suit by the bank against the maker thereof the trial court found that the bank held

them for collection only, under the printed agreement on the deposit slips, and that it was not a holder in due course and for value. The appellate court reversed such decision, holding that the agreement gave the bank a right which it might exercise or not as it chose, and that, having paid out the amount of the checks before it received any notice of defect in them, it was a holder in due course and for value and had a right to collect from the maker. See, also, Anglo-California Trust Company v. French American Bank, 108 Cal. App. 354, 291 P. 621, where plaintiff bank under similar circumstances was also held to be a holder in due course, in a suit against an endorser.

[2] We conclude that the section in question was adopted for the sole purpose of protecting the banks and making them safe for the many depositors whose money they use; that, in adopting as law the effect of the agreements which the banks had adopted to protect themselves from becoming debtors in every case where they accepted checks as a general deposit, the Legislature did not intend to in any way restrict or limit the right of the banks to make advances to depositors on the strength of either the depositor's credit or that of the maker of the negotiable instrument deposited; that in this case, when respondent bank accepted checks drawn on the amount of the deposited check without notice of any infirmity in it, the depositary became a holder thereof in due course and for value, with a right to recover from the maker the amount called for by the instrument, and in our opinion the Legislature intended in adopting such section to preserve to the banks all rights that attached to the same relationship created by agreement, as laid down in the decisions construing their rights thereunder.

Appellant urges in effect that the purpose of the Legislature in enacting section 16c was to prevent overdrafts. We can see nothing in the amendment that can be so construed. Section 21b of the Bank Act, adopted in 1921 (St. 1921, p. 1369, § 9), provides that: "In no case shall an overdraft of more than ninety days' standing be allowed as an asset of any bank." There is nothing in section 16c that affects or seems to be intended to affect the question of overdrafts, and section 21b does not limit the bank's right to prevent overdrafts, but simply requires the institution so permitting it to see that the same is paid within ninety days or to not thereafter consider it as an asset. Section 39 of the act (St. 1911, p. 1011, § 7) prohibits any officer, director, agent, teller, clerk, or employee of any bank from overdrawing his account, but that does not imply that the bank may not make a loan by way of overdraft to a customer, but fairly implies that it may be done. In the instant case, we fail to see how, by giving section 16c the full effect claimed by appellant, an overdraft would be prevented. As a matter of fact, unless the respondent bank can collect on the check, on the faith of which it must in part at least have paid the checks of Sammis-McBrien Company, there is bound to be a loss to it.

[3, 4] It hardly seems that appellant, whose representatives saw the check book of Sammis-McBrien Company and who knew that respondent bank was faced with an overdraft even with the credit of appellant's check, and who then failed to notify the bank that their company intended to stop payment on such check, is in a very good position to urge the defense here presented. One very large check was paid by respondent bank the day the condition of the bank account was known to appellant, and it may be that it would not then have been too late to charge all of the checks making the overdraft back to Sammis-McBrien Company, and thus have saved both the bank and appellant from loss if such notification had been timely made. Again, appellant issued a negotiable check, to circulate freely, when, as one of its employees testified, a bookkeeping entry was all that was necessary. For this further reason it would seem that appellant should be held liable, on the well-known principle that, where one of two innocent parties must suffer, the burden should be borne by the one whose action was the primary cause of the loss.

Judgment affirmed.

We concur: CRAIG, Acting P. J.; STEPHENS, J.

131 Cal.App. 148

ROY v. SMITH et al.

Civ. 4834.

District Court of Appeal, Third District. California.

April 10, 1933.

1. Appeal and error ⇐757(1).

Plaintiff's brief on appeal from adverse judgment in death action *held* to sufficiently comply with rule requiring brief to contain nature of action and substance of pleadings (Rules of Supreme Court and District Courts of Appeal, rule 8, § 3).

Plaintiff's brief recited in part that complaint alleged that the defendant negligently supplied natural gas to the deceased's apartment, which was burned through burners installed by the defendant, and that carbon dioxide gas was formed to such an extent that the deceased died, and that the defendant gas

company had control of the gas in question and had installed the gas jets required in making the change from artificial gas to natural gas. In addition to reciting the substance of the complaint upon which the plaintiff relied, the brief specifically referred to certain paragraphs thereof for further information.

2. Evidence ⇐9.

Courts may take judicial knowledge of scientific facts commonly recognized.

3. Evidence ⇐52.

Court's judicial knowledge of recognized laws of science may require it to disregard allegations of pleading in direct conflict.

4. Evidence ⇐1.

Courts will not take judicial notice of facts not constituting matters of common knowledge, or which may be ascertained by reference to dictionaries, encyclopedias, or scientific publications.

5. Appeal and error ⇐786.

Gas company, defendant in action for death resulting from asphyxiation, *held* not entitled to dismissal of plaintiff's appeal on ground it was frivolous under allegations of complaint.

Complaint, alleged to disclose facts making it physically impossible for gas company to be charged with negligence resulting in death, stated, in substance, that gas company was engaged in supplying heating gas to the deceased's apartment by means of a floor gas heater; that, in changing its fuel from artificial gas to natural gas, the gas company had attached a new burner; that gas company had exclusive control of the heating apparatus and of the pressure and flow of the gas supplied; that, while deceased was reclining in her apartment and while the flame was burning, carbon dioxide gas was generated in the room, causing her death.

Appeal from Superior Court, Solano County; W. T. O'Donnell, Judge.

Action by John D. Roy, administrator of the estate of Fern Mildred Roy, deceased, against Anna L. Smith and another. The cause was dismissed as to the defendant Anna L. Smith. From a judgment in favor of the Pacific Gas & Electric Company, the plaintiff appeals. On motion to dismiss the appeal.

Motion denied.

Robert H. Schwab, of Sacramento, for appellant.

Thomas J. Straub and Clinton F. Stanley, both of San Francisco, and W. U. Goodman and Jos. M. Raines, both of Fairfield, for respondents.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

The respondents moved to dismiss the appeal in this case on the ground that appellant's brief does not conform to rule VIII, § 3, of Rules of the Supreme Court and District Courts of Appeal, by omitting to print therein the substance of the complaint upon which she relies as her statement of a cause of action, and because the appeal is frivolous, since the complaint recites facts making it physically impossible for the defendants to be charged with negligence resulting in the death of Fern Mildred Roy. The cause was dismissed as to the defendant Smith.

[1] We think the appellant's brief sufficiently conforms to the above rule, which merely requires the printing of "the nature of the action and the substance of the pleadings" relied upon. The brief recites in part: "The complaint alleges that the defendant so negligently supplied natural gas to said apartment, which was burned through the burners installed by defendant, that carbon dioxide gas was formed to such an extent that Mrs. Roy died. * * * The defendant gas company had the control of the gas in question, and also that it had installed the gas jets which were required in making the change from artificial gas to natural gas. (See pars. V and VI of the complaint.)" It requires no speculation to understand the appellant has charged the defendant Pacific Gas & Electric Company with negligently causing the death of Fern Mildred Roy by the use of defective apparatus or the means by which it supplied her apartment with natural gas for the purpose of heating the rooms. The complaint is concise and free from ambiguity. The plaintiff relies on the doctrine of res ipsa loquitur. In addition to reciting the substance of the complaint upon which the appellant relies, the brief specifically refers to paragraphs V and VI of the complaint for further information. The brief appears to substantially comply with the requirement of the court rule above cited.

The respondent strenuously asserts that, because the complaint admits that the flame from the floor gas heater continued to burn after the death of Mrs. Roy, it is physically impossible for her to have died from the effect of carbon dioxide, because that noxious gas is heavier than normal air and would have settled to the floor and thereby extinguish the gas flame before she was suffocated. It is claimed the court will take judicial knowledge of this scientific fact, which destroys the appellant's cause of action upon his admitted statement that the flame was found burning after the death of Mrs. Roy. Admitting the truth of the scientific fact for which the respondent contends, the result precluding the possibility of asphyxiation does not necessarily follow.

The complaint alleges that the defendant Pacific Gas & Electric Company was engaged in supplying heating gas to the apartment of Fern Mildred Roy by means of a floor gas heater; this furnace was supplied with a vent pipe to carry off the noxious gas which is usually generated; in changing its fuel from artificial gas to natural gas, the company had attached a new burner which is presumed to be necessary for proper combustion of the natural gas; the defendant company had exclusive control of the heating apparatus and of the pressure and flow of the gas supplied; the deceased was reclining on the bed in her apartment where this gas floor heater was installed; the flame was burning; in some manner unknown to the plaintiff, either because of a defect of apparatus, or of the manner or pressure in supplying the gas, it is alleged that carbon dioxide was generated in the room, causing the death of Mrs. Roy. It is alleged that "said gas furnace continued to burn from the time Fern Mildred Roy lighted the same until after her death when said gas furnace was extinguished by another person." It is contended this admission is fatal to the plaintiff's right of recovery, for the reason that it refutes the possibility of her death as a result of carbon dioxide.

[2-5] It is true that courts may take judicial knowledge of scientific facts which are commonly recognized. Coughlin v. Great Western Power Co., 183 Cal. 548, 551, 191 P. 920. Under proper circumstances, judicial knowledge of recognized laws of nature or science may require a court to disregard the allegations of a pleading which are in direct conflict therewith. 16 Stand. Ency. of Proc. 600; People v. Oakland Water Front Co., 118 Cal. 234, 244, 50 P. 305. Upon the contrary, it is equally true that courts will not take judicial notice of facts which are not matters of common or general knowledge. They do not necessarily take judicial notice of facts which may be ascertained by reference to dictionaries, encyclopedias, or scientific publications. 23 C. J. 60, § 1810. Even though the laws of nature or science are so well known that they become matters of judicial knowledge, their application to the facts of a particular case may still remain a valid matter of controversy. The effect of such natural laws, however, should be clear and unescapable before a court will be justified in ignoring specific allegations of a pleading. It may be conceded in the language of Smith's Elementary Chemistry, that "Carbon dioxide * * * is one-half heavier than air. * * * The gas extinguishes burning wood, oil or candles. * * * Fifteen or sixteen per cent of it in air is sufficient to extinguish ordinary combustibles." It is common knowledge that carbon dioxide has a specific gravity of 1.53 as compared with ordinary air. It is heavier than air, and has a tendency to settle to the ground. It is generated by burning carbon in the presence of an excess of oxygen. It is commonly produced by combustion of fuel, respiration, fermentation, and decay of vegetable and animal matter. An overabundance of carbon dioxide will fill the lungs and suffocate a human being. It is a common cause of death. For that reason due care requires the use of vent pipes in connection with gas furnaces to carry off the noxious fumes. Granting that carbon dioxide is heavier than normal air, that it has a tendency to settle to the lowest available point, and that the presence of a sufficient quantity of it will extinguish burning wood or other fuel, still we are unable to say, as a matter of law, just what quantity or density is required to extinguish the burning flames of a gas furnace which is continuously fed by natural gas under high pressure. Neither are we able to say, as a matter of law, just what quantity of carbon dioxide is required to asphyxiate a human being under various conditions. Nor are we able to determine, as a matter of law, that carbon dioxide, which is generated by the burning of a floor heater and carried into the upper realm of an inclosed room by the currents of heated air created by the burning of a floor furnace, may not result in suffocating a person reclining on a bed before the noxious gas reaches the floor in sufficient quantity or density to extinguish a gas flame fed by high pressure. It will be observed the complaint in the present case does not state how long the gas flames continued to burn after the suffocating of Mrs. Roy. There are too many uncertainties and absent elements for this court to say under the pleading in this case, as a matter of law, that it was impossible for Mrs. Roy to have been asphyxiated by carbon dioxide merely because the gas flame was found burning after she had expired. There appear to be issues in this case which require the production of evidence to establish proof of the cause of death.

For that reason the motion to dismiss this appeal should be denied. It is so ordered.

We concur: PULLEN, P. J.; PLUMMER, J.

131 Cal.App. 164

LYNCH v. CUNNINGHAM et al.*

Civ. 8668.

District Court of Appeal, First District, Division 2, California.

April 12, 1933.

Rehearing Denied May 12, 1933.

Hearing Denied by Supreme Court June 7, 1933.

1. Execution ⇐41.

Beneficiary of realty trust obligating trustees after 20-year trust period to convey to beneficiaries had equitable estate in corpus, and hence "interest in realty" for purposes of execution (Civ. Code, § 14, subd. 5, and § 863; Code Civ. Proc. § 542, subd. 2, and §§ 688, 700, 700a–702).

[Ed. Note.—For other definitions of "Interest (In Property)," see Words and Phrases.]

2. Trusts ⇐134.

Statute providing that trust beneficiaries take no estate or interest in property means legal, not equitable, interest and estate (Civ. Code, § 863).

3. Conversion ⇐11.

Realty conveyed to trustee to sell will be treated in equity as personalty, but, where property in kind is or may be conveyed to beneficiary, no equitable conversion results.

4. Execution ⇐40.

Equitable estate in realty is deemed "real property" for purposes of execution (Civ. Code, § 14, subd. 5; Code Civ. Proc. §§ 688, 700–702).

Civ. Code, § 14, subd. 5, provides that words "real property" are coextensive with lands, tenements, and hereditaments, and "land" also embraces all titles, legal or equitable, perfect or imperfect, including such rights as lie in contract—those which are executory as well as those which are executed.

[Ed. Note.—For other definitions of "Land" and "Real Property," see Words and Phrases.]

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Action by Rose Murray, for whom E. A. Lynch, her trustee in bankruptcy, was substituted as plaintiff, against Daniel J. Cunningham and others. Judgment for defendants, and plaintiff appeals.

Reversed, with directions.

Aaron Levinson and Louis L. Swarthe, both of Los Angeles, for appellant.

Michael F. Shannon and Thomas A. Wood, both of Los Angeles, for respondents.

DOOLING, Justice pro tem.

This is an appeal by the plaintiff, as trustee in bankruptcy of Rose Murray, from a judgment denying equitable relief. Rose Murray is a daughter of one Dan Cunningham, who died in 1912. The estate of Dan Cunningham was distributed in 1913 in undivided interests one-half to Margaret Cunningham, his widow, and one-twelfth to each of his six children, including Rose Murray. On May 10, 1923, the mother and the six children created a trust designated as the Cunningham Estate Trust. In the creation of this trust the entire property, which consisted of real estate, was conveyed to two of Rose Murray's brothers, Daniel J. Cunningham and Hugh P. Cunningham, as trustees. By this deed of trust it was provided that such trustees should have the management, care, custody, and control of said property, and receive the rents, income, and revenue thereof and pay all expenses in connection with such property; that the trustees should have the power to sell and dispose of any portion or portions of the trust property and to invest and reinvest the proceeds subject to the other provisions of the trust deed; to borrow money, and for that purpose mortgage, pledge, or hypothecate the property; to grant and acquire, create and release easements, make leases, and otherwise manage the trust property. The trust was expressly provided not to be terminable until the expiration of twenty years except in the event of the death of all the beneficiaries prior thereto. It was further provided that the trustees should pay the net income to the beneficiaries in the proportion of their interests. The deed of trust provided that in case of the death of Margaret Cunningham her portion of the net proceeds should thereafter be paid to the other beneficiaries in equal portions, and, in the event of the death of any other beneficiary, his portion of the net income should be paid in equal portions to the issue of his body by right of representation, and in the event of his death without issue to the other beneficiaries and to the issue of any other original beneficiary then deceased. At the expiration of the trust period, the trustees are required to transfer, pay over, and convey all of the trust property remaining in their hands to the persons who shall then be beneficiaries in the proportions provided in the trust deed.

After the creation of this trust, judgment was recovered against Rose Murray by one Hileman for $2,940.74. A writ of execution was issued on this judgment on November 10, 1927, and levied upon all moneys, goods, credits, effects, debts due or owing, or any other personal property belonging to the defendant, Rose Murray, in the possession or under the control of Daniel J. Cunningham and Hugh P. Cunningham, trustees of the Cunningham Estate Trust. This levy was made by deliv-

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*Rehearing denied 21 P.(2d) 973.

ering to Hugh P. Cunningham a copy of the writ, together with the appropriate demand required by our Code in the case of the levy upon personal property in the possession of another. Sale at execution was had pursuant to this levy, and the property was bought at such sale by Hugh P. Cunningham, who was acting for his mother, Margaret Cunningham, for the amount of the judgment and accrued costs. By virtue of such sale Margaret Cunningham claims to have acquired all of the interest of Rose Murray in and to the trust property, the value of which is variously estimated from $69,000 to considerably over $100,000.

Rose Murray originally commenced this action for an accounting. After her adjudication as a bankrupt, the trustee in bankruptcy was substituted as plaintiff, and by amendments to the complaint sought to have the execution sale set aside and prayed for a judgment requiring the payment to plaintiff of all net income received from Rose Murray's interest in the trust and trust property subsequent to the execution sale, less the amount paid by Margaret Cunningham at the sale on execution.

Various attacks are leveled by appellant against the judgment appealed from. It is claimed by him that the sale price was grossly disproportionate to the value of the property, and that this, coupled with a claimed confidential relationship existing between Margaret Cunningham and her daughter Rose Murray, justified the setting aside of the sale. It is claimed that the buying of the property at the execution sale by one of the trustees acting for his mother was a breach of his trust as trustee for Rose Murray, and the sale was thereby rendered voidable by her. It is claimed that the sale was a fraud upon the other creditors of Rose Murray and voidable for that reason. It is likewise urged that Rose Murray had an equitable estate in the corpus of the trust; that, the corpus being real property, this equitable estate was an interest in real property, and should have been levied upon as an interest in real property (Code Civ. Proc. § 542, subd. 2), in which event Rose Murray would have had a right of redemption (Code Civ. Proc. §§ 700a, 701, 702). Certain other minor points are urged by appellant which we do not deem it necessary to set out here.

[1] It is plain that, if any one of these enumerated points is good, it will necessitate a reversal of the judgment and will also render unnecessary the consideration of any of the other points urged by appellant. For the reason that we have reached the conclusion that Rose Murray had an equitable estate in the corpus of the trust which was an interest in real property we shall confine our consideration to that point alone.

At the outset we are confronted by the claim of respondents that under section 863 of the Civil Code Rose Murray had no estate in the corpus of the trust but only a chose in action enforceable against the trustees. This section of the Civil Code reads: "Except as hereinafter otherwise provided, every express trust in real property, valid as such in its creation, vests the whole estate in the trustees, subject only to the execution of the trust. The beneficiaries take no estate or interest in the property, but may enforce the performance of the trust."

The proper construction of this section was the subject of elaborate consideration in Title Ins. & Trust Co. v. Duffill, 191 Cal. 629, 218 P. 14, 15. In that case one Harry Duffill had entered into an agreement with his wife to create a trust for her benefit in an undivided one-fourth of any property which he might receive from his mother, the income from such trust to be paid to the wife. Thereafter the mother died, and by her will created a testamentary trust in certain of her property with certain of the income therefrom to be paid to Harry Duffill until his son Albert should reach the age of twenty-one years, at which time one-half of the corpus of the trust was to be transferred and conveyed to Harry Duffill. In that trust, as in the one which we are considering, the trustee was given the power "to sell, lease, improve or exchange, invest or reinvest any or all of said property." It was the claim of Harry Duffill that the only property which he received from his mother's estate and to which the trust created by the agreement with his wife could attach as the corpus of the trust created by that agreement was the income from the trust created by his mother. This would have resulted in the payment of one-fourth of such income as received by Harry Duffill to the trustee for his wife to be held by such trustee in trust to pay only the income therefrom to the wife during the period provided in the agreement between them. It was the claim of the wife, on the other hand, that Harry Duffill took an immediate vested equitable estate in the corpus of the trust created by his mother, that this equitable estate was property received from his mother within the meaning of the agreement creating the trust for the wife's benefit, and hence that one-fourth of such equitable estate was impressed with the trust in her favor and became the corpus of the trust estate created for her benefit, and that she was accordingly entitled to receive as income from such one-fourth of Harry Duffill's equitable estate one-fourth of the income which Harry Duffill received from the trust created by his mother. The Supreme Court decided in favor of the contention of the wife. We quote at length from that opinion because of the careful and exhaustive consideration given by the Supreme Court to the questions there involved:

"The theory that Harry Duffill received at

his mother's death a beneficial interest in the property belonging to her, and that his subsequent receipts, therefore, are not directly from her, but are receipts from the income of his property, finds support in what we believe to be the status of the equitable interest and estate of a cestui que trust in property in this state. It is worthy of note that in the distribution of the mother's estate in this very matter Harry Duffill's equitable estate was recognized beyond the provisions of his mother's will. Mrs. Duffill intended that he should receive one-half of the income from the trust created by her, but upon the void condition that it should be accumulated during Albert's minority. As was pointed out by this court, it was undoubtedly the intention of the testatrix that the income should be retained and go with the corpus, to be held by the testamentary trustee and administered as principal, but this intention was frustrated by her unlawful wish for accumulation of that portion of the fund, and it was properly decreed that Harry should enter upon its immediate use and enjoyment. Estate of Duffill, 180 Cal. 748, 761, 183 P. 337. While it is beyond dispute that by the terms of the will of Eugenie A. Duffill the legal title to all property constituting the corpus of the testamentary trust created by her vested in the Los Angeles Trust & Savings Bank, as trustee, immediately upon her death, and that such title was declared and confirmed by the decree of distribution of her estate (Western Pac. R. R. Co. v. Godfrey, 166 Cal. 346, 349, Ann. Cas. 1915B, 825, 136 P. 284), it is equally beyond dispute that on her death there was also vested in Harry Duffill an equitable estate or beneficial interest in her property independent of the legal estate which vested in the testamentary trustee. In England, devises of trust, under this doctrine of an equitable interest, are distinct substantive devises, standing on their own basis, independent of the legal estate which is 'nothing but the shadow which always follows the trust res in the eye of a court of equity' (Attorney-General v. Downing, Wilmot, 1 (Eng.) 22, 97 Eng. Reprint, 1). In a still earlier English case (Burgess v. Wheate, 1 Eden. 177), Lord Keeper Henly (page 251) said that the trust should be considered in equity as the 'real estate' and the 'trustee should take no beneficial interest that the cestui que trust can enjoy.' In the same case, Lord Mansfield said (pages 217, 226): 'Now trusts are considered * * * as the real ownership of the land * * * the same as the land and trustee * * * is in no event to take a benefit.' The generally accepted rule in this country also is that—'Under the system now prevailing the cestui que trust is regarded as the real owner of the property, the trustee being merely the depositary of the legal title. His is not a property right, but a legal duty founded upon a personal confidence; his estate is not that which can be enjoyed, but a power that can be exercised.' 39 Cyc. 203. Such estates 'are in equity what legal estates are in law; the ownership of the equitable estate is regarded by equity as the real ownership, and the legal estate is, as has been said, no more than the shadow always following the equitable estate, which is the substance, except where there is a purchaser for value and without notice who has acquired the legal estate.' 1 Pomeroy, Eq. Juris. (4th Ed.) § 147; Underhill on Trusts and Trustees (4th Ed.) p. 6, art. 2.

"Respondents, it will be remembered, contend that Harry Duffill took no estate or interest in his mother's property, but only the right to enforce the performance of the trust. Such contention is largely based on section 863 of the Civil Code, which provides that, except as in the Code provided: 'Every express trust in real property, valid as such in its creation, vests the whole estate in the trustees, subject only to the execution of the trust. The beneficiaries take no estate or interest in the property but may enforce the performance of the trust.' Aside from the fact that but little of the property held under the testamentary trust is real property, rendering the Code section of but little moment in this discussion, the construction placed upon its provisions by respondents does not follow. The section was adopted as part of the Civil Code in 1872. It has been construed by this court many times, and the conclusion has been firmly established that—'The estate which a trustee takes by virtue of section 863 is not necessarily a fee, but only such estate as is required for the execution of his trust.' Keating v. Smith, 154 Cal. 186, 192, 97 P. 300; Morffew v. San Francisco, etc., R. R. Co., 107 Cal. 587, 595, 40 P. 810. This rule that the trustee takes only such an estate in the trust property as is necessary to the discharge of his trust duties refers directly to the quantity of his estate in the property, as, for instance, an estate for years, an estate for life, or an estate in fee. Estate of Pichoir, 139 Cal. 682, 688, 73 P. 606. In Gray v. Union Trust Co., 171 Cal. 637, 640, 154 P. 306, 308, a substantive 'equitable estate' was recognized to exist in one who had a 'usufructuary interest in the whole estate during her life,' notwithstanding there was 'conveyed to the trustee the whole legal title, since so much (was) plainly necessary for the purposes of the trust (Civ. Code, § 863),' which general purposes were to give the trustor the beneficial use of the property during her life, and upon her death to see that the property went to her nominees under her will. See, also, Estate of Aldersley, 174 Cal. 366, 371, 163 P. 206; Weston v. Weston, 125 Mass. 268; Crooke v. County of Kings, 97 N. Y. 421, 446; Patton v. Ludington, 103 Wis. 629, 644, 74 Am. St. Rep. 910, 79 N. W. 1073; Williams v.

Williams, 135 Wis. 60, 115 N. W. 342; Estate of Fair, 132 Cal. 523, 550, 571, 84 Am. St. Rep. 70 [60 P. 442], 64 P. 1000.

"It were useless, we feel, to carry this discussion to greater length, or to discuss other phases of the matter and probable lines of solution of the problem here presented. Harry Duffill was vested with an equitable estate and beneficial interest in his mother's property immediately upon her death, with only such legal title lodged in the Los Angeles Trust & Savings Bank as is required for the execution of the testamentary trust. That this interest was assignable is beyond controversy. 5 Cor. Jur. p. 854; 3 Pomeroy, Eq. Juris. (4th Ed.) § 1271. See, also, Bridge v. Kedon, 163 Cal. 493, 500, 43 L. R. A. (N. S.) 404, 126 P. 149. Whatever may be the duration or quantity of the equitable estate vested in Harry, whether for years or for life, or in mere expectancy, he has received, and is receiving, income thereon. What condition will prevail when the testamentary trust is terminated by lapse of time or death does not now concern us. The accrued and accruing income received by Harry, including the portion paid to plaintiff, is income from Harry's own equitable interest, and is not an interest in property arising out of the mother's estate. It is therefore 'income to Martha,' and should not be administered as corpus of the trust under the August agreement, but should be accounted for and paid direct to appellant as income."

It will be observed of this opinion that while the Supreme Court said that in that case but little real property was involved, nevertheless the court considered carefully the effect of Civil Code, § 863, upon such real property as was embodied in the corpus of the trust and it may not be said of the opinion that the discussion of this section was mere dictum for the reason that if section 863 had had the effect claimed for it by Harry Duffill in that case the court of necessity would have been compelled to treat the real property which was a part of the corpus as property in which Harry Duffill had neither a legal nor an equitable estate and the income from that portion of the trust property could not have been held to be income from property coming to Harry Duffill from the estate of his mother. The Supreme Court made no such distinction, but held that as to the entire corpus of the trust, real as well as personal, Harry Duffill had a present vested equitable estate.

[2] While the Supreme Court did not say so in so many words, it is implicit in the decision that the proper construction of Civil Code, § 863, is that it has reference to legal interests and estates as distinguished from equitable interests and estates. As construed in the Duffill Case this section means in effect: "Every express trust in real property * * * vests the whole [legal] estate in the trustees. * * * The beneficiaries take no [legal] estate or interest in the property. * * *"

This holding was foreshadowed in Estate of Fair, supra; Estate of Aldersley, supra; and Gray v. Union Trust Co., supra, all of which were cited and relied upon by the Supreme Court in the Duffill Case. It is perfectly in keeping with the similar holdings of the Supreme Court of Wisconsin in Patton v. Ludington, supra, and Williams v. Williams, supra, in both of which an equitable estate in the beneficiary was recognized despite a Code section identical in language with our Civil Code, § 863.

Respondents cite and rely upon Ward v. Waterman, 85 Cal. 488, 24 P. 930, Craven v. Dominguez Estate Co., 72 Cal. App. 713, 237 P. 821, Finnie v. Smith, 83 Cal. App. 707, 257 P. 866, and Houghton v. Pacific Southwest Trust & Savings Bank, 111 Cal. App. 509, 295 P. 1079, claiming that they announce a contrary doctrine. Each of those cases was concerned with a trust created for the sole purpose of selling the real property and paying the money received from such sale to the beneficiary. In no one of them was it contemplated that in the execution of the trust any part of the real property should ever be returned or reconveyed to the beneficiary; the only right which the beneficiary had under the trust being to receive from the trustee money after the real property had been sold. In such a situation the courts very properly held that the beneficiary had no title, legal or equitable, in the real property, but only the right to receive from the trustee money, a bare chose in action. This situation is clearly distinguishable from that existing in the Duffill Case and in the case before us. In the Duffill Case upon Albert's reaching the age of twenty-one years Harry was to receive from the trustees, not merely money, but one-half the corpus of the trust itself. In the pending case at the expiration of twenty years from the creation of the trust Rose Murray was to receive from the trustees, not merely money, but a one-twelfth interest in the real property which constituted the corpus of the trust. In such a situation a court of equity can look through form to substance and recognize in the beneficiary a present equitable estate as was done in the Duffill Case.

[3] The same result may be attained by applying the equitable doctrine of conversion. 6 Cal. Jur. p. 528, § 3. Where real property is conveyed to a trustee with directions to sell in any event, it will be treated in equity as personal property. But, where the property in kind is, or may be, conveyed to the beneficiary, no such equitable conversion results.

[4] For the purpose of levy and sale under execution an equitable estate in real property

has always been regarded in this state as real property. 15 Cal. Jur. p. 1018, § 27. In Fish v. Fowlie, 58 Cal. 373, the levy was "upon all the right, title, and interest which George Fowlie had in and to the land." It was held that sale under such levy transferred to the purchaser Fowlie's rights under an executory contract with the owner to sell the land to Fowlie, the court saying:

"The words 'real property' are co-extensive with lands, tenements, and hereditaments. (Subd. 5, § 14, Civ. Code.) Land also embraces all titles, legal or equitable, perfect or imperfect (Leese v. Clark, 20 Cal. 387), including such rights as lie in contract—those which are executory as well as those which are executed. (Soulard v. United States, 4 Pet. 511 [7 L. Ed. 938].) Any interest, therefore, in land, legal or equitable, is subject to attachment or execution, levy, and sale. (Code Civ. Proc., § 688; Kennedy v. Nunan, 52 Cal. 330; Le Roy v. Dunkerly, 54 Cal. 460.) As a purchaser at the sheriff's sale, the intervenor, therefore, became substituted to, and acquired all the right, title, interest, and claim, which the judgment debtor, George Fowlie, had in the land on the 27th of January, 1876—the date of the levy (Code Civ. Proc., § 700), and he was the owner of that interest when the defendants mortgaged the land to the plaintiffs.

"But it is claimed that Fowlie had no interest at the time of the levy and sale, which passed by the Sheriff's sale and deed to the intervenor. Fowlie had not the legal title to the land. He had nothing more than an interest derivable under a contract of sale made on the 15th of June, 1875, between himself and one W. J. Gunn, who was the legal owner. By that contract Gunn contracted to convey the land to 'Fowlie, his heirs or assigns,' upon payment of a balance of unpaid purchase money 'on or before the 15th of September, 1876.' No personal obligation was given by Fowlie for the payment of the purchase money; and it does not appear that Fowlie obtained possession under the contract, or that he was in possession at the time of the levy or sale. Yet he had agreed to purchase the property, and had paid part of the purchase money, and covenanted to pay the balance at a stipulated time; and he thus became vested with such an equitable interest in the land as was the subject of sale or transfer by himself; or of appropriation by execution, or in any other mode prescribed by law, by his creditors. This interest being vendible by the judgment debtor, and leviable by his attachment or judgment creditors, was all that passed by the sale and deed under the judgment against him to the intervenor." See, also, Le Roy v. Dunkerly, 54 Cal. 452; Kennedy v. Nunan, 52 Cal. 326; Logan v. Hale, 42 Cal. 645; Brown v. Campbell, 100 Cal. 635, 35 P. 433, 38 Am. St. Rep. 314.

It is difficult to discern any logical difference between the right to receive a conveyance from an executory vendor which was held to create an equitable estate in the real property in Fish v. Fowlie, supra, and Logan v. Hale, supra, and the right to receive a conveyance at the expiration of the life of the trust such as exists in the case under consideration. In either event, the only existing right is to receive a conveyance of the property in the future. If such a right creates a vested equitable estate in the one case, it should logically have the same effect in the other.

If respondent Margaret Cunningham is correct in her contention that Rose Murray had a mere chose in action and nothing more, then by the purchase as personal property of the interest of Rose Murray on the execution sale respondent has acquired all of the rights of Rose Murray under the trust. It would result that, if Rose Murray is still living at the expiration of the trust, respondent would be entitled to have the trustees convey to her the one-twelfth interest in the real property held in trust by the trustees to reconvey to Rose Murray. She would then have the legal title to such real property in fee, and she would have acquired such legal title by the purchase of Rose Murray's interest in the trust as personal property, and by her purchasing it as personal property Rose Murray would be deprived of the right of redemption given to an owner of an interest in real property by our Code. We are satisfied that no such result should follow, and under the authority of Title Ins. & Trust Co. v. Duffill, supra, and the cases therein cited, we are likewise satisfied that, while the trustees held the legal estate of the trust property in fee, Rose Murray had an equitable estate in one-twelfth thereof, and, since the trust property was realty, that this equitable estate was an interest in real property belonging to the defendant and standing in the name of the trustees which should have been levied upon in the manner provided by section 542, subdivision 2, of the Code of Civil Procedure.

It results that the judgment appealed from should be and it is reversed, with directions to the trial court to take an accounting to determine the net income received by respondent Margaret Cunningham since the sale on execution from the interest of Rose Murray in the property in question, and, if such net income with legal interest from the dates of the various payments to such respondent exceeds the amount paid by such respondent upon the execution with legal interest thereon, to order such excess paid to plaintiff and to quiet the title of Rose Murray in and to her interest in the trust and trust estate against the claim of respondent Margaret Cunningham based upon her purchase at the execution sale; if, however, upon such accounting such net income with interest is found to be

less than the amount paid by such respondent upon the execution sale with interest, to make such decree quieting title conditional upon the payment to such respondent of the difference between such amounts within a reasonable time to be fixed by the trial court.

We concur: NOURSE, P. J., STURTEVANT, J.

130 Cal.App. 770

SUMNER v. EDMUNDS et al.

BUCHER v. SAME.

Civ. 785.

District Court of Appeal, Fourth District, California.

April 3, 1933.

1. Automobiles ⇐244(20).

In action for injuries sustained by occupant of automobile driven on wrong side of road at night and colliding with truck, evidence warranted finding of automobile driver's gross negligence (St. 1923, p. 517, § 141¾, as added by St. 1929, p. 1580).

2. Negligence ⇐11.

"Gross negligence" does not involve elements of either willfulness or wantonness.

[Ed. Note.—For other definitions of "Gross Negligence," see Words and Phrases.]

3. Negligence ⇐11.

If intent to do act constituting negligence is present, it is not necessary that it be willful or wanton in order to conclude that circumstances surrounding performance of act establish gross negligence.

4. Negligence ⇐11.

"Gross negligence" is want of slight diligence and entire failure to exercise care or exercise of so slight a degree of care as to justify belief that there was indifference to things and welfare of others.

5. Automobiles ⇐244(20).

Evidence supported finding that one sustaining injuries while riding in automobile for purpose of learning newspaper route in case vacancy should occur was not employee of driver or of publishing company.

6. Master and servant ⇐3(1).

Mere offer of services not yet accepted by prospective employer does not make offeree an "employee."

[Ed. Note.—For other definitions of "Employee," see Words and Phrases.]

7. Automobiles ⇐181(2).

"Guest," within automobile statute, is one invited, directly or by implication, to enjoy driver's hospitality, who accepts hospitality, and rides either for his pleasure or on business without conferring benefit on driver (St. 1923, p. 517, § 141¾, as added by St. 1929, p. 1580).

[Ed. Note.—For other definitions of "Guest," see Words and Phrases.]

8. Automobiles ⇐244(20).

Evidence showed that plaintiff, when injured, was riding in automobile at request of driver and owner for purpose of learning paper route in case vacancy occurred, so that, if he was not guest, he was passenger (St. 1923, p. 517, § 141¾, as added by St. 1929, p. 1580).

9. Automobiles ⇐181(1).

Passenger injured in automobile collision need only prove ordinary negligence to recover from driver and owner.

10. Appeal and error ⇐1071(1).

In automobile collision case, defendant could not complain of findings of proof of gross negligence, where proof of ordinary negligence would have been sufficient.

11. Appeal and error ⇐1122(3).

Where all findings attacked were supported by ample evidence, District Court of Appeals was not required to prepare new findings (Code Civ. Proc. § 956a).

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by Edgar W. Sumner against William J. Edmunds and others. From a judgment for plaintiff, defendant named and another defendant appeal.

Affirmed.

See, also, (Cal. App.) 13 P.(2d) 1046.

F. W. Docker, of Fresno, for appellant Edmunds.

Harris, Willey, Griffith & Harris, of Fresno, for appellant Fresno Republican Pub. Co.

Martin C. Thuesen, of Fresno, for respondent.

CAMPBELL, Justice pro tem.

Respondent had judgment against appellants Edmunds and Fresno Republican Publishing Company, a corporation, for and on account of personal injuries sustained in an automobile accident which occurred near the city of Fresno on December 17, 1929. The case was tried by the court without a jury, and, from a judgment rendered against them, said defendants have taken this appeal.

The facts may be summarized as follows: Appellant Edmunds was employed by Fresno Republican Publishing Company, a corporation, to deliver papers; respondent wished to work for the publishing company, and had previously talked with one Carrie, manager

of the auto routes for the publishing company, regarding such employment, and Carrie told him that he would be given an opportunity should a vacancy occur. Appellant Edmunds called on respondent the night before the accident and asked him to meet him at the publishing company's office the next morning to accompany him on the route in order to familiarize himself with the route; they met at the appointed hour, and respondent was taken by appellant Edmunds in his automobile and proceeded on the route. Respondent did not negotiate with Edmunds for taking over the route; he did not pay any one transportation charges, nor did he receive compensation from any one. Appellant and respondent proceeded along the highway, in a northerly direction, to a point just north of Roeding Park near the city of Fresno. Appellant Edmunds was driving the automobile on the right-hand side of the road, and, upon coming to a point where he was to make delivery of a paper to a subscriber, he changed his position to the left-hand side of the highway, and proceeded along the left-hand side of the highway for some distance, when he turned suddenly back to his right, driving his car into a truck proceeding in a southerly direction on the highway, thereby causing the injuries to respondent.

Appellants contend that the evidence does not sustain certain findings essential to the validity of the judgment rendered against them. The particular findings to which our attention is directed are findings No. 2, "* * * that plaintiff was riding as a guest with the knowledge and consent and at the request of defendants Wm. J. Edmunds and Fresno Republican Publishing Company; * * *" finding No 3, "* * * that defendant Wm. J. Edmunds drove and operated his said automobile in a careless, reckless and grossly negligent manner; * * *" finding No. 8, "* * * that it is true that as a proximate result of the carelessness, recklessness and gross negligence, of said defendants * * * said plaintiff received injuries; * * *" finding No. 15, "that it is not true that on the 17th day of December 1929 plaintiff was an employee of the defendant Wm. J. Edmunds, and that the injury sustained by said plaintiff arose out of his employment; * * *" finding No. 16, "that it is not true that on the 17th day of December 1929 plaintiff was employed by the defendant Fresno Republican Publishing Company. * * *"

The court found: "That it is true that said defendant Wm. J. Edmunds was driving his automobile for and on behalf of and at the direction and as an employee and agent of and in the course of his employment with said defendant Fresno Republican Publishing Company."

Appellants concede that the evidence is sufficient to support the finding just quoted.

[1] Since the appellants question the sufficiency of the findings, it becomes necessary to examine the testimony taken at the trial to determine whether there is sufficient support in the evidence for the findings.

On direct examination respondent Sumner testified in part as follows:

"Q. How did you happen to be with Mr. Edmunds this morning of the accident? A. Well he came out to my house where I was living the night before the accident. * * *

"Q. Had you talked to Mr. Edmunds prior to the night before, when he came out to your house? A. No, sir.

"Q. Had you talked with anyone about anyone coming out to your place that night? A. Well Mr. Carrie told me that he would have * * * Mr. Edmunds come out and drop me a line or call me up or something.

"Q. Who is Mr. Carrie, do you know? A. He is the manager of the automobile routes of the Republican.

"Q. Where did you talk with Mr. Carrie? A. Down at the Republican office.

"Q. When was that? A. It was about the tenth of December. * * *

"Q. What was the conversation you had with Mr. Carrie? A. Well I told him that I would like to get an automobile route whenever there was a place open; he said they were, all the men he had were there then, but Mr. Edmunds was thinking about going off on a vacation and that he would need a substitute, and he would get in touch with me whenever he got ready for one.

"Q. What did Mr. Edmunds tell you the night before, the 17th? A. He told me to meet him down at the Republican office the next morning 2.30 or 2.15. * * *

"Q. Did you enter into any negotiations with him for taking his job over? A. No, sir.

"Q. Had you discussed that proposition with him at all? A. No, I don't believe we did.

"Q. Did you discuss with Mr. Carrie of the Republican as to whether or not you would go to work for the Republican? A. Yes, sir, I belive he told me the first place open he would give me a chance at it.

"Q. In other words he offered to give you a position in the event one would open up in the future? A. Yes, sir.

"Q. But there was none open at that time? A. No, sir.

"Q. Were you receiving any compensation from anyone for going out on the morning of the 17th with Mr. Edmunds? A. No, sir.

"Q. Were you paying anyone for your transportation? A. No, sir. * * *

"Q. Do you know where the Apache Indian Village is located? North of Roeding Park? A. Yes, sir.

"Q. Do you know where the Adams Service Station is located? A. Yes, sir.

"Q. Approximately how far north of Roeding Park is that? A Why, I should judge about three quarters of a mile I believe.

"Q. What time of the morning or afternoon, day or night was it when you arrived out there at the Adams Camp ground? A. It was about 3.45.

"Q. About 3.45 in the morning? A. In the morning.

"Q. Which did you come to first, the Apache Indian Village or the Adams Service Station? A. The Indian Village.

"Q. How far beyond that is the Adams Service Station? A. It was about fifty or sixty feet I think.

"Q. Where with reference to the Adams Service Station did the collision occur? A. Just north of the Adams Service Station a few feet I should say.

"Q. On the paved portion of the highway or not? A. Just about the center of the highway.

"Q. Tell the court everything that happened from the time just prior to the time you got to the Apache Indian Village? A. Well, he was going about 30 or 35 miles an hour—

"Q. Who was? A. Mr. Edmunds was. And there was a couple of cars coming toward us, I remember one of them was quite a ways in front of the other, but he waited until he could pass us, or slowed down just a little bit so he could reach the Indian Village after the car passed us, and he turned to his left—

"Q. How far did he turn to his left? A. He run off, just about the left wheel off, on the oiled part of the road, I suppose, off the highway.

"Q. Would you say then clear off the paved portion to the westerly side of the State highway? A. Yes, I think his about left wheel was.

"Q. What is that? A. The left part of his car was off the highway.

"Q. What did Mr. Sumner—what course did Mr. Sumner—Mr. Sumner, did Mr. Edmunds pursue after that? A. Well he just made about a half circle; he threw off his papers and came back to the highway and just made a sharp turn. * * *

"Q. Was he on the paved portion when he threw the papers at the service station? A. Yes, just going into it, that is swinging back to the highway then, you know, he turned off a little bit at the Indian Village, turned clear off the highway and was just going back on when he threw the last paper.

"Q. How far from the point of the collision did you say Mr. Edmunds' car was at the time he left the highway to deliver the paper at the service station? A. Oh, about 200 feet I think.

"Q. Did you look up the highway, the northerly direction at any time after that? A. I don't just remember whether I did or not. * * *"

Appellant Edmunds testified in part as follows:

"Q. Well Mr. Sumner was riding with you at the time of the collision wasn't he? A. Yes, sir, he was.

"Q. Was he paying you anything for that ride? A. No, sir.

"Q. You knew he was going to ride with you in the automobile when you started out? A. Yes, sir. * * *

"Q. You say you drove over the center of the highway? A. Yes, sir.

"Q. Now, will you explain just what you mean by that? A. Well the—

"Q. With reference to the white center line? A. We were approximately centering the white center line.

"Q. That is your car was centering it? A. Yes, sir.

"Q. So that the left hand wheels would be on the left hand side of the center line and your right hand wheels on your easterly side? A. Yes.

"Q. You drove in that position from the time you made the—or shortly before you made the delivery to the Indian Village and on up the highway to the point you delivered to the Adams service station? A. Yes, sir.

"Q. And then you swung back to the right? A. Yes, sir. * * *

"Q. The right hand front fender of your car struck the right-hand front fender and wheel of the truck? A. Yes, sir. * * *

"Q. You were just pulling back on your right side of the pavement? A. Yes.

"Q. You think you were going 35 or 40 miles an hour? A. About 35 miles an hour. * * *

"Q. Did you apply your brakes at any time before the accident? Before the collision? A. No, sir.

"Q. Did you ever apply your brakes? A. No.

"Q. Never applied them? A. No.

"Q. What caused your car to stop? A. Hit a 2½ ton truck.

"Q. Didn't it stop when it hit the first one? A. It didn't hit the first truck a direct blow.

"Q. It didn't stop at that time? A. No.

"Q. Bounced off and hit the second car? A. Yes.

"Q. And what caused you to stop? Did you stop your motor? A. No, I was thrown out of the car. * * *

"Q. You had four-wheel brakes? A. Yes, sir.

"Q. In what distance could you stop the car at 35 miles an hour? A. From 40 miles an hour in about fifty feet.

"Q. In other words if you had seen this car 50 feet ahead, you could have brought your car to a complete stop? A. Yes, sir. * * *

"Q. Did you see this truck prior to the time you collided with it? A. Not more than one fifth of a second before the collision. * * *

"Mr. Docker: Q. Mr. Edmunds, in taking Mr. Sumner with you that morning, what was your purpose? A. To teach him the route, the automobile route that I cover. * * *

"Q. I know, but I am talking about your lights. How far ahead would they distinguish objects? A. Approximately one hundred and fifty feet. * * *

"Q. How far beyond that could you see objects at all? Approximately? Just your estimate of it? A. Not over another—you mean on this special night?

"Q. Yes, on that night? A. Not over 40 or 50 feet."

Does the testimony warrant findings of gross negligence? It is admitted by appellants that the automobile was being driven in the nighttime on the wrong side of the highway. Appellant Edmunds says that he had good lights on his automobile capable of discerning objects two hundred feet away, and says that he did not see the trucks until one-fifth of a second before the collision. That it is extremely hazardous to propel an automobile in the nighttime on the wrong side of the highway without paying particular attention to where one is going we think is beyond question. In this case the driving of the automobile on the wrong side of the highway was an intentional act, and there was nothing to prevent the driver of the automobile from seeing the trucks with which he collided had he been using slight care. We are of the conclusion that no automobile can be propelled along the wrong side of a public highway, the driver of which is not keeping a lookout ahead, without an indifference as to the rights and safety of others who may have occasion to use the highway, and driving with greater or less indifference to the safety of a person riding in the automobile so being driven.

[2-4] In the recent case of Kastel, etc., v. Stieber et al., 215 Cal. 37, at page 46, 8 P.(2d) 474, 477, the court, in discussing gross negligence, says:

"That the defendants were violating a statute of the state stands admitted; therefore, the language of the Supreme Court in Benjamin v. Noonan, 207 Cal. 279, 277 P. 1045, 1046, is pertinent, to wit: 'While it is undoubtedly correct to say that the act of driving a vehicle over a street or public highway beyond the speed limit established by a municipal ordinance or a statute merely constitutes evidence of negligence in cases where damage has followed the infraction of such an ordinance or law, the rule in this state is, however, that it is conclusive evidence of negligence (citing cases). Therefore, the statement that such an act is "of itself negligence," or "negligence as a matter of law" or "negligence per se" (equivalent expressions) is, in this state, strictly correct.' (Citing a number of authorities.)

"In 45 C. J. p. 678, the rule is thus stated: 'Violation of a statute or ordinance does not of itself constitute wilfulness or wantonness, but it may be considered as a circumstance tending to show that the act or omission in question was wilful or wanton, as being entirely regardless of the law and the safety of others.' In this state gross negligence does not involve the elements of either wilfulness or wantonness. If the intent to do the act constituting negligence is present, it is not necessary that it be wilful or wanton in order to conclude that the circumstances surrounding the performance of the act establish gross negligence.

"In the recent case of Malone et al. v. Clemow et al., 111 Cal. App. 13, 295 P. 70, 71, we find the meaning of the words 'gross negligence' considered It is there said: 'Gross negligence has been defined to be "the want of slight diligence." Redington v. Pacific Postal Telegraph Cable Co., 107 Cal. 317, 48 Am. St. Rep. 132, 40 P. 432, 434; Walther v. Southern Pac. Co., 159 Cal. 775, 37 L. R. A. (N. S.) 235, 116 P. 51; Shearman & Redfield on Negligence, § 49; Krause v. Rarity et al., 210 Cal. 644 [77 A. L. R. 1327], 293 P. 62, 66; Coit v. Western Union Tel. Co., 130 Cal. 657, 80 Am. St. Rep. 153, 53 L. R. A. 678, 63 P. 83; Helme v. Great Western Milling Co., 43 Cal. App. 416, 185 P. 510, 512; 19 Cal. Jur. 554. In the recent case of Krause v. Rarity, supra, the Supreme Court, in considering the meaning of the phrase "gross negligence" as used in section 141¾ of the California Vehicle Act, said: "In many jurisdictions the division of negligence into degrees is not countenanced (20 R. C. L. 21); the concept being that such phrases as 'gross negligence' and 'slight negligence' are misnomers. In this state the degrees of negligence have been frequently recognized. The term 'gross negligence' has been defined as 'the want of slight diligence,' as 'an entire failure to exercise care, or the exercise of so slight a degree of care as to justify the belief that there was an indifference to the things and welfare of others,' and as 'that want of care which would raise a presumption of the conscious indifference to consequences.'" We should not confuse "gross negligence" with "wilful misconduct," because there is a clear distinction between the two terms.'"

[5, 6] The next question presented by this appeal is whether the evidence in this case is sufficient to support the finding that respondent was not an employee of the appel-

lant Edmunds, or appellant Fresno Republican Publishing Company. The testimony shows that he had merely offered his services, which had not yet been accepted, either by appellant Edmunds or by appellant Fresno Republican Publishing Company; that he had been invited by them to go with appellant Edmunds to learn the route so that he might take it in case a vacancy occurred at some time in the future. There is no evidence showing that respondent's offer of his services was accepted. There is evidence showing that it was not accepted. A mere offer of services not yet accepted by the prospective employer is not sufficient to make the offeree an employee. California Highway etc. v. Industrial Acc. Com., 40 Cal. App. 465, 181 P. 112.

[7] Appellants argue at length in their attack on finding No. 2 that respondent was not a guest of appellants, and rely upon the case of Crawford v. Foster, 110 Cal. App. 81, 293 P. 841, 842. Section 141¾ of the California Vehicle Act (as added by St. 1929, p. 1580), defines a guest as follows: "For the purpose of this section the term 'guest' is hereby defined as being a person who accepts a ride in any vehicle without giving compensation therefor." In considering this section, the court, in the Crawford Case, supra, says: "We think the meaning of the language used is, that a guest is one who is invited, either directly or by implication, to enjoy the hospitality of a driver of a car; who accepts such hospitality; and who takes a ride either for his own pleasure or on his own business, without making any return to or conferring any benefit upon the driver of the car, other than the mere pleasure of his company."

In the Crawford Case, supra, the plaintiff was injured while riding in an automobile which was being demonstrated to the plaintiff by defendant Martins, who was the agent of defendant Foster. Defendant Foster was in the business of selling automobiles, and defendant Martins was one of his salesmen. The court says in that case, at page 85 of 110 Cal. App., 293 P. 841, 842:

"The relationship between the parties here is not entirely dissimilar to that existing between the owner of a store and a customer using an elevator therein. In such a case, the Supreme Court has said: 'Naturally this facility of transportation would increase its patronage and necessarily its profits in business. In fixing the price at which its goods and merchandise must be sold so as to return a profit, necessarily the operating expenses of the establishment, including this elevator service, must be taken into consideration and provided for. The prices charged and paid by customers for goods would include a reimbursement to appellant for its expenses entailed in the operation of the elevator for its patrons, and hence would constitute a sufficient reward for their carriage, so as to bring appellant within the category of a carrier of passengers for hire and subject to the same duties and responsibilities.' Champagne v. Hamburger, 169 Cal. 683, 147 P. 954, 958.

"The indirect benefit to the merchant is in that case held to be compensation for a ride in an elevator. A similar benefit appears in the instant case, which we think must be held to be a compensation given and received, for the ride in question. While the respondents may not have been passengers for hire, having given compensation for the ride, they were not guests. * * *

"In Massachusetts, although they have no statute similar to the one here in question, the rule has been established that where an invited guest is riding in a machine with the owner thereof, he cannot recover for injuries sustained, unless the owner and driver of the car was guilty of gross negligence. Massaletti v. Fitzroy, 228 Mass. 487, 489, Ann. Cas. 1918B, 1088, L. R. A. 1918C, 264, 118 N. E. 168; West v. Poor, 196 Mass. 183, 124 Am. St. Rep. 541, 11 L. R. A. (N. S.) 936, 81 N. E. 960. But in applying the rule, the courts of this state have distinguished between cases where one is a mere guest of another and has been permitted to ride gratuitously, and cases where one, in riding, is conferring some benefit upon the driver of the car. Lyttle v. Monto, 248 Mass. 340, 142 N. E. 795; Jackson v. Queen, 257 Mass. 515, 154 N. E. 78; Labatte v. Lavallee, 258 Mass. 527, 155 N. E. 433; Loftus v. Pelletier, 223 Mass. 63, 111 N. E. 712. Not only is such a distinction a logical one, but that it was intended by the statute here in question is indicated by the use of such broad words as 'giving compensation,' instead of words limiting the meaning to the payment of a fare, or the transfer of a definite consideration."

[8, 9] In the case at bar we have found that respondent was not an employee of appellants. The evidence shows that he was traveling with appellant Edmunds at the instance and request of the appellants for the purpose of learning the paper route, so that in the future, should the occasion arise, he might be able to take the route over from Edmunds. The case just cited, Crawford v. Foster, relied upon so strongly by appellants, can afford appellants very little comfort, for, if respondent was not a guest, he was a passenger within the rule laid down in that case; and it is our opinion respondent comes within that rule. In that event ordinary negligence is all that would have to be proved in order to recover.

[10, 11] We have examined the record carefully, and have quoted quite extensively from it, and, in view of all the evidence, we are not inclined to disturb the findings of the lower court. All the findings attacked are supported by ample evidence, and appellants cannot complain of findings of proof of gross

negligence where proof of ordinary negligence would have been sufficient. Under these circumstances it is not necessary for this court to prepare new findings under section 956a of the Code of Civil Procedure.

The judgment is affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

131 Cal.App. 203

In re BANK OF OAKLEY.

CONTRA COSTA COUNTY v. RAINEY, State Superintendent of Banks.

Civ. 8503.

District Court of Appeal, First District, Division 1, California.

April 14, 1933.

Hearing Denied by Supreme Court June 13, 1933.

1. Pledges ⇐26, 55.

Pledgee can sue to recover debt without first exhausting collateral, and may retain collateral until debt is paid (Civ. Code, § 2987).

2. Banks and banking ⇐80(1).

County *held* entitled to dividends on full amount of its deposit in insolvent bank, regardless of collateral held by county (Gen. Laws 1931, Act 652, § 136; St. 1927, p. 1388, as amended St. 1931, p. 2223; Civ. Code, § 2987).

3. Constitutional law ⇐103.

Application to county of rule precluding creditor of insolvent bank holding collateral from proving for entire debt, without allowing for collateral, would constitute invasion of county's vested rights (Gen. Laws 1931, Act 652, § 136; St. 1927, p. 1388, as amended St. 1931, p. 2223; Civ. Code, § 2987).

Application to county of bankruptcy rule, under which a creditor of a closed bank having a secured claim must first exhaust his collateral and credit the proceeds on his claim, or credit the value of his security thereon and prove for the balance, or surrender his collateral and prove for the full amount of his debt, would invade the vested rights of county, which it acquired when the contracts for deposit were executed, for by these contracts county was given a right to retain bonds pledged to secure its deposit and participate equally with other creditors of the bank in the funds realized from the liquidation of its unpledged assets, and in the event that the unpledged assets were insufficient to satisfy the debt, then county had the right to resort to pledged bonds to make up the deficiency.

4. Depositaries ⇐10.

County treasurer could not recover on or convert bonds securing county's bank deposit before demand for payment of deposit followed by failure to pay (St. 1927, p. 1391, § 5).

5. Banks and banking ⇐80(1).

Statutes governing marshaling of assets *held* not to require county to exhaust security for its deposit in insolvent bank and then to share dividend on balance only (Gen. Laws 1931, Act 652, § 136; St. 1927, p. 1388, as amended St. 1931, p. 2223; Civ. Code, §§ 2899, 3433).

Appeal from Superior Court, Contra Costa County; A. B. McKenzie, Judge.

Petition by Contra Costa County against Edward Rainey, State Superintendent of Banks, in the matter of the Bank of Oakley, in liquidation. From the judgment, petitioner appeals.

Reversed with directions.

Hearing denied by Supreme Court; LANGDON, J., dissenting.

James F. Hoey, Dist. Atty., of Martinez, for appellant.

Louis H. Burke, of Montebello, and Burke, Hickson & Burke and Daniel G. Marshall, all of Los Angeles, as amici curiæ in behalf of appellant.

Sullivan, Roche, Johnson & Barry, of San Francisco, for respondent.

JAMISON, Justice pro tem.

The Bank of Oakley is a commercial and savings bank organized and existing under the laws of the state of California. On December 10, 1930, the superintendent of banks took possession of the Bank of Oakley for the purpose of liquidating its affairs in accordance with the provisions of section 136 of the bank act of this state (Deering's Gen. Laws 1931, Act 652). At that time the county of Contra Costa had on deposit with said bank the sum of $12,240.63 in the commercial department and the sum of $12,280.62 in the savings department. Each of these deposits was secured by the pledge of certain bonds in accordance with the provisions of the County and Municipal Deposit Act (St. 1927, p. 1388, as amended St. 1931, p. 2223). The county of Contra Costa presented and filed, in the form prescribed by law, claims covering both deposits. These claims were allowed and approved by the superintendent of banks as secured claims against the said commercial and savings departments, but the treasurer of said county was notified by the said superintendent of banks that the said claims were allowed without right to participate in dividends declared until after the exhaustion of the security, and that thereafter dividends on said claims would be paid only after the security was exhaust-

ed, and then only on the amount of the deficiency.

On May 15, 1931, after the claims of said county had been presented and allowed as aforesaid, a dividend of 25 per cent. was declared and allowed upon all general claims against each of the commercial and savings departments of said bank, and on December 1, 1931, a dividend of 20 per cent. on all general claims was declared against the commercial department of said bank and another dividend of 15 per cent. was declared upon all general claims against the said savings department.

The said superintendent refused to make payment of dividends to said county on its claims for said deposits until the said securities were exhausted; and then only on the deficient sum which remained after exhausting said securities. Upon being excluded from participating in said dividends the said county filed a petition asking for an order of the court directing the said superintendent to pay dividends upon the full amount of its secured claims in the same amounts paid to the general creditors. After a hearing upon an agreed statement of facts, the court made and entered an order denying the petition, and rendered judgment thereon against the said county. From this order and judgment the said county has appealed.

The question presented for decision on this appeal is what rule shall be applied by the superintendent of banks, in determining the dividends that shall be allowed creditors of the closed bank who are secured by pledged bonds. There are two rules by which the federal and state courts have been guided in the determination of this question. One of these rules is known as the "bankruptcy rule." Under this rule a creditor of a closed bank having a secured claim must first exhaust his security and credit the proceeds upon his claim, or credit the value of his security thereon and prove for the balance, or he may surrender his security and prove for the full amount of his debt. The other is called the "chancery" or "equity rule." This rule permits the creditor to prove for and receive dividends upon the full amount of his claim regardless of the collateral held by him and regardless of any sums received by him from the collateral after the transfer of the assets of the insolvent debtor, provided, however, such secured creditor shall not receive more than the full sum due him.

[1] While this question has been passed upon by decisions in the federal courts and in many of the state courts, some of them adopting the bankruptcy rule and others the chancery rule, it has never been passed upon by the Supreme Court of this state. In the case of In re Farmers' & Merchants' Bank (Cal. App. the Fourth Appellate District) 292 P. 665, 667, held that the equity rule should apply. However, the Supreme Court granted a rehearing and in passing thereon the court held that the order from which the appeal was taken was not an appealable order, and so holding declined to pass upon the question whether or not the chancery rule or the bankruptcy rule should prevail in this state. In re Farmers' & Merchants' Bank, 213 Cal. 33, 1 P.(2d) 422. In its contention that the equity rule be followed in this state, appellant in its opening brief has called our attention to the decisions of the Supreme Court of the United States, and to those of some sixteen states upholding this rule, while on the other hand respondent in his brief has cited decisions from fourteen or fifteen states holding that the bankruptcy rule should be followed. As was remarked by the District Court of Appeal in the case of In re Farmers' & Merchants' Bank, supra: "No great good could come from a review or analysis of the various decisions cited. In some jurisdictions the courts are aided in their conclusions by the statutes they are construing." In each of these decisions able and learned jurists have set forth their several reasons for their conclusions for upholding one or the other of these rules and the conclusions they have reached in doing this are based upon principles more or less convincing. Under these conditions it is difficult to determine which rule carries the weight of authority. The California Bank Act furnishes no assistance in determining this question. However, the bonds were pledged to appellant to secure the debts owing to it by the said bank. Every contract by which the possession of personal property is transferred as security only is deemed a pledge. Civ. Code, § 2987. It is the well established law that the pledgee may sue to recover the debt without first exhausting the subject of the pledge. Ehrlich v. Ewald, 66 Cal. 97, 4 P. 1062; Savings Bank v. Middlekauff, 113 Cal. 463, 45 P. 840; Klever v. Hewins, 101 Cal. App. 295, 281 P. 695. And as a pledge is security for the payment of the debt, the pledgee has the right to retain possession of the property pledged until his debt is paid. Sonoma Valley Bank v. Hill, 59 Cal. 107; Spect v. Spect, 88 Cal. 437, 26 P. 203, 13 L. R. A. 137, 22 Am. St. Rep. 314; Commercial Savings Bank v. Hornberger, 140 Cal. 16, 73 P. 625.

[2, 3] We approve the following language used by the District Court of Appeal in its opinion in the case of In re Farmers' & Merchants' Bank, supra: "It would therefore seem clear that in California a pledge is given and received as collateral security for the payment of the entire debt and not any divisible part or portion thereof. It is as much security for the first dollar of the obligation as it is the last dollar of the debt which may remain unpaid after the application of credits derived from other property of the debtor. We cannot see how the pledge holder can be compelled to treat the pledge as a security for a portion of his debt only in the absence of a statute which might be construed as a part

of the contract, compelling him so to do. Also in the absence of any mandate of the law changing the general rule, we cannot see how the fact of the debtor being a bank, the affairs of which are being administered by the superintendent of banks, can change the general rule. The rights and obligations of the parties to a pledge are fixed by the contract under the provisions of law, and the Bank Act being silent upon the subject, the rights and obligations of the parties must remain the same after the commissioner of banks entered the transaction as they were before that event."

It seems clear that the application of the bankruptcy rule would invade the vested rights of appellant which it acquired when the contracts for the deposits were executed, for by these contracts appellant was given the right to retain the pledged bonds and participate equally with the other creditors of the bank in the funds realized from the liquidation of its unpledged assets, and in the event that the said assets were insufficient to satisfy the debt then appellant had the right to resort to the pledged bonds to make up the deficiency.

This was so held in the case of Merrill v. National Bank of Jacksonville, 173 U. S. 131, 19 S. Ct. 360, 363, 43 L. Ed. 640, so frequently quoted and approved as authority in the later decisions upon this question. In the course of that opinion the court, speaking of the chancery rule, said: "* * * As the trust created by the transfer of the assets by operation of law or otherwise is a trust for all creditors, no creditor can equitably be compelled to surrender any other vested right he has in the assets of his debtor in order to obtain his vested right under the trust." Further along the court said: "The creditor can sue, recover judgment, and collect from the debtor's general property, and apply the proceeds of the collateral to any balance which may remain. Insolvency proceedings shift the creditor's remedy to the interest in the assets. * * * And, while the unsecured creditors are entitled to be substituted as far as possible to the rights of secured creditors, the latter are entitled to retain their securities until the indebtedness due them is extinguished." Harrigan v. Gilchrist, 121 Wis. 127, 99 N. W. 909, 975; Kellogg v. Miller, 22 Or. 406, 30 P. 229, 29 Am. St. Rep. 618; In re Prescott State Bank's Estate (Ariz.) 3 P.(2d) 788, 790.

In Chemical National Bank v. Armstrong (C. C. A.) 59 F. 372, 376, 28 L. R. A. 231, Judge Taft delivering the opinion said: "He [the creditor] had two securities for the payment of his debt, one of which he held in common with all the creditors, the other of which he had obtained by lawful contract from his debtor." In this same case Judge Taft also said, referring to Amory v. Francis, 16 Mass. 308: "With much deference to the great jurist [Chief Justice Parker] who advanced this argument [in favor of the bankruptcy rule], we think that it quite incorrectly states the effect of the contract of pledge, which is that the collateral shall be security for the whole debt, and every part of it, and therefore is as applicable to any balance which remains after payments from other sources as to the original amount due."

[4] Respondent calls our attention to the County and Municipal Deposit Act (St. 1927, pp. 1388, 1391) under which these deposits were made, which provides that "* * * in the event that any said bank or banks of deposit shall fail to pay such deposits, or any part thereof, on the demand of the treasurer then it shall be the duty of such treasurer to forthwith recover upon or convert said notes or bonds into money and to disburse the same according to law." Section 5. Under the equity rule this provision can be of no avail to respondent, because that rule provides that the creditor holding collateral security shall receive dividends upon the full amount of his claim regardless of any sums received by him from the collateral after the transfer of the assets of the insolvent debtor. Merrill v. National Bank of Jacksonville, supra; Aldrich v. Chemical National Bank, 176 U. S. 618, 20 S. Ct. 498, 44 L. Ed. 611. In this former case the court said: "Our conclusion is that the claims of creditors are to be determined as of the date of the declaration of insolvency, irrespective of the question whether particular creditors have security or not. When secured creditors have received payment in full, their right to dividends and their right to retain their securities cease, but collections therefrom are not otherwise material." In the instant case there is nothing in the record indicating that appellant's treasurer had ever made any demand upon the said bank for the payment of said deposits. Until such demand was made and thereupon the bank failed to pay such deposits, no authority to recover upon or convert said bonds was vested in said treasurer.

[5] Respondent contends that under the provisions of sections 2899 and 3433 of the Civil Code appellant should first exhaust its security and then participate equally with the other creditors in the general assets of the bank for the balance due it. It is admitted that the market value of the bonds is far less than their par value and that said bonds are insufficient to liquidate appellant's claims. Again we quote from the opinion of the District Court of Appeal in the case of In re Farmers' & Merchants' Bank, supra, as a complete answer to respondent's said contention, as follows: "The two Code sections [2899 and 3433, Civil Code] cited state the rule for marshaling assets in force in this jurisdiction. Neither requires the prior creditor to first resort to the fund or property upon which he has

the sole lien if such action would impair his right to the complete satisfaction of his debt. The marshaling of assets is an equitable doctrine which cannot be invoked by one creditor to defeat part of the demand of a prior lienholder. This rule is clearly stated in 16 California Jurisprudence, 950, as follows: 'A lien claimant may invoke the rule of marshalling assets only when it will benefit him without injuring others. The right to marshall is a mere equity which may never be invoked when its operation will accomplish inequity. Marshalling will not be enforced, for example, where the holder of the senior security will be prejudiced by it.' Kent v. Williams, 114 Cal. 537, 46 P. 462; Harrington v. Taylor, 176 Cal. 802, 169 P. 690. If the district were required to exhaust its security and then participate equally with the other creditors in the other assets of the bank, its demand for which the pledge was given would not be paid in full."

We are of the opinion that the equity or chancery rule should be applied in this case, and so concluding we consider it unnecessary to lengthen this opinion by the discussion of other matters raised by appellant.

The order and judgment thereon dismissing the order to show cause are reversed with directions to the trial court to grant the petition of appellant and ordering respondent to pay it 25 per cent. on each of its claims against the said departments of said bank, and 20 per cent. additional on its claims against the commercial department thereof, and 15 per cent. additional upon its claims against the savings department of said bank.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

131 Cal.App. 300

PEOPLE v. STELLING.

Cr. 1704.

District Court of Appeal, First District, Division 2, California.

April 19, 1933.

1. Licenses ⇐42(4).

Evidence *held* to establish that defendant charged with violating Motor Carriers Transportation Agents' Act held himself out as motor carrier transportation agent and negotiated for transportation within meaning of statute (St. 1931, p. 1362).

2. Licenses ⇐42(4).

Evidence established that portion of highway over which transportation in violation of Motor Carriers Transportation Agents' Act occurred was served by certified carriers (St. 1931, p. 1362).

3. Licenses ⇐42(4).

Whether defendant negotiating for transportation without certificate of public convenience acted as principal or as agent for carrier operating without certificate *held* immaterial in prosecution for violating Motor Carriers Transportation Agents' Act (St. 1931, p. 1362).

4. Licenses ⇐42(4).

Evidence established that defendant charged with violating Motor Carriers Transportation Agents' Act and carrier for whom defendant sold transportation did not have certificates of public convenience (St. 1931, p. 1362).

5. Licenses ⇐42(4).

Defendant's license as transportation agent *held* inadmissible in prosecution for violating Motor Carriers Transportation Agents' Act, where license was issued to person other than defendant and after offense prosecuted for had occurred (St. 1931, p. 1362).

6. Constitutional law ⇐6, 207(2). Licenses ⇐7(1).

Statute regulating and licensing motor carrier transportation agents *held* not unconstitutional as violating privileges and immunities provision and provision regarding manner of amending Constitution (St. 1931, p. 1362; Const. U. S. art. 4, § 2; art. 5).

7. Constitutional law ⇐230(2), 275(1).

Statute regulating and licensing motor carrier transportation agents *held* not unconstitutional as violating Fifth and Fourteenth Amendments (St. 1931, p. 1362; Const. U. S. Amends. 5, 14).

Appeal from Superior Court, City and County of San Francisco; Lile T. Jacks, Judge.

Harry Stelling was convicted of violating the Motor Carriers Transportation Agents' Act (Stats. 1931, p. 1362), and he appeals.

Affirmed.

Philip M. Zwerin, of San Francisco (Fabian D. Brown, of San Francisco, of counsel), for appellant.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, of San Francisco, for the People.

SPENCE, Justice.

Defendant was charged with a violation of chapter 638 of the Statutes of 1931 (page 1362), said act being referred to by the parties as either the Motor Carriers' Transportation Act or the Motor Carriers Transportation Agents' Act. Defendant was duly tried and convicted and he appeals from the judg-

ment of conviction and the order denying his motion for a new trial.

[1-4] Appellant contends that the evidence was insufficient in several respects, but we find no merit in these contentions. It is first claimed that the evidence failed to show that appellant "sold or offered for sale the alleged transportation." It appears, however, that appellant was operating an establishment at 768 Howard street in San Francisco, where signs were displayed advertising fares to various points; that two officers in civilian clothes entered the place and asked appellant "if this was the place to buy transportation to Los Angeles" and appellant "said it was"; that appellant advised the officers that the fare would be $6 apiece; that the officers each offered to pay $6, but appellant stated that $1 should be paid to him by each of them "for the reservations" and that each "should give the $5.00 additional to the driver." There was a conflict in the evidence, appellant testifying that the officers did not offer to pay $6, that they did not pay $2 for reservations, but that they merely paid him 25 cents each for insurance policies which he delivered to them. Nevertheless, the evidence of the officers showed that appellant accepted money for the express purpose of making reservations for the transportation of said officers. In our opinion the evidence was sufficient to show that appellant was holding himself out as a motor carrier transportation agent and that he offered for sale and negotiated for transportation as such agent within the meaning of said act. Appellant also claims that the evidence failed to show "that the portion of the highway over which the alleged transportation occurred was served by any certified carriers." In support of this claim appellant attempts to put an unwarranted interpretation upon the testimony of Mr. Williams, an assistant engineer connected with the railroad commission, who testified that the route over which the officers were transported was "served by carriers certified by the railroad commission of the state of California." Appellant also claims that "it does not appear that the carrier for whom appellant sold transportation did not have a certificate of public convenience." The prosecution introduced evidence to show that Thompson, the driver of the automobile in which the officers were transported, was in appellant's place of business when the officers paid appellant for their reservations. One of the officers asked appellant what kind of a machine he would be transported in, and Thompson spoke up and said, "You are going down in a seven-passenger Studebaker." It was apparently the theory of the prosecution that appellant himself might have been the carrier operating the Studebaker car, using Thompson as the driver. Testimony was therefore introduced to show that appellant had no certificate of public convenience and necessity. Appellant took the stand and denied most of the material evidence given by the officers regarding the transaction, denied any connection with Thompson, denied the presence of Thompson at the time, and denied any knowledge of the fact that the officers were transported in the car driven by Thompson. He admitted, however, that he knew Thompson and that said Thompson was "one of those wild catters." Whether appellant acted as principal or as agent for Thompson is immaterial under the act and the foregoing evidence was sufficient to show that neither appellant nor Thompson had a certificate of public convenience and necessity.

[5] Appellant further contends that the trial court erred in refusing to permit him to introduce in evidence "his license as a transportation agent." The alleged offense occurred in March, 1932. The license offered in evidence is not before us but it was referred to by appellant as a "permit" from the railroad commission issued on August 29, 1932, to E. D. Grave. We are at a loss to understand the theory upon which appellant offered this permit which was issued to E. D. Grave some months after the commission of the offense. Upon the face of the record it appears that the trial court properly sustained the objection to the offer.

[6, 7] The final contention made by appellant is that "the statute in question contravenes the United States Constitution." Appellant refers only to "section 2 of article 4" and also to the "fifth article" of the Constitution. The first deals with the right of the citizens of each state to all of the privileges and immunities of the citizens in the several states and the other deals with the manner of amending the Constitution. A reading of the statute under consideration clearly shows that it is not in contravention of either of said articles. From appellant's argument it appears that he may have had in mind the Fifth and Fourteenth Amendments to the United States Constitution, but in our opinion there is nothing in the statute which violates either of the amendments last mentioned. In a recent case in the Southern Division of the United States District Court, Northern District of the State of California, it was contended that said statute was violative of both the Constitution of the United States and the Constitution of California, but said statute was upheld as constitutional in an opinion handed down in said case on March 7, 1933. Finn v. Railroad Commission, 2 F. Supp. 891.

The judgment and order denying the motion for a new trial are and each of them is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

CASTRO et al. v. SINGH.

Civ. 747.

District Court of Appeal, Fourth District, California.

April 7, 1933.

Hearing Denied by Supreme Court June 5, 1933.

1. Automobiles ⇐181(1).

Automobile guest statutes restricted existing common-law or statutory rights of injured guest by making duty of host less onerous than before (St. 1923, p. 517, § 141¾, as added by St. 1929, p. 1580, as amended by St. 1931, p. 1693).

2. Automobiles ⇐6.

Statute impairing automobile guest's common-law right to sue host for negligence is not retroactive unless made so by its terms (St. 1923, p. 517, § 141¾, as added by St. 1929, p. 1580).

3. Automobiles ⇐6.

Where at time of accident injured automobile guests could recover against host for gross negligence, passage of subsequent statute making host liable only for injury or death resulting from intoxication or willful misconduct did not affect guests' right to recover for gross negligence (St. 1923, p. 517, § 141¾, as added by St. 1929, p. 1580, as amended by St. 1931, p. 1693).

4. Automobiles ⇐238(7).

Complaint under automobile guest statute was not defective for lack of express allegation of gross negligence where it was charged that host carelessly, negligently, unlawfully, recklessly, wantonly, and without due care or caution drove automobile on left-hand side of highway (St. 1923, p. 517, § 141¾, as added by St. 1929, p. 1580).

5. Appeal and error ⇐1071(5).

Defendant could not complain of finding that he was guilty of willful misconduct where plaintiffs agreed that complaint raised no such issue and there was no evidence to support such finding (St. 1923, p. 517, § 141¾, as added by St. 1929, p. 1580).

6. Appeal and error ⇐1011(1).

Findings of trial court on conflicting evidence will not be disturbed on appeal.

7. Automobiles ⇐181(1).

"Gross negligence" under automobile guest statute is want of slight diligence, entire failure to exercise care which would raise presumption of conscious indifference to consequences, and may consist in breach of some statutory duty (St. 1923, p. 517, § 141¾, as added by St. 1929, p. 1580).

[Ed. Note.—For other definitions of "Gross Negligence," see Words and Phrases.]

8. Automobiles ⇐181(1).

Driving on left-hand side of highway in face of on-coming car by host *held* to show conscious indifference to welfare and safety of guests amounting to "gross negligence" (St. 1923, p. 517, § 141¾, as added by St. 1929, p. 1580).

9. Appeal and error ⇐970(4).

Rulings on motion to reopen case for further proof will not be disturbed on appeal, absent clear abuse of discretion to prejudice of complaining party.

10. Trial ⇐66.

Denial of motion to reopen case for further evidence was not abuse of discretion where such evidence was merely cumulative.

Appeal from Superior Court, Fresno County; T. R. Thomson, Judge.

Action by Leonardi Castro and others against Kopper Singh. From a judgment for plaintiffs, defendant appeals.

Affirmed.

Conley, Conley & Conley and Phillip Conley, all of Fresno, for appellant.

Herbert McDowell and M. F. McCormick, both of Fresno, for respondents.

CAMPBELL, Justice pro tem.

This appeal is by defendant from a judgment in favor of plaintiffs in an action for personal injuries sustained by plaintiffs while riding as guests in defendant's automobile. The case was tried before the court without a jury.

Appellant admits that respondents were guests, and his specifications of errors may be briefly summarized as follows: (1) That the complaint is defective in basic allegations; (2) that the findings are not supported by the evidence; (3) that the evidence does not justify any judgment for plaintiffs under the guest law; (4) that the court erred in refusing to reopen the case to hear further testimony; (5) the denial of a motion for new trial was error; and (6) that there can be no recovery based on gross negligence in this case, by reason of the fact that section 141¾ of the California Vehicle Act, effective August 14, 1931, abrogated the statutory rights under which respondents theretofore had a claim of recovery on the basis of gross negligence; that the original guest law passed in 1929 abrogated the common-law rule in effect prior thereto.

We shall consider appellant's last contention first, for in this case the accident in which respondents received injuries occurred August 19, 1929, and trial was had and judgment entered in favor of respondents May 14, 1931. Final judgment, of course, has not

been entered; and it is obvious that if appellant's contentions as set forth are correct the case must be reversed.

(6) At the time of this accident, to wit, August 19, 1929, section 141¾ of the California Vehicle Act read in part as follows: "* * * Nothing in this section contained shall be construed as relieving the owner or driver or person responsible for the operation of a vehicle from liability for injury to or death of such guest proximately resulting from the intoxication, wilful misconduct, or gross negligence of such owner, driver or person responsible for the operation of such vehicle. * * *" (St. 1929, p. 1580).

In 1931 this statute was amended, the amendment practically re-enacting the statute with the omission of the words "gross negligence." The present statute reads word for word as quoted above, save the omission noted. (Deering's Gen. Laws 1931, p. 2520.)

Appellant argues that the right of a guest to recover under any circumstances after August 14, 1931, is governed solely by that statute, that is, section 141¾ of the California Vehicle Act as it exists today, and that the amendment of the former act which authorized a recovery on proof of gross negligence, without any saving clause, takes away any right of action which respondents might have had for gross negligence, and base their argument on the well-established rule of law that: "It is a rule of almost universal application that where a right is created solely by a statute, and is dependent upon the statute alone, and such right is still inchoate, and not reduced to possession or perfected by final judgment, the repeal of the statute destroys the remedy, unless the repealing statute contains a saving clause" (Napa State Hospital v. Flaherty, 134 Cal. 315, 317, 66 P. 322, 323), and "a repeal of the statute conferring the right, prior to final judgment, would abolish the right and place the parties in the same position as if the statute never existed" (Krause v. Rarity, 210 Cal. 644, 653, 293 P. 62, 65, 77 A. L. R. 1327). The amendment of the statute in 1931, so far as this case is concerned, simply deleted the term "gross negligence." Section 141¾ is not repealed and reenacted, but it is simply amended to read as it now stands. St. 1931, p. 1693; Huffman v. Hall, 102 Cal. 26, 36 P. 417.

While the cause of action in Krause v. Rarity, supra, was one not existing at common law, but in reference to a situation such as we have in the case at bar, the court said:

"If the present action were one brought by Krause, during his lifetime, for damages for personal injuries inflicted upon him while a guest of the defendant Rarity, such a cause of action would be one grounded on the common-law liability, and the right of action would be a vested right and survive a repeal of the statute. Callet v. Alioti, 210 Cal. 65, 290 P. 438. The case of James v. Oakland Traction Co. [10 Cal. App. 785, 103 P. 1082], supra, relied upon by the plaintiff, was one for damages for personal injuries inflicted upon the plaintiff therein.

"That case is illustrative of the numerous decisions holding that upon the wrongful infliction of the injury a vested right accrued to the party injured freed from any disturbance by subsequent legislative enactment."

[1] The guest statute is to be considered merely as statements of the requisites of negligence or wrongful act which neither repeals nor amends the right to recover as it existed under the common law; it simply affects the standard of duty or common-law obligation to use due care toward a guest and its corresponding substantive right. In Krause v. Rarity, supra, at page 654 of 210 Cal., 293 P. 62, 66, the court says: "In other words, there has not been a moment of time since the enactment of section 377 to the present time when an action would not lie on behalf of the heirs on account of the death of the guest. The only change brought about by the new law was in the nature and character of the proof required in each case. There was no abolishment of the right or cause of action, but only a change in the proof required, not to maintain the action, but to permit a recovery."

[2] The 1929 act (St. 1929, p. 1580) created no right whatever in favor of a guest, but simply impaired the guest's existing common-law right, preserving to the guest a right of action against his host based on gross negligence. The effect of the 1931 amendment, by eliminating gross negligence as a cause of action, simply further impaired his common-law right which had at all times existed in favor of the guest. The guest's right to sue his host for gross negligence, or any type of negligence, existed at common law, and any statute impairing that common-law right is not retroactive in operation unless made so by its terms. In the case of Callet v. Alioti, supra, a contention identical in principle was made by the appellant therein. The court held that since the right of the guest to recover for the negligence of his host was grounded on common law, and not in any special statute creating the right, a repeal or amendment was not retroactive in effect and affirmed the judgment. In that case the court says:

"The second contention, in which appellant is aided by a brief of amicus curiæ, is based upon section 141¾ of the California Vehicle Act, added to our law by the 1929 Legislature (Deering's Gen. Laws Supp. 1929, Act 5128). Appellant contends that that section is retroactive so as to affect all cases not prosecuted to final judgment before the act went into effect.

"By section 141¾ of the California Vehicle Act the right of action of a guest in a vehicle to recover for personal injuries based upon ordinary negligence of the driver is taken away. The right to recover is made dependent upon proof of gross negligence, willful misconduct or intoxication of the driver. It is contended by appellant that this section of the California Vehicle Act repeals by implication those parts of sections 1714 and 2096 of the Civil Code, which permitted the guest in a vehicle to recover for personal injuries caused by the ordinary negligence of the driver in the operation of the vehicle. It is likewise contended that at common law the guest could not recover when injured due to the ordinary negligence of the driver, and that that right, formerly recognized by the California law, was purely a statutory right based on the above code sections, and that the rule is well settled that a cause of action or remedy dependent on a statute falls with the repeal of the statute, even after the action thereon is pending, in the absence of a saving clause in the repealing statute. In the statute under discussion there is no saving clause. In this case the accident in which respondent received the injuries of which complaint is made occurred in May, 1925. The case was tried and the jury returned a verdict for respondent in March, 1928. It is obvious that if appellant's contentions, as above set forth, are correct, the case must be reversed. There are certain rules of statutory construction which are applicable to the facts here presented. It is too well settled to require citation of authority that in the absence of a clearly expressed intention to the contrary, every statute will be construed so as not to affect pending causes of action. Or, as the rule is generally stated, every statute will be construed to operate prospectively and will not be given a retrospective effect, unless the intention that it should have that effect is clearly expressed. It is also a general rule, subject to certain limitations not necessary to discuss here, that a cause of action or remedy dependent on a statute falls with a repeal of the statute, even after the action thereon is pending, in the absence of a saving clause in the repealing statute. Merchants' Ins. Co. v. Ritchie, 5 Wall. (72 U. S.) 541, 18 L. Ed. 540 [see, also, Rose's U. S. Notes]; Moss v. Smith, 171 Cal. 777, 155 P. 90; First Nat. Bank v. Henderson, 101 Cal. 307, 35 P. 899; People v. Bank of San Luis Obispo, 159 Cal. 65, Ann. Cas. 1912B, 1148, 37 L. R. A. (N. S.) 934, 112 P. 866; Napa State Hospital v. Flaherty, 134 Cal. 315, 66 P. 322. The justification for this rule is that all statutory remedies are pursued with full realization that the Legislature may abolish the right to recover at any time. Section 327, Pol. Code. This rule only applies when the right in question is a statutory right and does not apply to an existing right of action which has accrued to a person under the rules of the common law, or by virtue of a statute codifying the common law. In such a case, it is generally stated that the cause of action is a vested property right which may not be impaired by legislation. In other words, the repeal of such a statute or of such a right should not be construed to affect existing causes of action. James v. Oakland Traction Co., 10 Cal. App. 785, 103 P. 1082; Williams v. Johnson, 30 Md. 500, 96 Am. Dec. 613; McCann v. City of New York, 52 App. Div. 358, 65 N. Y. S. 308; Middleton v. Texas Power & Light Co., 108 Tex. 96, 185 S. W. 556; 18 Cal. Law Rev. 331, 334."

The court on page 68 of 210 Cal., 290 P. 438, proceeds to declare that the right of action of a guest was a right recognized at common law, and then at page 70 of 210 Cal., 290 P. 438, 441, says: "After a careful analysis of the above cases, we are of the opinion that the better reasoned cases permitted a recovery at common law based on failure of the driver to use ordinary care. It therefore follows, under the rules of statutory construction referred to, supra, that since section 141¾ of the California Vehicle Act abrogates the common-law rule, in a case involving personal injuries, that statute does not in any way affect causes of action existing on August 14, 1929, the date the statute took effect."

The principle announced in the foregoing opinion was approved in Krause v. Rarity, supra, and at page 655 of 210 Cal., 293 P. 62, 66, the court says: "The case, then, falls within the operation of the rule contended for by the plaintiff, namely, that, although the Legislature has the power to give a statute retrospective operation, if it does not impair the obligation of contracts or disturb vested rights, yet it is to be presumed that no statute is intended to have that effect, and it will not be given that effect, unless such intention clearly appear from the language of the statute. Pignaz v. Burnett, 119 Cal. 157, 51 P. 48."

[3] The authorities referred to sufficiently distinguish this case from those cases in which the rule now contended for by this appellant is to be applied, and that the 1931 amendment to the statute now under consideration has no effect upon this case. Anderson v. Ott (Cal. App.) 15 P.(2d) 526.

[4] We shall now proceed to take up the other assignments of error:

(1) The complaint is in the usual form and sets forth three causes of action, and the allegations of negligence are the same in each cause of action, and is as follows: "* * * And at said time and place the said defendant did then and there so carelessly, negligently, unlawfully, recklessly, wantonly and without due care or caution, drive and operate his said automobile on the left hand side of said highway." Appellant says that such

pleading is fatally defective because it lacks an allegation of gross negligence. This contention is disposed of, however, in the case of Malone v. Clemow, 111 Cal. App. 13, 19, 295 P. 70, 73, where the court says "appellants further contend that none of the three amended complaints states facts sufficient to constitute a cause of action for gross negligence. This contention is also without merit. 'Degrees of negligence are matters of proof, and not of averment; and a general allegation of negligence, want of care and skill, etc., is sufficient in an action for injuries caused by such negligence, whether the defendant is liable for ordinary or gross negligence.'" (Citing cases.)

[5] (2) Appellant claims and respondents admit that the finding that appellant was guilty of willful misconduct is not supported by the evidence. The complaint does not contain an allegation of willful misconduct. Appellant cannot complain that he has been prejudiced by such a finding when the parties to the action agree that no issue of willful misconduct was presented by the pleadings. The words "willful misconduct" in the findings are surplusage and must be disregarded.

[6-8] (3) The evidence on the issue of negligence need not be recounted at length. It was conflicting, and may be summarized briefly: Appellant and respondents were traveling northerly toward Fresno on the evening of the accident, and were proceeding on the Golden State Highway and had reached a point thereon about three miles from Fresno, when they overtook another automobile which was also traveling northerly toward Fresno; appellant attempted to pass this car, and in doing so he drove his car on his left-hand side, and the westerly side, of the paved highway, and after he had gotten past this car, instead of turning back to his right-hand side, and the easterly side, of the highway, as he could and should have done, he continued on and upon, and drove on his left-hand side of the highway, colliding with an on-coming car. The evidence was conflicting, and the findings of the trial court will not be disturbed on appeal. Gross negligence may arise out of the breach of some statutory duty. The case of Taylor v. Cockrell, 116 Cal. App. 596, 3 P.(2d) 16, 17, fully and clearly states the rule as to when a driver of an automobile is guilty of gross negligence; and one of the chief elements of gross negligence being heedless and flagrant violation of some particular statute regulating the operation of motor cars. The court there discusses the elements of gross negligence as follows: "'Gross negligence is the want of slight diligence * * * an entire failure to exercise care * * * that entire want of care which would raise a presumption of a conscious indifference to consequences.'" It seems to us in the case at bar appellant's act in turning to the left in the face of an oncoming car was intentional, and is sufficient to show a conscious indifference to the welfare and safety of those riding in the automobile with him. There is ample evidence in the record to sustain the findings of the lower court that appellant was guilty of gross negligence. "It is further claimed by the appellant that many of the findings of the court are without support in the evidence. Let the claim be conceded; still the finding to which we have referred has support in the evidence, and that finding absolutely points the judgment against appellant, whatever may be the real facts as to other matters alleged in the complaint." Wheat v. Bank of California, 119 Cal. 4, 7, 50 P. 842, 843, 51 P. 47.

[9, 10] (4) After order for judgment was made, and prior to the signing and filing of findings, defendant made a motion to set aside the order for judgment and reopen the case for further hearing of testimony, based upon the discovery of certain facts set forth in an affidavit of one Amelia Morgan. Respondents objected and filed counteraffidavits. Upon hearing, appellant's motion was denied by the court, and appellant assigns this as error. It is a well-settled rule that trial courts are vested with discretion in permitting or refusing permission to reopen cases for the purpose of introducing further proof; and rulings on questions to reopen will be disturbed only in cases where there has been a clear abuse of discretion, and to the prejudice of the party complaining. In this case the affidavits merely showed a further conflict. We are of the opinion that the trial court did not abuse its discretion in denying appellant's motion.

(5) We have read the entire record and are satisfied that the trial court did not err in denying appellant's motion for a new trial.

The judgment is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

R. G. HAMILTON CORPORATION, Limited, et al. v. CORUM et al.

S. F. 14689.

Supreme Court of California.

April 27, 1933.

Rehearing Denied May 25, 1933.

1. Action ⇐6.

Though judgment in action for declaratory relief that rights of parties are as set forth in findings is not commended, it is not ineffectual so long as rights and duties of parties may be ascertained therefrom.

2. Action ⇐6.

Whether judgment in action for declaratory relief is sufficient must be judged from its substance rather than its form.

3. Action ⇐6.

In action for declaratory relief, court may determine disputed questions of fact.

4. Action ⇐6.

Action for declaratory relief involving validity of trust deed was not inhibited by statute relating to exercise of power of sale under mortgage (Civ. Code, § 2924; Code Civ. Proc. § 1062).

The action for declaratory relief was not inhibited because validity of trust deed was involved. Code Civ. Proc. § 1062, provides that all remedies are cumulative, and Civ. Code, § 2924, does not purport to provide remedy but to prescribe certain limitation for exercise of contractual remedy.

5. Mortgages ⇐342.

Recorded instrument referring to all deeds of trust owned by association as beneficiary and appointing new trustee transferred title to substituted trustee of property covered by trust deed in controversy, which provided for substitution of trustee by such beneficiary.

6. Mortgages ⇐342.

In absence of requirement in trust deed that no valid substitution of trustee shall be made unless by written instrument specifically addressed to trust deed itself, general instrument covering several trust deeds is sufficient.

7. Mortgages ⇐335.

Recorded notice of breach and election to sell under trust deed, which stated that beneficiary considered all moneys due and immediately payable, and had elected to sell for breach which had been made, and contained other essential recitations, *held* sufficient, especially where note expressly waived notice of exercise of option to declare acceleration of indebtedness and notice showed existence of breach to pay entire indebtedness (Civ. Code, § 639).

8. Mortgages ⇐335.

Where payments under trust deed were 12 months in arrears, past leniency and acceptance of partial payments did not estop beneficiary from accelerating maturity of obligation in accordance with trust deed.

9. Mortgages ⇐335.

Notice of breach was not premature and void because there was no prior application by beneficiary to trustee under trust deed to sell property (Civ. Code, § 2924).

In Bank.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Action for declaratory relief by the R. G. Hamilton Corporation, Limited, as substituted trustee under deed of trust dated October 3, 1927, given by Augusta Corum, an unmarried woman, as trustor, to Allen Rudolph and F. L. Johnson, as trustees, and to the San Jose Pacific Building & Loan Association, as beneficiary, and another, against Augusta Corum and others. From a judgment for plaintiffs, named defendant appeals.

Affirmed.

Geo. D. Collins, Jr., of San Francisco, for appellant.

Breed, Burpee & Robinson, of Oakland, for respondents.

IRA F. THOMPSON, Justice.

This action for declaratory relief was instituted by San Jose Pacific Building & Loan Association, herein called the association, beneficiary under a deed of trust of real estate in Alameda county, and the R. G. Hamilton Corporation, Limited, substituted as trustee in place of the original trustees, by general appointment of the plaintiff association. The deed of trust was given in 1927 to secure a building loan in the principal sum of $170,000, bearing interest at the rate of 7.2 per cent. per annum, evidenced by a promissory note payable in 120 monthly installments of $1,990.70 each. The proceeds of the loan were used to erect a hotel on Piedmont avenue in Oakland. Appellant has never made a full payment under the terms of the loan, but has made irregular payments on account. She also failed to pay taxes and premiums on insurance policies, and the association was compelled to pay them. The last payment made by appellant was made on May 16, 1930, and covered the interest on principal, taxes, and premiums up to August 27, 1929. The appellant being generally in default, the entire indebtedness was declared due under the acceleration clauses in the note and deed of trust, and on November 17, 1930, notice of breach and election to sell the property was executed and recorded in Alameda county.

Because of numerous claims of appellant, including assertions that the association was not the owner of the note, that the note had not been delivered, that the provision for monthly payments had been abrogated, that she was not in default, and that the plaintiff trustee had not been regularly substituted, this action was brought to have the rights and duties of the parties with respect to the trust deed and note established by declaratory judgment. It was also sought to have determined the validity and effect of the above notice of breach and election to sell under the provisions of section 2924 of the Civil Code, and respondents further asked for an accounting between the parties. The defendant and appellant in her answer denied substantially all the material allegations of the complaint, and alleged the existence of an oral agreement altering the terms of said note, and specifically alleged waiver by plaintiff of defaults in payment of installments of principal and interest. She also filed a cross-complaint praying for declaratory relief upon the identical matters set forth in plaintiffs' complaint, and on additional claims not involved in this appeal. The court found in favor of plaintiffs upon all of the questions presented by the pleadings, and this appeal is from the judgment declaring the rights of the parties in accordance therewith.

[1-3] Appellant first attacks the form of the judgment on the ground that it is not such a decree as the statute requires in an action for declaratory relief because it merely declares the rights of the parties to be in accordance with, and as set forth in, the findings. Appellant also makes the point that the judgment is upon disputed facts and not upon a controversy as to legal rights and duties growing out of undisputed facts, and that it does not involve the validity or meaning of the promissory note or trust deed. While the judgment entered is rather unusual and is not a practice to be commended, we cannot say that the adoption of this unusual form has rendered the judgment ineffectual as long as the rights and duties of the respective parties may be ascertained therefrom. Hopkins v. Warner, 109 Cal. 133, 139, 41 P. 868; Pista v. Resetar, 205 Cal. 197, 200, 270 P. 453. Whether it is sufficient is to be judged from its substance rather than from its form. With respect to appellant's contention that the action for declaratory relief is restricted to a determination of legal duties and rights, it has been already decided that in such actions the court may determine disputed questions of fact. Hess v. Country Club Park, 213 Cal. 613, 2 P.(2d) 782; Herrlein v. Tocchini (Cal. App.) 18 P.(2d) 73. Appellant's argument is concluded by the cited cases.

[4] Appellant further contends that section 2924 of the Civil Code provides an exclusive remedy for the enforcement of a deed of trust with power of sale in all cases where there is no controversy as to the meaning and validity of the instrument. There are three answers to this argument: First, the validity of the deed of trust was one of the very questions in issue in this case. Second, section 1062 of the Code of Civil Procedure reads: "*Other remedies not affected.* The remedies provided by this chapter are cumulative, and shall not be construed as restricting any remedy, provisional or otherwise, provided by law for the benefit of any party to such action, and no judgment under this chapter shall preclude any party from obtaining additional relief based upon the same facts." Third, section 2924 does not purport to provide a remedy, but to prescribe a certain limitation for the exercise of the contractual remedy.

[5, 6] It is next urged that there was no valid substitution of trustees. While the deed of trust did not itself specify the form of the instrument, it specifically authorized, by the seventh provision of the deed of trust, the appointment by the beneficiary of a substituted trustee. The substitution in this case was made by an instrument which referred to all of the deeds of trust owned by the respondent association as beneficiary and in which certain named parties were the original trustees, and held legal title as such, and the instrument was recorded in Alameda county in which the land described in the deed of trust was situated. There can be no doubt that the substitution in the general form made use of transferred the legal title to the substituted trustee, and was in compliance with the terms of the deed of trust. In the absence of any such requirement in the trust deed, we find no merit in the contention that no valid substitution is possible in such a case unless the written instrument of substitution is specifically addressed to the trust deed itself. 41 Cor. Jur. 381.

[7] Appellant next attacks the validity of the notice of breach and election to sell, and does so on the ground that the notice is expressly restricted, and assigns only defaults in part payments that are stated in the notice as occurring more than four months prior to the alleged acceleration of the maturity of the entire indebtedness, principal and interest, and does not assign a breach or default in the payment of the entire indebtedness as accelerated to maturity. The notice does, however, state the fact that the association considers all the moneys to be immediately due and payable, and has elected to sell the property to satisfy the indebtedness. Section 639 of the Civil Code provided at the time that: "* * * Whenever a borrower shall be three months in arrears in the payment of his dues or interest or loan installments, the whole loan shall become due at the option of the board of directors, and they may proceed

to enforce collection upon the securities held by the association, * * *" and the recorded notice which contained the other essential recitations stated that a breach of the obligations secured by the deed of trust had been made. The note expressly waived notice of the exercising of the option to declare an acceleration, and the recorded notice left no room for speculation as to the existence of a breach of the obligation to pay the entire indebtedness.

[8] It is insisted by appellant that the failure to act promptly constituted a waiver of the right to accelerate the maturity of the obligation, and a number of cases are cited as supporting this contention. These cases are not applicable because we are not here dealing with a forfeiture, and, while it is true that respondents might have dealt with appellant in such a way as to estop them from exercising their option to accelerate maturity, we are here dealing with facts that indicate the exercise of leniency and a forbearance to elect within a reasonable time. The appellant, although making partial payments on her obligation, was in default in payments of principal, interest, and advancements for over twelve months, and each month a new and additional default was occurring. Under these circumstances respondents may not be regarded as impairing their right of acceleration upon default in future payments or be regarded as waiving that right. Glas v. Glas, 114 Cal. 566, 46 P. 667, 55 Am. St. Rep. 90; Campbell v. West, 86 Cal. 197, 24 P. 1000; note, 5 A. L. R. 437, 439.

[9] Finally, it is urged that the notice of breach was premature and void because there was no prior application by the beneficiary to the trustee to sell the property.

The deed of trust provided that: "On written application of the beneficiary and after three months shall have elapsed following such recordation of said notice, said trustee, without demand on said trustor, shall sell said property in whole or in part or parcels at the discretion of the trustee in the following manner, namely. * * *" Section 2924 of the Civil Code expressly provides for the recording of a notice of breach and election to sell by "trustee, mortgagee, or beneficiary" before the exercise of the power of sale. An application to the trustee to sell prior to the recording of the notice of breach would be an idle act, because the trustee was not called upon to act under his power until the notice was recorded, and had no power to sell under the statute until after the expiration of three months from the recording of the notice. The theory of appellant that the power to sell must be vested in the trustee before the recording of the notice of breach is not tenable either under the statute or the provisions of the deed of trust.

The judgment is affirmed.

We concur: WASTE, C. J.; SEAWELL, J.; CURTIS, J.; LANGDON, J.; PRESTON, J.; SHENK, J.

218 Cal. 59

NESSEN v. NESSEN.

S. F. 14724.

Supreme Court of California.

April 26, 1933.

1. Deeds ⇐211(1).

Evidence supported finding that 75 year old mother making conveyance to one of children was capable of understanding nature of act.

2. Deeds ⇐68(3), 72(7).

That grantor was old, ill, had moments of forgetfulness, and was easily swayed, did not alone show undue influence or incapacity to make conveyance to one of children.

3. Deeds ⇐196(3).

Relation of parent and child alone does not require grantee to dispel every suspicion of undue influence.

Such relationship, without a showing of a practically exclusive opportunity designedly created for the purpose of influencing the grantor in favor of one to the exclusion of several children, does not cast burden on grantee to dispel every suspicion thrown in his direction by his brothers and sisters.

In Bank.

Appeal from Superior Court, Alameda County; Frank M. Ogden, Judge.

Suit by Hans P. Nessen against Andres P Nessen to set aside a conveyance of real property. Judgment for defendant, and plaintiff appeals.

Affirmed.

H. B. M. Miller and T. C. Van Ness, Jr., both of San Francisco, for appellant.

McNoble & Parkinson, of Stockton, Frank B. Graves, of Oakland, and O. C. Parkinson, of Stockton, for respondent.

SHENK, Justice.

This is an appeal by the plaintiff from a judgment in an action to set aside a convey-

ance of real property made to the defendant by the mother of the parties hereto. The mother, Thyra M. Nessen, had another son, Will Nessen, and a daughter, Anna Nelson.

Thyra M. Nessen died on August 10, 1930, at the age of seventy-five years. On June 7th preceding, she conveyed by deed of gift to her son, the defendant Andres P. Nessen, the only real property of which she was possessed, consisting of two lots with improvements situate in Alameda county, of the value of about $6,000. The present action was commenced on the 16th day of August, 1930, by Hans P. Nessen alone, to set aside and cancel said deed on the grounds that Thyra M. Nessen at the time she executed and delivered the conveyance was physically and mentally incapable of transacting business; that there was no consideration for the deed: and that the gift was not the voluntary act of the grantor but was induced solely by the undue influence and fraud of the defendant. The court found that although Thyra M. Nessen was for many months prior to her death physically infirm and suffering from an incurable ailment which ultimately caused her death, she was nevertheless not mentally impaired, nor physically or mentally incapable of transacting business; that the deed of gift to her son was made voluntarily, of her own free will and accord, and without any fraud, duress, menace or undue influence exercised by the defendant. The court also found that in addition to the kinship and natural love and affection existing between the parties thereto the consideration for the deed was the agreement of the defendant to support, maintain, and provide for his mother during the remainder of her life. The court specifically found that at the time of the execution and delivery of the deed Thyra M. Nessen was physically and mentally capable of understanding and appreciating the nature of her act and understood and appreciated the fact that thereby she divested herself of all right, title, and interest in and to said property and that it thereupon became the property of the defendant; also specifically found that the defendant exercised no undue influence and committed no acts of fraud or duress in the premises. The court concluded that the defendant was the owner of the property and was entitled to have his title quieted. Judgment was entered accordingly.

The only points made on this appeal are that the evidence does not sustain the finding of understanding and competence on the part of the grantor, and that the evidence does not sustain the finding that the defendant was guiltless of fraud and undue influence.

The record does not present such a case as would justify this court in holding as a matter of law that the grantor was in such a mental or physical condition as to compel a finding that she was incapable of understanding what she was doing; nor does the record present a situation and circumstances surrounding the grantor and her relations with her children as to suggest no other reasonable conclusion than that the defendant exercised undue influence in the transaction.

[1, 2] The deed was executed and delivered under circumstances which could cast no doubt upon the testimony of the witnesses, including the attorney who prepared it at the request of Mrs. Nessen herself, that the grantor fully understood her act and the effect thereof. The findings on this branch of the case are fully supported by the evidence.

The fact that the grantor was seventy-five years of age and at times endured pain, sleeplessness, and other effects of her malady and her age, even though coupled with moments of forgetfulness and a natural trait of being easily swayed by one or another of the natural objects of her affection, does not without more sustain the plaintiff's contentions. Best v. Paul, 101 Cal. App. 497, 281 P. 1089; Johnson v. Studley, 80 Cal. App. 538, 559, 252 P. 638; Broaddus v. James, 13 Cal. App. 464, 110 P. 158; 9 Cal. Jur., pp. 117-119, 224-225.

[3] The relationship of parent and child alone, without a showing of a practically exclusive opportunity designedly created for the purpose of influencing the grantor in favor of one to the exclusion of several children, and no claim is advanced that such a showing was made, can hardly be said to cast a burden upon the grantee to dispel every suspicion thrown in his direction by his brothers and sisters. See Wilbur v. Wilbur, 197 Cal. 1, 239 P. 332; Longmire v. Kruger, 80 Cal. App. 230, 251 P. 692; Broaddus v. James, supra, at page 472 of 13 Cal. App., 110 P. 158; 17 Cal. Jur. 233. Were it otherwise, it must be said that the burden in this case on the record before us has been fully met. Soberanes v. Soberanes, 97 Cal. 140, 31 P. 910; Walker v. Smith, 58 Cal. App. 145, 208 P. 157; Broaddus v. James, supra. Furthermore, we have a situation where the sympathies of the children who are not parties to the action are not fully with the plaintiff. The brother, Will Nessen, in the lifetime of the grantor expressed his approval of the grant as made to one entitled thereto, and this approval is apparent in his testimony at the trial. The execution and delivery of the deed was announced immediately to other members of the family, and immediate recordation thereof was made at the request of the grantor herself.

The record presents a case wherein the determination of the issues was peculiarly within the province of the trial court. No abuse

of its discretion has been shown, and no error appears.

The judgment is affirmed.

We concur: WASTE, C. J.; SEAWELL, J.; THOMPSON, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.

218 Cal. 3

HUGHES v. KORNTVED et al.

S. F. 14647.

Supreme Court of California.

April 19, 1933.

Trusts ⇐83.

Where lender advanced purchase price of property, but took title in his own name under agreement to convey upon purchaser's repayment of sums advanced, purchaser was entitled to conveyance if he repaid advances within time specified; otherwise lender was entitled to judgment quieting lender's title.

In Bank.

Appeal from Superior Court, Monterey County; H. G. Jorgensen, Judge.

Action by Ralph L. Hughes against Henry C. Korntved, wherein defendant filed a cross-complaint against J. A. Bardin and others. Judgment for cross-complainant, and cross-defendants appeal.

Modified, and, as modified, affirmed.

J. A. Bardin and J. T. Harrington, both of Salinas, for appellants.

Charles B. Rosendale and Edson G. Thomas, both of Salinas, for respondent.

SHENK, Justice.

This is an appeal from a judgment in favor of the defendant and cross-complainant in an action to quiet title. The complaint is in the usual form. The defendant answered, denying the plaintiff's ownership, and in his cross-complaint against one Lorentzen and others he alleged that he was the owner, and that the deed to the plaintiff's grantor, the cross-defendant Lorentzen, was intended only as a mortgage to secure the payment by the defendant of the sum of $7,500. The trial court found in favor of the defendant and cross-complainant and entered a decree allowing him two years from the entry of judgment to pay the sums due, and, if not so paid, Lorentzen to have the right to foreclose. The contention on this appeal is that the conclusion of the trial court that the deed to Lorentzen is a mortgage is not sustained by the findings or the evidence.

The facts briefly are these: Korntved was in possession of and desired to purchase some 520 acres of agricultural land and improvements in Monterey county owned by Stanley W. and Ethel Herbert, the purchase price of which was $5,000. At that time (1924) the land apparently had oil possibilities which were attractive to Lorentzen and his associates, who are the cross-defendants. The defendant Korntved did not have the purchase money nor the money to develop the land. He applied to Lorentzen, who agreed to advance the purchase money and $2,500 for improvements, take title in his own name, and enter into a written contract with Korntved by which the latter was to repay to Lorentzen and his associates the sum of $7,500 and receive a deed from the latter by which, also, Lorentzen and his associates were to reserve a proportion of the mineral rights in the property in consideration of the advances. The purchase price of $5,000 was paid to the Herberts and $2,500 to Korntved for improvements which were made, and Lorentzen took title from the Herberts on October 31, 1925. Subsequently and before any written contract between the parties to the cross-action was executed, Lorentzen conveyed to Ralph L. Hughes, the plaintiff herein. The written contract was never entered into between Lorentzen and Korntved, for the reason that certain misunderstandings arose concerning the transfer to Hughes, who was proposed as a contracting party; also a dispute arose as to the nature and extent of the oil rights to be reserved. Korntved continued in his possession of the property. The present action was commenced in March, 1930, and judgment was entered on January 5, 1932.

The trial court found the foregoing facts; also that the contemplated contract between Korntved and Lorentzen was one of purchase and sale of the property involved. The court concluded that Korntved was the owner of the property subject to certain specified mineral rights of the cross-defendants, that the plaintiff had no title or interest in the property, and that the cross-defendant Lorentzen "is the record title holder of the property as a mortgagee" to secure the repayment of the sum of $7,500 and other sums advanced for taxes found to be due, with interest, and which it decreed should be paid by Korntved within two years after entry of judgment, and that, upon payment of the sums found to be due within said period, the defendant would be entitled to final judgment quieting title in him, but that otherwise the cross-defendant Lorentzen would be entitled to foreclose as in the manner provided for the foreclosure of mortgages.

The facts found by the trial court bring the case within the rule of Woodard v. Hen-

negan, 128 Cal. 293, 60 P. 769, in which an almost identical situation was presented. There the deed to land purchased by the defendant was taken by the plaintiff, who advanced the purchase price paid to the grantor. The legal title never was in the defendant. It was stated that the plaintiff possessed the rights of a seller as well as of a mortgagee, and this court said at page 301 of 128 Cal., 60 P. 769, 771, quoting from Campbell v. Freeman, 99 Cal. 547, 34 P. 113: "In such case the grantee holds a double relation to the real purchaser. He is his trustee of the legal title to the land, and his mortgagee for the money advanced for its purchase." The result in such cases is that the grantee, the trustee of the legal title, is not required to pursue his foreclosure rights upon nonpayment of the amount decreed to be due, but may have his title quieted as against the real purchaser who has repudiated or breached his contract. Woodard v. Hennegan, supra; Lamberson v. Bashore, 167 Cal. 387, 139 P. 817; Prefumo v. Russell, 10 Cal. App. 113, 101 P. 24; Hooper v. Young, 10 Cal. App. 590, 102 P. 950; Doane v. California Land Co. (C. C. A.) 243 F. 67; 17 Cal. Jur., pp. 752 et seq.

In the present case the purchase price was $7,500, which the defendant may not refuse to pay before he may demand a conveyance to him. On the record presented we cannot say as a matter of law that the defendant has repudiated the contract so as to entitle the cross-defendant Lorentzen to a decree quieting title, unless the defendant pays the sums due within a reasonable period, which he urges is no more than sixty days. The evidence as to the time when the amount advanced should become due from the defendant is conflicting; that on behalf of the cross-defendants being to the effect that payment was already due, and that on behalf of the defendant being that he was to have five years with an additional five years at his option. It also appears in evidence that the defendant Korntved had expended an additional $5,000 in improvements on the land, and the court so found. It would appear that the court was of the opinion that the defendant Korntved had not repudiated his contract, and that the period of two years allowed for payment was reasonable under all of the circumstances. We are not disposed to disturb this provision of the judgment.

A reversal, however, is not deemed necessary. A modification of the judgment would be in conformity with the cross-defendants' rights in the premises, and would assure to the defendant all of the rights to which he is entitled. Accordingly the judgment is modified by striking therefrom the requirement that, in the event the defendant, on or before January 5, 1934, fail to pay the sums found to be due, the cross-defendant Lorentzen may proceed to foreclose in the manner prescribed for the foreclosure of mortgages; and inserting in lieu thereof the provision that, upon nonpayment of said sums by the defendant on or before January 5, 1934, the cross-defendant Lorentzen shall be entitled to a judgment quieting his title.

As so modified, the judgment is affirmed; neither party to recover costs on appeal.

We concur: WASTE, C. J.; SEAWELL, J.; IRA F. THOMPSON, J.; PRESTON, J.; CURTIS, J.; LANGDON, J.

218 Cal. 98

WARDEN v. WARDEN.

S. F. 14836.

Supreme Court of California.

April 28, 1933.

Divorce ⇐252.

In divorce action, distribution of community property *held* properly done as against contention prevailing party received less than half.

The evidence was conflicting, but the record would support the conclusion that wife, who prevailed in action, received home valued at from $3,000 to $5,500, subject to $4,500 incumbrance, lot valued at $1,500 to $3,000, automobile with agreed valuation of $250, household furniture valued at $500, and $250 in cash; while husband received half interest in drug business, valued at $3,000 to $5,000.

In Bank.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Divorce suit by Elizabeth K. Warden against George Warden. From the judgment and from an order denying temporary maintenance pending appeal, plaintiff appeals.

Affirmed.

Norman S. Menifee, of Redwood City, for appellant.

J. E. McCurdy, of San Mateo, for respondent.

PRESTON, Justice.

Action for divorce on grounds of extreme cruelty. The divorce was uncontested by defendant, but evidence was offered on the issue of division of the community properties, which was highly conflicting. The court thereafter rendered its interlocutory decree granting to plaintiff a divorce as prayed, together with $35 costs and $100 counsel fees, and awarding to her the equity, if any, of the parties in their home, together with the household furnishings, the family automo-

bile, and the sum of $250; to defendant was awarded his undivided one-half interest in a drug store in Burlingame. Plaintiff appealed from said decree and also from an order made after judgment denying her temporary maintenance during pendency of the appeal, together with counsel fees and costs for its prosecution.

Appellant contends that the court erred in distributing to her, as the prevailing party in a divorce action on grounds of extreme cruelty, less than one-half of the community property, citing Quagelli v. Quagelli, 99 Cal. App. 172, 277 P. 1089; Tipton v. Tipton, 209 Cal. 443, 444, 288 P. 65. But a discussion of this doctrine or its applicability becomes unnecessary because the record fails to sufficiently show that appellant did, in fact, receive less than one-half of the community property.

In other words, the only real question on the appeal is whether the findings and judgment are supported by the evidence, and it is clear that they are. The conflicting evidence raised a grave doubt as to the existence of alleged interests from small separate funds of the wife or her minor child. The wife received the home, valued at from $3,000 to $5,500, subject to a $4,500 incumbrance; a lot in South San Francisco valued at from $1,500 to $3,000; an automobile with an agreed valuation of $250; household furniture valued at $500 more or less, plus the sum of $250 in cash. The husband received said half interest in a drug business, valued at from $3,000 to $5,000. The court below was warranted in crediting that evidence which supports, as equally just and equitable, the division of the properties as made by the findings and judgment.

We need only add that the record likewise fails to show any abuse of discretion in the court's denial to appellant of temporary support, counsel fees, and costs on appeal.

The judgment is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; LANGDON, J.; SHENK, J.; SEAWELL, J.; IRA F. THOMPSON, J.

218 Cal. 83

REHFELD et ux. v. CITY AND COUNTY OF SAN FRANCISCO.

S. F. 14800.

Supreme Court of California.

April 27, 1933.

1. Municipal corporations ⊂⊃601.

Municipality can establish residential district by zoning and exclude therefrom such structures as stores and apartment houses.

2. Municipal corporations ⊂⊃601.

Grocery store existing as nonconforming use in district zoned for residences could not be enlarged backward into vacant lot, notwithstanding such enlargement would not adversely affect public welfare.

3. Municipal corporations ⊂⊃601.

Relief from zoning restrictions could be justified only upon showing of city planning commission's abuse of discretion.

4. Evidence ⊂⊃83(2).

Presumption favors correctness of city planning commission's determination on matter of rezoning.

In Bank.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by Adolph Rehfeld and wife against the City and County of San Francisco. From a judgment for plaintiffs, defendant appeals.

Reversed.

John J. O'Toole and Sylvain D. Leipsic, both of San Francisco, for appellant.

Milton Marks, of San Francisco, for respondents.

LANGDON, Justice.

This is an appeal by defendant city and county of San Francisco, from a judgment of the superior court granting declaratory relief and an injunction. The plaintiffs are owners of a piece of land at the corner of Filbert and Baker streets, now used as a grocery store. They sought to enlarge the store by extending it twenty-two feet backward into a lot now vacant. The district in which all this land is situated is zoned for residences. The store of plaintiffs had been erected many years before the zoning ordinance was passed, and by the terms of said ordinance, existing nonconforming uses were permitted to remain. Plaintiffs filed their application with the city planning commission to rezone the twenty-two feet in the rear of the store, so as to permit the proposed enlargement. The commission denied the request, and plaintiffs then commenced this action. The lower court found that the deepening of the store would not adversely affect the public health, safety, comfort, morals, convenience, or welfare, and therefore declared the right of plaintiffs to carry out their plans, and enjoined the defendant city from preventing such action.

[1] It is at once obvious that the plaintiffs and the lower court have proceeded upon an erroneous theory. Plaintiffs' brief takes the position that the court has power to review any decision of the city planning commission, and determine whether, in each case, the prohibited act is sufficiently dangerous to the

public welfare to justify the exercise of police power. They cite cases dealing with judicial review of the constitutionality of *zoning ordinances*, none of which is in point. The zoning ordinance of the city and county of San Francisco is not attacked, and the constitutional power of a municipality to establish residential districts, and to exclude therefrom such structures as stores and apartment houses, is well settled. See Miller v. Board of Public Works, 195 Cal. 477, 234 P. 381, 38 A. L. R. 1479; Jones v. Los Angeles, 211 Cal. 304, 307, 295 P. 14. In enacting such ordinances, however, municipal authorities have had in mind the injustice and doubtful constitutionality of compelling the *immediate removal* of the objectionable buildings already in the district, and have usually made express provision that these *nonconforming uses* may be continued, without the right to enlarge or rebuild after destruction. The object of such provision is the gradual elimination of the nonconforming use by obsolescence or destruction by fire or the elements, and it has been frequently upheld by the courts. See State v. Hillman, 110 Conn. 92, 147 A. 294; Jones v. Los Angeles, supra, 211 Cal. 304, 319, 295 P. 14; Metzenbaum, Law of Zoning, p. 288.

[2] We have in this case an admittedly valid zoning ordinance, and a nonconforming use which has been permitted to remain under the provisions of the ordinance. Upon what logic may that permission be transformed into a right to obtain more than the ordinance gives? No one in the district may build a new store, and it would be an unwarranted discrimination in favor of plaintiffs to permit them to enlarge their existing store in this residential district. The finding that the public welfare would not be endangered is beside the point. Obviously a *rezoning* would not cause injury to the public, but the whole value of zoning lies in the establishment of more or less permanent districts, well planned and arranged. If, upon the complaint of the owner, the courts are to reexamine each instance of inclusion or exclusion of property from a district, solely with regard to the dangerous or nondangerous character of the particular structure, and irrespective of the general scheme of the ordinance, then there is, of course, no possibility of ever achieving successful zoning.

[3, 4] The only basis upon which relief could be justified would be upon a showing of an abuse of discretion on the part of the city planning commission. No such showing is made. The presumption is, moreover, in favor of the correctness of the determination of this administrative body on the matter of rezoning, as upon other questions of fact. See Norcross v. Board of Appeal, 255 Mass. 177, 150 N. E. 887; Metzenbaum, Law of Zoning, p. 265.

The judgment is reversed.

We concur: WASTE, C. J.; PRESTON, J.; CURTIS, J.; SHENK, J.; SEAWELL, J.; THOMPSON, J.

217 Cal. 785

Katherine GIRARD, Plaintiff and Respondent, v. Leah HOLBACK, Defendant and Respondent, and Ervin D. Willis, Defendant and Appellant.

S. F. 14816.

Supreme Court of California.

April 19, 1933.

In Bank.

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

Lelia R. Leep, of San Francisco, for appellant.

Morris Oppenheim, of San Francisco, for respondents.

PER CURIAM.

Action to quiet title to real property situated in Santa Clara county. The defendant Holback filed a disclaimer. The defendant Willis answered and appeals from a judgment in favor of the plaintiff. The points made on the appeal are that the findings are not supported by the evidence and that the judgment is against law.

The plaintiff's title rested upon a deed to her from the defendant Holback dated August 1, 1930, acknowledged March 3, 1931, and recorded March 7, 1931. The defendant Willis claimed an interest in the real estate by reason of a writ of attachment levied on said property on March 21, 1931, in an action brought by him against the defendant Holback. The issues were whether the deed to the plaintiff had been delivered, whether the plaintiff had paid a consideration for said deed, and whether the transfer was made to hinder, delay, or defraud the defendant Willis.

The court found in favor of the plaintiff on all the issues. The findings are supported by the evidence. The record presents a case of evidentiary conflict and no error of law appears.

The judgment is affirmed.

218 Cal. 54

FEIG v. BANK OF ITALY NAT. TRUST & SAVINGS ASS'N et al.

S. F. 14254.

Supreme Court of California.

April 26, 1933.

1. Husband and wife ⇐248.
Existence of divorce decree is fatal to claim of community property.

2. Husband and wife ⇐248.
Property acquired by wife during period between divorce and remarriage to first husband could not be community property.

3. Judgment ⇐499.
Evidence outside record is not admissible on collateral attack to show that summons was not served on defendant.

4. Husband and wife ⇐273(12).
Action will lie by surviving husband against executors of deceased wife to procure decree that property was community property.

5. Husband and wife ⇐273(12).
In surviving husband's action to have property declared community property, modification of issues by defense showing divorce decree should not foreclose plaintiff from receiving whatever relief he is entitled to under evidence.

6. Pleading ⇐166.
Plaintiff, without further pleading, may offer evidence in avoidance of new matters set up in answer or tending to overcome matters disclosed by defendants' evidence admitted under denial.

7. Marriage ⇐54.
Where husband lived continuously with wife for forty years, ignorant of existence of divorce decree, believing himself to be her lawful husband, he is entitled after wife's death to equitable apportionment of gains made by their joint efforts.

8. Pleading ⇐237(1).
Amendments of complaint to conform to proof are liberally allowed.

In Bank.

Appeal from the Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Action by Joseph Feig against Bank of Italy National Trust & Savings Association and another as executors of the last will and testament of Mindell Feig, deceased, and others. From an adverse judgment, plaintiff appeals.

Reversed, with directions.

Prior opinion, 14 P.(2d) 612.

Reisner & Deming, of San Francisco, for appellant.

Leo R. Friedman and Jas. J. Harrington, both of San Francisco, for respondents.

WASTE, Chief Justice.

This is an appeal from a judgment of nonsuit. Plaintiff, as the surviving husband of Mindell Feig, deceased, brought this action against the executors of her will to recover certain real and personal property.

The complaint is in three counts; the first being for money had and received in the sum of $8,600. This sum represents the aggregate of two bank deposits. The second cause of action is for the recovery of a specific deposit held by the defendant bank. The third count is in ejectment for the recovery of possession of two pieces of real property. There was no demurrer for misjoinder. All of the property, both real and personal, stood in the decedent's name at the time of her demise. It is the plaintiff's theory that the property is community property. He contends it was acquired during the marriage of the parties and placed in the decedent's name, pursuant to an oral understanding, merely as a convenience to facilitate its handling and investment. Defendants, on the other hand, urge that the property was and is the separate property of the decedent, and that the plaintiff has no interest therein, except such as is conferred upon him by the decedent's will.

Plaintiff's evidence shows that the parties were married in 1889, and that they continuously lived together until the decedent's death in 1929. Plaintiff testified that from the inception of the marital status it was agreed that the decedent should be the business head of the family and should handle all properties acquired. He testified further that it was agreed to place all such properties in the decedent's name in order to facilitate this plan, the parties at all times recognizing such properties as the accumulations of their joint efforts, in which each had an equal interest.

[1, 2] During their cross-examination of plaintiff the defendants introduced in evidence a certified copy of a decree of divorce granted to the decedent in 1890, one year after she had intermarried with the plaintiff. The record of this divorce decree was destroyed in the conflagration of 1906, but was restored in 1912 by court order pursuant to a proceeding duly initiated and prosecuted by the decedent for that purpose. A certified copy of the judgment roll in the restoration proceeding was introduced into evidence. The existence of the divorce decree is fatal to the plaintiff's claim that the property is community property. In the absence of a valid, subsisting marriage, there can, of course, be no community property. Flanagan

v. Capital Nat. Bank, 213 Cal. 664, 666, 3 P. (2d) 307; Schneider v. Schneider, 183 Cal. 335, 341, 191 P. 533, 11 A. L. R. 1386. Plaintiff testified that the parties were remarried in 1921, at decedent's suggestion, in order to quiet certain rumors that persons, other than plaintiff, "would be the sole heirs to the property" in the event of decedent's demise. The evidence now before us tends to indicate that all of the property here involved was acquired in the interim between the divorce granted in 1890 and the remarriage of the parties in 1921. There is no evidence indicating that any of the property was acquired while the parties were legally married. Under the above authorities, such evidence is indispensable to the characterization of the property as community property.

[3] In an attempt to overcome the effect of the divorce decree, plaintiff attacks its validity upon the ground that he was not served with summons in the divorce proceeding and had no knowledge of its pendency. The decree so attacked was entered in 1890, and recites on its face that service was duly had on defendant, plaintiff herein. This being so, plaintiff cannot now collaterally attack the decree on the ground urged. It is well settled that evidence outside the record is not admissible on collateral attack to show that summons was not served on the defendant. Crouch v. H. L. Miller & Co., 169 Cal. 341, 146 P. 880; Hahn v. Kelly, 34 Cal. 391, 94 Am. Dec. 742. If the fact of nonservice does not appear from an inspection of the judgment roll, it cannot be shown by extrinsic evidence. Lake v. Bonynge, 161 Cal. 120, 118 P. 535. Such invalidity does not appear from the restored judgment roll in the divorce proceeding. What has been said sufficiently disposes of a similar attack by plaintiff on the order restoring the record of the divorce proceeding. The order of restoration was entered in 1912, and recites on its face that service was duly had. For the reason already advanced, that order is also immune from collateral attack.

[4-6] The motion for nonsuit was granted primarily on the theory that plaintiff had misconceived his remedy and should have alleged facts entitling him to equitable relief. In this the court below erred. Legal and equitable relief are administered in this state in the same forum. The complaint herein is grounded upon the theory that the property involved was acquired by the parties during the existence of the marriage relationship. In effect, the action as originally conceived and filed was one in which a surviving husband sued the executors of the estate of his deceased wife for the purpose of procuring a decree that the property mentioned in the three counts of the complaint was the community property of the spouses before the death of the wife, and not her separate estate as claimed by the executors. Such an action will lie. Maguire v. Cunningham, 64 Cal. App. 536, 544, 222 P. 838. Inspection of the record discloses that the proof offered by the plaintiff tends to support the theory upon which the complaint was framed. It was not until the defendants, by way of defense, had offered in evidence a certified copy of the decree of divorce above mentioned, of which decree the plaintiff professed ignorance, that the issues were modified. This change came about solely by reason of the defense interposed. It should not, therefore, serve to foreclose the plaintiff from receiving whatever relief he is entitled to, legal or equitable, under the evidence. It is well settled that a plaintiff, without further pleading, may offer evidence, in avoidance of new matters set up in the answer or tending to overcome matters disclosed by the defendants' evidence admitted under the denials contained in the answer. Wendling Lumber Co. v. Glenwood Lumber Co., 153 Cal. 411, 415, 95 P. 1029; Peck v. Noee, 154 Cal. 351, 354, 97 P. 865; White v. Stevenson, 144 Cal. 104, 112, 77 P. 828.

[7, 8] If, as plaintiff contends and his evidence tends to show, he continuously lived with the decedent from the date of their marriage in 1889 until the decedent's death in 1929 in absolute ignorance of the existence of the divorce proceeding and the decree therein entered, and innocently and in good faith believed himself at all times to be the lawful husband of the decedent, he is entitled to an equitable apportionment of the gains made by their joint efforts. Coats v. Coats, 160 Cal. 671, 678, 118 P. 441, 36 L. R. A. (N. S.) 844; Schneider v. Schneider, supra; Figoni v. Figoni, 211 Cal. 354, 357, 295 P. 339, 340; 20 Cal. Law Rev. 453. Much of plaintiff's proffered evidence, to which the court below sustained objections, tended to sustain this theory. The court below should have accorded both sides a hearing on this issue, and, after weighing all of the evidence thereon, made its findings and entered its judgment in conformity thereto. In the event of a determination favorable to the plaintiff, an amendment of the complaint to conform to proof would have been in order. Such amendments are liberally allowed in this state. Lavely v. Nonemaker, 212 Cal. 380, 298 P. 976; Murnane v. Le Mesnager, 207 Cal. 485, 496, 279 P. 800. In so holding, we are not unmindful of the principle announced in Schirmer v. Drexler, 134 Cal. 134, 139, 66 P. 180, requiring that a plaintiff recover, if at all, upon the cause of action set out in the complaint and not upon some other which may be developed by the proofs. That principle is without application here, for, as already pointed out, the change in the issues and in the relief to be granted, if any, is traceable solely to the defense interposed. As above indicated, plaintiff was entitled to meet that defense, and, upon amendment of

the complaint, to receive such relief, either legal or equitable, as the evidence warrants.

The judgment is therefore reversed, with directions to the court below to permit plaintiff, if he be so advised, to amend his complaint in the manner herein indicated.

We concur: CURTIS, J.; PRESTON, J.; SHENK, J.; IRA F. THOMPSON, J.; SEAWELL, J.

218 Cal. 34

Ex parte ALBORI.

Cr. 3639.

Supreme Court of California.

April 25, 1933.

1. Prisons ⇐15.

Prisoner's time credits must be calculated under statute as amended since he entered prison (Pen. Code, § 1168, subd. 6).

2. Prisons ⇐15.

Time credits of prisoner, sentenced to two consecutive seven-year terms, should be computed on single 14-year "term of confinement" (Pen. Code, § 1168).

Expression "term of confinement," in Pen. Code, § 1168, providing for time credit reductions from such term, conveys thought of continuous period of imprisonment and has same effect as expression, "entire term of penal servitude," in earlier statute.

[Ed. Note.—For other definitions of "Term of Imprisonment," see Words and Phrases.]

3. Habeas corpus ⇐25(1).

Habeas corpus lies to release prisoner on parole granted by parole board (Pen. Code, § 1493).

4. Habeas corpus ⇐109.

Prisoner released on parole is not entitled to absolute discharge on writ of habeas corpus, but should be committed to custody of parole board (Pen. Code, §§ 1168, subd. 4, 1493; St. 1931, p. 1061).

In Bank.

Application by Marco Albori for a writ of habeas corpus to the Warden of San Quentin State Prison.

Writ granted, and petitioner ordered released on parole and committed to the custody of the Board of Prison Terms and Paroles.

Leo R. Friedman, of San Francisco, for petitioner.

U. S. Webb, Atty. Gen., and Wm. F. Cleary, Deputy Atty. Gen., for respondent.

SPENCE, Justice pro tem.

Petitioner, an inmate of the state prison at San Quentin, seeks his release on habeas corpus.

The facts are not in dispute. No return to the writ was filed herein, but it was stipulated upon the hearing "that the allegations of fact set forth in the petition are true; that the petition may stand as a return to the writ and also as a traverse thereto." It appears that petitioner was convicted on two charges of assault with a deadly weapon. For each of said offenses he was sentenced to be confined in the state prison at San Quentin for the term prescribed by law and he was thereafter received at said prison on April 20, 1929. On October 28, 1931, the board of prison terms and paroles fixed petitioner's term of imprisonment on said two sentences at seven years each, the terms to run consecutively. Said board also made its order granting petitioner five years on parole. Petitioner has been continuously confined in the state prison since being received there on April 20, 1929, and has been allowed full time credits during his confinement by resolutions duly adopted by the board upon recommendation of the warden.

[1] This proceeding has arisen by reason of a difference of opinion as to the manner of computing the time credits to which petitioner is entitled. The parties seek the opinion of this court as to whether said credits "are to be calculated under the statute in force at the time of his conviction or should be calculated under the statute now in force." Section 1168 of the Penal Code, which now provides for such time credits, has been amended twice since petitioner entered the prison, but subdivision 6 thereof provides, "The provisions of this section are to apply to all prisoners now serving sentences in the state prison." We believe it clear that petitioner's time credits are to be calculated under the provisions of said section as amended. See Ex parte Kepford (Cal. Sup.) 20 P.(2d) 333.

[2] The further question has arisen as to whether under said section such time credits should be computed on a single "term of confinement" of fourteen years or upon two separate "terms" of seven years each. The parties seem to be agreed upon the proposition that if the computation is to be made upon the first basis, then petitioner was entitled to his release upon parole on February 20, 1933, while if the computation is to be made upon the second basis, he will not be entitled to such release until October 20, 1933. The difference in these computations can best be explained in figures. Under section 1168 of the Penal Code, a full allowance of time cred-

its on a fourteen-year term amounts to five years and two months, leaving eight years and ten months to be served. Deducting from said period of eight years and ten months, the five-year period of parole allowed by the board, a period of three years and ten months remains. Petitioner had served three years and ten months on February 20, 1933. On the other hand, a full allowance of time credits on a seven-year term amounts to two years and three months. If petitioner's time credits are computed on each of the two seven-year terms independently and said credits are added, then the full allowance of time credits amounts to four years and six months, leaving nine years and six months to be served. Deducting from said period of nine years and six months, the five-year period of parole allowed by the board, a period of four years and six months remains. Petitioner will not have served four years and six months until October 20, 1933.

Said section 1168 provides that the prisoner is to "be allowed time credit reductions from his term of confinement as fixed by the board of directors. * * *" No decision construing the words "term of confinement" has been called to our attention and the previous decisions of this court have dealt with the construction of the wording of the earlier statutes. In Ex parte Dalton, 49 Cal. 463, the statute provided for the deduction of time credits "from the entire term of penal servitude to which such convict shall have been sentenced," and it was there held that each term of ten years was a part of the "entire term" of twenty years. After the decision in the Dalton Case the statute was amended to provide that the prisoner's time credit deductions should "be allowed * * * from his term" and the statute as amended, was before this court in Ex parte Clifton, 145 Cal. 186, 78 P. 655, 656. In that opinion, attention was called to the radical and essential difference" in language employed in the two statutes and it was held that the amendment required that the allowance of credits "be made from the terms as they were served, treated and considered as separate and independent terms of imprisonment." On page 189 of the opinion in 145 Cal., 78 P. 655, 657, it is clearly indicated that the decision rests upon the fact that the word "term" was used in the amendment "without any words of further definition or qualification." The court therefore concluded that "a prisoner is entitled to commutation credits for good behavior upon each term only as it is served, and not upon the separate terms to which he may have been sentenced, treated as a continuous period of imprisonment, or as an entire term, under the original section of the Penal Code, as construed in the Dalton Case."

Under the present wording of said section 1168, the word "term" is qualified by the use of the expression "term of confinement." Such expression conveys the thought of a "continuous period of imprisonment" and we believe that it should be construed to have the same effect for the purpose under discussion as the expression "entire term of penal servitude." We therefore conclude that petitioner's "term of confinement" within the meaning of that section was fourteen years and that his time credit reductions should be computed upon such "term of confinement" rather than upon two separate terms of seven years each. This being the case, petitioner is now entitled to his release upon parole.

[3, 4] It is contended herein that resort may not be had to habeas corpus to release a prisoner upon parole and that this remedy can only be exercised where the prisoner is entitled to an absolute discharge. There is ample authority however, for the use of the writ of habeas corpus to obtain relief other than that of absolute discharge. Pen. Code, § 1493, 29 C. J. 12, § 5. In support of this contention it is argued that the granting of parole is a matter vested in the board of prison terms and paroles and that said board cannot be compelled to grant a parole in any case. There is no doubt that the granting of parole is a matter entirely within the discretion of the board, but in the present case the board has heretofore made its order granting petitioner five years on parole. It is admitted that none of his credits have been forfeited and that his parole order stands unrevoked. There is therefore no question of the discretion of the board involved in this proceeding. It is further argued that the board has ample power to compel the warden to obey any lawful parole order it may make. Conceding that the board has such power, it does not follow that petitioner may not seek his release upon habeas corpus. Assuming, as above indicated, that petitioner is entitled to his release on parole, we believe that he has pursued the proper remedy. Petitioner is not, however, entitled to an absolute discharge. Subdivision 4 of section 1168 of the Penal Code provides: "Prisoners on parole shall remain under the legal custody and control of the state board of prison directors. * * *" The powers and duties of the board of prison directors with respect to paroled prisoners have been recently transferred to the board of prison terms and paroles. St. 1931, c. 487, p. 1061. Section 1493 of the Penal Code provides: "In cases where any party is held under illegal restraint or custody, or any other person is entitled to the restraint or custody of such party, the judge or court may order such party to be committed to the restraint or custody of such person as is by law entitled thereto." It is therefore apparent that in releasing petitioner upon parole, he should be committed to the custody of said board of prison terms and paroles.

It is therefore ordered that petitioner be released upon parole and that he be committed to the custody of the board of prison terms and paroles.

We concur: WASTE, C. J.; LANGDON, J.; SHENK, J.; CURTIS, J.; SEAWELL, J.; THOMPSON, J.

218 Cal. 7

CALIFORNIA TOLL BRIDGE AUTHORITY v. KELLY, State Director of Department of Public Works.

S. F. 14878.

Supreme Court of California.
April 20, 1933.

1. States ⇐115.

Statutes making present appropriation of moneys of existing special funds for maintenance and operation of San Francisco-Oakland Bay toll bridge did not convert revenue bonds payable only out of special funds into general obligations of state within constitutional prohibition against incurring indebtedness in excess of $300,000 without submission to the people (St. 1929, p. 1491; St. 1933, cc. 5, 9; St. 1927, p. 1564, § 4; Const. art. 16, § 1).

2. States ⇐115.

Statutes making present appropriation of money of highway construction fund and state highway fund for maintenance and operation of San Francisco-Oakland Bay toll bridge payable solely out of such funds *held* not to create "debt," or pledge of state's credit within constitutional prohibition against incurring indebtedness in excess of $300,000 without submission to the people (St. 1929, p. 1491; St. 1933, cc. 5, 9; St. 1927, p. 1564, § 4; Const. art. 16, § 1).

[Ed. Note.—For other definitions of "Debt," see Words and Phrases.]

3. States ⇐131.

Statute making available specific fund for definite object constitutes valid appropriation of such fund, though amount thereof is not fixed.

4. States ⇐122.

California Toll Bridge Authority is agency of state and "public corporation" with power to deposit moneys in banks outside state for payment of principal or interest on bridge bonds within constitutional provision authorizing state to deposit money in outside banks (St. 1929, p. 1491; St. 1933, cc. 5, 9; St. 1927, p. 1564, § 4; Const. art. 11, § 16½, as amended in 1924).

"Public corporations" are auxiliaries of government in important business of municipal rule, and, where a corporation is composed exclusively of officers of the government having no personal interest in it or with its concerns and acting only as organs of the state in effecting a great public improvement, it is a "public corporation."

[Ed. Note.—For other definitions of "Public Corporation," see Words and Phrases.]

5. Mandamus ⇐103.

Mandamus *held* to lie to compel director of public works to perform his duty to sign bonds of California Toll Bridge Authority authorized to reimburse state for moneys advanced (St. 1929, p. 1491; St. 1933, cc. 5, 9; St. 1927, p. 1564, § 4; Const. art. 16, § 1).

In Bank.

Petition by California Toll Bridge Authority for a writ of mandate to be addressed to Earl Lee Kelly, as Director of the Department of Public Works of the State of California, to compel respondent as such Director to affix his signature to certain bonds issued by petitioner.

Peremptory writ directed to issue.

U. S. Webb, Atty. Gen., Robert W. Harrison, Chief Deputy Atty. Gen., C. C. Carleton, of Sacramento, Department of Public Works of Sacramento, and Hugh K. McKevitt, John J. Dailey, F. M. McAuliffe, Lloyd W. Dinkelspiel, and Heller, Ehrman, White & McAuliffe, all of San Francisco, for petitioner.

Erwin P. Werner, City Atty., Loren A. Butts, Asst. City Atty., F. M. Bottorff, Deputy City Atty., and S. B. Robinson, Sp. Counsel, Department of Water and Power, all of Los Angeles, amici curiæ, for petitioner.

Frank B. Durkee, of Sacramento, and C. R. Montgomery, of Los Angeles, for respondent.

WASTE, Chief Justice.

The petitioner, California Toll Bridge Authority, duly authorized the issuance of San Francisco-Oakland Bay toll bridge revenue bonds amounting to $62,050,000, for the purpose of constructing a toll bridge across the Bay of San Francisco between the cities of San Francisco and Oakland, and for the purpose of reimbursing the state of California for the sum of $650,000 theretofore advanced by the state and expended in certain preliminary work in connection with the bridge. The bridge authority applied to and sought to have the Reconstruction Finance Corporation, a public corporation created by act of

Congress, and hereinafter referred to as the corporation, bid for the bonds. The application was accepted, and the corporation agreed to and has bid for $61,400,000 of the issue on condition that bonds be sold elsewhere in an amount sufficient to reimburse the state for the $650,000 advanced by it. It is a portion of this last-mentioned issue to which the respondent, as director of public works of the state of California, whose duty it is to sign all bonds issued by the Toll Bridge Authority, refuses to affix his signature, and this proceeding is brought to compel him to do so.

The purpose, the history, and the legal sufficiency of the legislation (St. 1929, c. 763, p. 1491) which created the California Toll Bridge Authority (hereinafter referred to as the Bridge Authority) were carefully considered by this court in Re California Toll Bridge Authority (City and County of San Francisco v. Wentworth), 212 Cal. 298, 298 P. 485, involving, in substance, the propriety of the issuance of the very bonds here in dispute. Petitioner relies upon that decision as settling all of the points of the controversy now here. The question considered in the Wentworth Case was the effect of the means provided for the ultimate satisfaction and payment of the claims of the bondholders, that is, the segregation of the toll revenues derived from the operation of the bridge into a special fund to which the bondholders must look exclusively for payment. We held that the issuance of such "revenue bonds" and the creation of such "special fund" for their payment did not create and would not be a debt or general obligation of the state, and did not amount to a violation of the provision of the State Constitution prohibiting the creation of debts or liabilities in excess of $300,000 without submission of the proposition to a vote of the people. Const. art. 16, § 1. Other decisions of this court support the conclusion that the "special fund" doctrine has been adopted in this state. Shelton v. City of Los Angeles, 206 Cal. 544, 275 P. 421; Garrett v. Swanton, 216 Cal. 220, 13 P.(2d) 725. The respondent "does not deny the soundness of the holding in the [Wentworth] Case," but contends that since the date of that decision legislative changes have been made, and factors have entered into the plan for financing the building of the bridge and its maintenance when built, which call the constitutionality of the procedure into grave question. The Reconstruction Finance Corporation, as a party to the contract created by the application of the Bridge Authority and its acceptance by the corporation, submits the controversy on the contentions advanced by the director of public works and the points and authorities presented by him.

How the bridge, when built, would be maintained and operated had not received legislative attention when the Wentworth Case was decided, other than the provisions contained in the act creating the Bridge Authority. Owing to the exigencies of the times, and as before stated, the Bridge Authority applied to and the Reconstruction Finance Corporation agreed to take the bond issue on condition that the Legislature should enact legislation satisfactory to the corporation. To meet these conditions, the Legislature adopted emergency legislation authorizing and directing the department of public works to acquire the sites and construct the approaches to the bridge (St. 1933, c. 9); and, for the purpose of enabling the department to carry on the work, appropriated (St. 1933, c. 5) the sum of $1,650,000 each year until the total sum of $6,600,000 has been made available for said purpose "out of any moneys in the state highway construction fund and out of any moneys to accrue or be credited to said fund during the period of years required for the construction of the bridge, but only from that portion of said fund allocated or which may be allocated for the construction and improvement of primary state highways to the group of counties designated as group No. 1 in the act of the legislature classifying the highways of the state into primary and secondary highways." St. 1927, c. 794, p. 1564, § 4. The city and county of San Francisco and the city of Oakland are in this group. These sums so appropriated, and commencing with the year 1933, shall be available, and shall be payable at such times and in such amounts as the department of public works shall deem to be necessary in order to complete such acquisition of sites and construction of the approaches by the time the bridge is ready for opening. The Legislature also provided that the toll bridge and the approaches shall constitute a primary state highway, and that at all times during construction the director of public works shall cause the same to be insured against all risks, and that upon the completion of the construction of the bridge and approaches, and as long as any of the bonds which may be issued by the Bridge Authority for the construction of the bridge may be outstanding, the department of public works shall permanently maintain and operate the bridge and approaches as a primary state highway, and shall cause them to be at all times insured. None of the cost of constructing the approaches and of maintaining and operating the bridge and approaches, including the cost of insurance (other than insurance against loss of tolls or other revenue), shall be paid out of the proceeds of the bonds or out of the tolls and revenues received from the use and operation of the bridge as long as any of the bonds are outstanding and unpaid, but are to be paid from moneys accruing and to accrue in the state highway maintenance fund available for roadway purposes in the group of counties designated as group No. 1; provided, that such cost of operation and maintenance "may be paid from any other fund or funds which may

hereafter be made available for such purposes."

[1] Respondent contends that the practical and ultimate result of these statutory provisions calling for the maintenance, operation, and insurance of the bridge will be the conversion of the bonds issued to finance the construction of the bridge into general obligations of the state, falling within the prohibition of the Constitution against incurring of indebtedness, supra. We cannot accept that view. While the practical effect of the plan may be to impose a burden on certain special funds of the state, to protect the state's outlay in the construction of the approaches to the bridge and for the purpose of maintenance, operation, and insurance of the structure, it does not result that the bonds will be general obligations of the state in any sense. The legislation which provides for their issuance, their nature, and kind prevents the holders from having any recourse against the state for their payment in the event of default. The act providing for the issuance of the bonds (St. 1929, c. 763, p. 1491) expressly provides that the bonds shall not constitute or be a debt, liability, or obligation of the state, but the payment of both principal and interest shall be secured only by the tolls or other revenues collected from the particular bridge for which such bonds are issued. In re California Toll Bridge Authority (City and County of San Francisco v. Wentworth), supra. While it may be to the interests of the state, in the event of necessity, to make contribution for the preservation of the bridge, the better to conserve the amount of funds it has spent in assisting the consummation of the enterprise, it does not follow that the bonds themselves will be thereby converted into a liability against the general funds of the state. The construction of the bridge by the Bridge Authority with funds raised by the issuance and sale of revenue bonds which, under no circumstances, may create a general liability against the state, is one transaction, complete in and of itself. What the state may do in the way of assisting an enterprise which will result in the construction of an important link in its system of primary highways is a separate and distinct transaction, entirely aside the mark in considering the legality of the bonds in this case, unless by some legal transformation the bonds have been changed from revenue bonds, payable by the Bridge Authority from a special fund, into general liabilities of the state. Such transformation or transition is not apparent to the court.

We must not lose sight of the fact that these bonds are not, and cannot be, bonds of the state creating a general liability against it. So far as payment of principal and interest of the bonds is concerned, no funds of the state, general or special, can be resorted to. This fact serves to distinguish the present case from Garrett v. Swanton, 216 Cal. 220, 13 P.(2d) 725, and like cases from other jurisdictions cited and relied on by respondent. In Garrett v. Swanton, the contract for the purchase of the machinery provided that the price was to be paid from the revenues received from the operation of the entire water supply system, of which the new equipment was but a part. The bonds were city bonds, and were not payable solely from the special fund created by segregation of the revenues for that purpose, but also from the general funds of the city in the event the special fund should be insufficient.

[2, 3] Respondent admits that the "special fund" theory for the payment of principal and interest of these bonds was involved in and sanctioned in its application by the decision in the Wentworth Case, but he contends that the state, in effect, will be compelled to protect its property by general fund expenditures for operation, maintenance, and insurance, citing such cases as City of Pasadena v. McAllaster, 204 Cal. 267, 267 P. 873. For this reason, he contends the "special fund" theory is not applicable. This contention is not tenable. It seems clear that the statutes involved, providing for the building of approaches and the maintaining, operating, and insuring of the bridge, contemplate the present appropriation of money out of special funds now in existence, the highway construction fund and the state highway maintenance fund, and, for this additional reason, do not in any way involve the creation of an indebtedness or the pledging of the credit of the state. It cannot be questioned that a statute making available a specific fund for a definite object constitutes a valid appropriation of such fund, and it is not even necessary that the amount thereof be fixed or specified. Ryan v. Riley, 65 Cal. App. 181, 223 P. 1027; Gamble v. Velarde, 36 N. M. 262, 13 P.(2d) 559. The statutes under consideration make no attempt to pledge any funds for the approaches to or for the operation, maintenance, and insurance of the bridge. Under the authorities from other states, however, even if the statutes had purported to pledge these funds for these purposes, such action would not constitute the pledging of the credit of the state. These funds are special funds, and obligations payable solely from such funds do not constitute a debt within the meaning of the constitutional limitation involved. In Briggs v. Greenville County, 137 S. C. 288, 135 S. E. 153, the state agreed to repay to the counties and highway districts money advanced by them, but only out of the special fund set apart for the construction and maintenance of highways. This fund, as is the case here, was fed from receipts on gasoline. The court held that this created no indebtedness within the meaning of the Constitution of South Carolina. At page 157 of 135 S. E., 137 S. C. 288, the court stated:

"The proposed reimbursement agreements will not constitute a general liability. * * *

The reimbursements to be made thereunder can be made only from a special fund consisting of the gasoline tax, automobile license tax, and federal aid. No property tax can ever be levied to meet these obligations.

"Is such a limited liability a debt of the state in the constitutional sense? The underlying purpose of the constitutional provisions concerning the creation of state debt was that they should serve as a limit of taxation—as a protection to taxpayers, and especially those whose property might be subjected to taxation. This purpose will not be defeated if it should be held by this court that a debt for the construction of a state highway system, payable exclusively from federal aid moneys and special license taxes to be borne by the persons who will derive the principal benefits from the state highway system, is not a debt of the kind required by the Constitution to be approved by the voters of the state before it is incurred. According to the weight of authority in other states, such a debt does not fall within the terms of such a constitutional provision."

See, also, State v. Moorer, 152 S. C. 455, 150 S. E. 269; Wright v. Hardwick, 152 Ga. 302, 109 S. E. 903, and Alabama State Bridge Corp. v. Smith, 217 Ala. 311, 116 So. 695. The reasoning of these cases seems conclusive here.

[4] Respondent urges, as a further reason for his refusal to sign and execute the bonds, that the same are payable at the option of the holder at either certain designated banks in San Francisco or one designated in New York. The Constitution (article 11, § 16½) was amended in 1924 to provide "that the state or * * * [other public or municipal corporations] issuing bonds under the laws of this state, may deposit moneys in any bank or banks outside this state for the payment of the principal or interest of such bonds at the place or places at which the same are payable." Respondent contends that the California Toll Bridge Authority is not specifically mentioned as being entitled to deposit any of its funds in a bank outside the state of California for the payment of interest on these bonds. The Toll Bridge Act, § 13, provides that the state treasurer shall transfer to the place or places of payment named in the bonds such sums as may be required to pay the maturing interest and principal of the bonds. There can be little question that the California Toll Bridge Authority is an agency of the state. Consequently, all moneys received from the sale of bonds and other tolls and from revenues of the bridge are in the custody of the state. Furthermore, while there is no express reference to the Bridge Authority as being a public corporation, we are satisfied that it is. Through its board of directors or its managing agents, the Bridge Authority may make contracts, incur debts, employ servants and agents, and perform many other acts which pertain to natural persons; and it may sue and be sued in the name of California Toll Bridge Authority. Giving it these powers is the creation of an entity with power to act. That this entity was not, in terms, named a corporation is of no significance. Hancock v. Louisville & N. R. Co., 145 U. S. 409, 415, 12 S. Ct. 969, 36 L. Ed. 755. As was said in Dean v. Davis, 51 Cal. 406, 409, quoting from Angell and Ames on Corporations, "Public corporations 'are the auxiliaries of the government in the important business of municipal rule.' * * * 'Where a corporation is composed exclusively of officers of the government having no personal interest in it or with its concerns, and only acting as the organs of the State in effecting a great public improvement, it is a public corporation.'" See, also, State v. Bates, 317 Mo. 696, 296 S. W. 418; Stern v. State Board of Dental Examiners, 50 Wash. 100, 96 P. 693.

[5] Other contentions advanced by the respondent appear to us to be definitely disposed of by the decision in the Wentworth Case, supra, and by what we have already said in answer to the questions here considered.

Let a peremptory writ of mandate issue requiring the respondent, as director of the department of public works of the state of California, to sign the bonds here involved.

We concur: LANGDON, J.; CURTIS, J.; SHENK, J.; SEAWELL, J.; IRA F. THOMPSON, J.; PRESTON, J.

218 Cal. 17

MARTIN v. SUGARMAN et al.

L. A. 13524.

Supreme Court of California.

April 20, 1933.

1. Pleading ⇐165.

All matters of avoidance set up by answer are deemed denied and put in issue by plaintiff (Code Civ. Proc. § 462).

2. Evidence ⇐434(8).

Where defendant introduced purported compromise agreement in support of defense of release alleged in answer, plaintiff's evidence that execution of agreement was procured by fraud *held* admissible (Code Civ. Proc. §§ 462, 1856).

Plaintiff's evidence that execution of agreement was procured by fraud was admissible under Code Civ. Proc. §§ 462, 1856, in view of general rule that, where documentary evidence is offered in support of alleged defense, plaintiff may meet proof by establishing by parol evidence

any such defenses as estoppel, abandonment, bad faith, concealment, deceit, duress, forfeiture, fraud, misrepresentation, mistake, rescission, statute of limitations, undue influence, or waiver, and defendant may counter with all pertinent defenses such as estoppel, failure to rescind, laches, and statute of limitations.

In Bank.

Appeal from Superior Court, Los Angeles County; L. T. Price, Judge.

Action by Louis F. Martin against J. J. Sugarman and another, doing business as the J. J. Sugarman Company, and others. From a judgment in favor of the plaintiff, the defendants appeal.

Affirmed.

Samuel A. Miller, Paul J. Ziegler, and John E. Dalton, all of Los Angeles, for appellants.

Edw. C. Purpus, of Los Angeles, for respondent.

PRESTON, Justice.

Action for an accounting. The answer denied all allegations of the complaint and set up some five special defenses; the only one of interest being No. 5 to the effect that plaintiff and defendants mutually agreed to cancel their reciprocal demands and plaintiff thereupon released the claims upon which this cause is based. Defendants, in attempting to establish this defense, raise the only question of law involved on the appeal, and the lack of merit in their contention will presently be shown.

These defendants are professional purchasers and liquidators of insolvent, bankrupt, assigned, and distressed stocks of merchandise, which stocks are sold by them through various stores, largely temporary in character, opened and operated for that purpose. The proof abundantly supports the finding that plaintiff was employed by defendants at a specified weekly salary, coupled with a joint venture feature allowing to him a percentage of the profits of each establishment, but not requiring him to share losses, should any occur; also that each particular store should be a separate unit so that net profits or losses from any one store should not in any wise affect the others.

The claim of plaintiff for a large sum was disputed by defendants, and this litigation followed. A referee was appointed, and evidence in a very large volume was received. Upon the report of the referee, adopted by the court, a balance was found to be due plaintiff, above set-offs, of $892.42; the reference, including compensation to the referee and other expenses having amounted to more than $1,000 in cost.

The evidence to support the findings is challenged by appellants, but the excerpts therefrom quoted in the respective briefs of the parties and supplements thereto conclusively show this contention to be without merit. The same is true of the contention that the overhead of the central business office should be prorated among the several enterprises before the profits from the respective stores could be determined. The evidence, although conflicting, supports the finding that these charges were to be excluded.

[1, 2] Lastly, defendants introduced a document signed by plaintiff, purporting to be a compromise agreement or settlement between the parties for release of the cause of action here. Evidence, parol in character, justified the finding that this paper was not intended by plaintiff to be a final settlement and that the execution thereof was induced by the fraud of defendants. They say that the introduction of such testimony violated the rule of law that parol evidence may not be introduced to vary the terms of a written instrument. Section 1856, Code Civ. Proc Manifestly, however, appellants do not appreciate the basic principles controlling our system of pleading. Since the Practice Act, § 65, followed by the enactment of section 432 of the Code of Civil Procedure, all matters of avoidance set up by answer are deemed denied and put in issue by plaintiff. And, where documentary evidence is offered in support of such a defense, plaintiff may meet that proof by establishing by parol evidence any such defenses as estoppel, abandonment, bad faith, concealment, deceit, duress, forfeiture, fraud, misrepresentation, mistake, rescission, statute of limitations, undue influence, or waiver. And defendant, in such case, may counter with all pertinent defenses such as estoppel, failure to rescind, laches, and statute of limitations. A vast number of authorities could be cited to support these statements. 21 Cal. Jur., § 113, pp. 163-166. These proofs are an exception to the rule contended for by counsel; in fact, they are embodied in subdivisions 1 and 2 of section 1856 of the Code of Civil Procedure.

The judgment is affirmed.

We concur: WASTE, C. J.; LANGDON, J.; CURTIS, J.; IRA F. THOMPSON, J.; SHENK, J.

218 Cal. 78

CRAIG et al. v. BUCKLEY et al.

BUCKLEY v. HIRSCH et al.

S. F. 14057.

Supreme Court of California.

April 27, 1933.

1. Mortgages ⇐576.

Complaint cannot be made that notice of sale under trust deed set forth excessive amount where notice was not set forth in pleading, and nothing in judgment roll showed what was contained therein.

2. Mortgages ⇐357.

Under trust deed expressly authorizing postponement of sale by oral proclamation, trustee could postpone sale from time to time, without further publication of notice.

3. Mortgages ⇐357.

Order restraining sale under trust deed does not prevent trustee from continuing sale to time after restraining order has become ineffective.

4. Principal and agent ⇐145(4).

Plaintiff may bring action against both agent and undisclosed principal, but must elect whether he will take judgment against one or other, unless right to compel election is waived by failure to demand that remedy during trial.

In Bank.

Appeals from Superior Court, City and County of San Francisco; Edward W. Engs, Judge.

Actions by J. L. Craig and others against Christopher A. Buckley, Jr., and others and by Christopher A. Buckley, Jr., against Sidney J. Hirsch and others. From an adverse judgment in the first case, plaintiff W. L. Hogan appeals; and from an adverse judgment in the second case, defendant W. L. Hogan appeals.

Affirmed.

H. M. Anthony, of San Francisco, for appellant.

Oliver Dibble, of San Francisco, for respondent.

CURTIS, Justice.

The first of these two actions was instituted by the owners of certain real property, which was subject to a deed of trust, to enjoin the sale of said real property, after an alleged default on the part of the plaintiffs in the payment of the promissory note, to secure which said trust deed was given. The second action was commenced by the payee of said promissory note to recover an amount alleged to be due on said promissory note after the sale of said real property under said trust deed, and the credit of the net proceeds of said sale upon said promissory note. The two cases were consolidated for trial. They were tried together and one set of findings was made and one judgment was rendered by which all of the issues in the two actions were determined and the rights of the parties adjudicated. The court in the judgment as rendered denied to the plaintiffs in the first action any relief by means of injunction, or otherwise, and in the second action gave judgment for the amount found due on said promissory note after the application to the payment thereof of the net proceeds of the sale of said real property under said trust deed. W. L. Hogan, one of the plaintiffs in the first action, and one of the defendants in the second action, alone appeals. The appeal is taken on the judgment roll.

Although W. L. Hogan was not a party to said promissory notes or trust deed, the court found that at the time of making said loan he was in fact the owner of said real property; that said loan was made for his use and benefit; and that Sidney J. Hirsch, one of the signers of said note, acted as the agent for said defendant, W. L. Hogan, in the making of said loan and in the execution and delivery of said note and deed of trust. The court, therefore, gave a personal judgment for the amount due and unpaid on said promissory note against the said W. L. Hogan and also against the said Sidney J. Hirsch and Anna Mae Hirsch, his wife. It released from all liability, however, Morton Hirsch, who had signed said promissory note with Sidney J. Hirsch and Anna Mae Hirsch, and who personally negotiated the loan of said money from Christopher A. Buckley, Jr., the plaintiff in the second suit.

[1] The first point made by appellant for the reversal of the judgment is that the notice of sale under the trust deed set forth an excessive amount as due and unpaid on said promissory note at the date of said notice. A complete answer to this contention is that said notice of sale is not set forth in any of the pleadings nor is there anything in the judgment roll to show just what was contained in said notice of sale, or that there was in said notice of sale any overstatement of the amount due.

[2] Equally untenable is the next point made by the appellant that the notice of sale was insufficient. It is conceded that due and legal notice of the sale in the first instance was given both by publication in a newspaper and by posting. Thereafter the trustee at the time and place fixed in said notice and without any further publication or posting postponed the sale to a definite date and at the place fixed in said notice of sale. By this and other like postponements the sale was

continued from August 30, 1927, the date fixed in the said notice of sale, to January 26, 1928. There were twenty-three such postponements and they were each made by oral proclamation by the trustee at the time and place previously appointed and advertised for such sale. These postponements were made in accordance with the terms of said trust deed, which provided: "[The trustee] may from time to time postpone such sale by such advertisement as it may deem reasonable, or without further advertisement by proclamation made to the persons assembled at the time and place previously appointed and advertised for such sale." Appellant has cited a number of authorities to the effect that when a sale of property under execution, or under a power of sale, is postponed or continued a new notice of sale must be given either by publication or posting, or by both, as required in the first instance. These cases, as will be readily seen upon an examination of them, arose either under statutes expressly requiring the giving of a new notice or under instruments containing a power of sale making the same requirement. None of them, so far as we are able to determine, involved a sale under a trust deed, or other instrument, expressly authorizing the trustee, or person authorized to make the sale, to postpone the sale by oral proclamation. We see nothing in the claim of appellant that the provision in the deed of trust quoted above authorizes only one postponement. On the other hand, it explicitly provides for a postponement, "from time to time." Before leaving this phase of the case, we might add that there are cases holding that a sale duly and regularly noticed may be legally postponed by public proclamation made at the time and place at which the sale was noticed. Allen v. Cole, 9 N. J. Eq. 286, 59 Am. Dec. 416; Coxe v. Halsted, 2 N. J. Eq. 311; Beacon Hill Land Co. v. Bowen, 33 R. I. 404, 82 A. 81.

[3] The further point is made that the sale was continued contrary to the terms of a restraining order. Again we must call attention to the condition of the record. It does not contain the restraining order, or any information as to its contents sufficient to support appellant's assertion that its terms were violated by the trustee in merely postponing the date of sale. The only statement in the record to which our attention is called as indicating that a restraining order was issued against the trustee is a reference to an allegation in the answer of respondent, "that said sale would have been actually made on the 30th day of August, 1927, at the hour of 11:00 a. m. on said day had not this court restrained the same." If we can assume from this statement that the sale itself was restrained, it does not follow that the trustee was restrained from continuing the sale to a time after the restraining order had become ineffective. This evidently was just what was done, as no claim is made that any restraining order against the sale was in effect at the date on which the sale was finally made.

[4] The final point made by appellant is that the judgment is erroneous in that it runs against both the agent and the undisclosed principal. The rule upon this subject is well settled that while the plaintiff may bring the action against both the agent and the undisclosed principal, he may not have judgment against both, but before the close of the case must elect whether he will take judgment against the one or the other. McDevitt v. Chas. Corriea & Bros., 70 Cal. App. 245, 233 P. 381. This rule, however, is subject to an exception, or modification which holds that the right to compel an election is waived by failure to demand or move for that remedy during the course of the trial. Klinger v. Modesto Fruit Co., Inc., 107 Cal. App. 97, 290 P. 127. The case just cited was followed by this court in a recent decision wherein is to be found the following statement of the law: "It is contended that where suit is brought against an agent, and the undisclosed principal is joined, the plaintiff must, prior to the judgment, elect to hold one or the other. This is undoubtedly the rule, and it is fully discussed in the recent case of Klinger v. Modesto Fruit Co., 107 Cal. App. 97, 290 P. 127; but it was there held also that the principal who desires to take advantage of the rule must raise the point in the trial court by demurrer, motion, or otherwise; and that a failure to demand such an election in the lower court constitutes a waiver of the right. There is no evidence in the record of such a demand, and the point is therefore not well taken." Fleming v. Dolfin, 214 Cal. 269, 271, 4 P.(2d) 776, 777, 78 A. L. R. 585.

We have searched the record in the case now before us and do not find that appellant by motion, demurrer, or otherwise ever raised the point in the trial court or demanded or requested that respondent elect whether he take judgment against the agent or the undisclosed principal. Under the decisions cited such a failure constitutes a waiver of the right.

The judgment is affirmed.

We concur: WASTE, C. J.; SHENK, J.; SEAWELL, J.; IRA F. THOMPSON, J.; PRESTON, J.; LANGDON, J.

218 Cal. 69

HART v. FARRIS et al.
L. A. 13223.

Supreme Court of California.
April 26, 1933.

1. Automobiles ⇐244(13).
Evidence supported finding of negligence of motorist, allegedly not keeping lookout, where headlights would have disclosed bicycle 300 feet away (St. 1923, p. 517, § 28½, subd. b, as added by St. 1929, p. 510, § 7).

Although evidence was conflicting, there was testimony that automobile was traveling in excess of 20 miles an hour within residence district as defined by California Vehicle Act (St. 1923, p. 517, § 28½, subd. b, as added by St. 1929, p. 510, § 7; that driver was not keeping lookout ahead; and that he admitted responsibility for collision with bicycle, which would have been disclosed by headlights of automobile at any point within 300 feet ahead of automobile.

2. Automobiles ⇐244(46).
On basis of testimony, even if uncorroborated, of bicyclist injured by automobile, jury *held* justified in negativing contributory negligence.

3. Automobiles ⇐226(2).
That bicycle struck by automobile was unlighted, thereby violating statute, would not preclude bicyclist's recovery because contributorily negligent, unless such violation proximately contributed to accident (St. 1923, p. 550, § 105).

4. Automobiles ⇐244(46).
Evidence warranted conclusion that absence of lights on bicycle did not constitute contributory negligence; automobile headlights disclosing bicycle 300 feet away, and motorist failing to keep lookout (St. 1923, p. 550, § 105).

5. Automobiles ⇐212.
Automobiles being parked along curb, bicyclist riding 18 feet from curb *held* not violation of ordinance keeping bicycles within 5 feet of curb unless turning or passing vehicles.

6. Trial ⇐228(3).
Contributory negligence instruction *held* faulty because using "approximate" instead of "proximate" in discussing cause of injury.

[Ed. Note.—For other definitions of "Approximate; Approximately" and "Proximate," see Words and Phrases.]

7. Trial ⇐261.
Court is not required to modify instruction to make it correct.

8. Automobiles ⇐246(48).
Instruction that bicyclist and motorist had equal right to street *held* not erroneous; ordinance keeping bicycles within 5 feet of curb being inapplicable because of parked automobiles.

9. Automobiles ⇐246(28).
Instruction that bicyclist need not look back for vehicles approaching from behind to avoid collisions *held* not erroneous.

10. Trial ⇐29(3).
That court in negligence case required witness several times to indicate on plat meaning of "here" in her testimony *held* proper.

11. Trial ⇐29(3).
If counsel is asking proper questions without delay or repetition, court should ordinarily refrain from taking over questioning of witness, particularly in jury trials.

12. Trial ⇐31.
Court's questioning defendants' witness, thereby developing strong evidence for defendants, *held* not error available to defendants, in absence of timely objection.

13. New trial ⇐77(2).
Court may interpose its judgment as against jury's only where verdict is so grossly disproportionate as to shock sense of justice and raise strong suspicion of prejudice or passion.

14. Damages ⇐130(1).
$20,000 for woman 41, sustaining fractured ribs, vertebræ, and wounds confining her to bed for over two months, and causing suffering from heart trouble which probably would greatly shorten life, *held* not excessive.

In Bank.

Appeal from Superior Court, San Diego County; Charles C. Haines, Judge.

Action by Gerda Hart against Robert Farris and others. Judgment for plaintiff, and defendants appeal.

Affirmed.
Prior opinion, 13 P.(2d) 790.

Noon & Noon and Charles A. Brinkley, all of San Diego, for appellants.

Fred A. Steiner, of San Diego, and Eugene D. Williams, of Los Angeles, for respondent.

CURTIS, Justice.

An order was made transferring this cause to this court, for the reason that at the hearing of the petition for transfer the members of the court were in serious doubt whether the judgment of the trial court awarding damages to the plaintiff in the sum of $20,000 was not excessive. We therefore decided to give this question further consideration. We have carefully examined the record before us, and particularly that portion which relates to the nature and character of plaintiff's

injuries sustained by her by reason of the collision between her bicycle and the automobile of the defendants, and, after such examination, we are of the opinion that the judgment herein should not be disturbed. Plaintiff's injuries are accurately set forth in detail in the opinion of the District Court of Appeal, and we are in agreement with the members of that court in their conclusion that the condition of the plaintiff, directly and proximately due to the injuries sustained by her in said collision, furnishes sufficient support for the verdict of the jury and the judgment based thereon in favor of the plaintiff. In all other respects the opinion of the District Court of Appeal also meets with our approval. We therefore adopt said opinion as the opinion of this court. As written by Justice pro tem. Harden, it is as follows:

Defendants appeal from a judgment entered upon the verdict of a jury in favor of plaintiff for the sum of $20,000 and for costs. The action is one for damages for personal injuries sustained by plaintiff arising out of a collision between a bicycle ridden by plaintiff and an automobile driven by the defendant Malcolm L. Farris. The accident occurred on El Cajon avenue in the city of San Diego at about 7 p. m. on January 30, 1930. Malcolm L. Farris, the son of defendants, Robert Farris and Mabel Farris, was driving the automobile with the consent of his parents; and his mother, Mabel Farris, and a friend were passengers therein. El Cajon avenue is a thoroughfare 75 feet in width running in an easterly and westerly direction. Three parallel streets intersect El Cajon avenue at right angles. From west to east they are Cherokee street, Thirty-Seventh street, and McClintock street. The scene of the accident was within a residence district as defined by the California Vehicle Act (St. 1929, p. 510, § 7). The collision occurred at a point approximately 52 feet west of McClintock street and 18 feet from the southerly side of El Cajon avenue. On the day of the accident, the sun set at 5:19 p. m.

[1] The first of several points raised is that the evidence did not establish negligence on the part of the defendants. The testimony of plaintiff was to the effect that at the time of the collision she was riding her bicycle in an easterly direction along the southerly side of El Cajon avenue; that immediately after an automobile had passed her bicycle on the left side she was run down from the rear by the automobile of defendants. There was evidence from which the jury could have concluded that at the time of the collision defendants' automobile was traveling in excess of 20 miles per hour and that the driver was not keeping a lookout ahead. There was also evidence of declarations made by the driver of the automobile admitting responsibility for the collision. It was shown that the headlights of the automobile lighted the highway to such an extent that a person riding a bicycle at any point within a distance of 300 feet ahead of the automobile would be visible to the driver thereof. It was also in evidence that the force of the impact threw plaintiff a distance of from 18 to 20 feet in an easterly direction. While there was testimony tending to exonerate the driver of the automobile from fault, it merely created a conflict in the evidence to be determined by the jury. The evidence was ample to support a finding of negligence upon the part of the driver of the automobile.

[2] The next point raised is that the evidence established contributory negligence on the part of plaintiff barring a recovery. Several contentions are advanced in support of this claim. The first one is that the evidence established that plaintiff having ridden her bicycle in an easterly direction along the north side of El Cajon avenue from Cherokee street to a point between Thirty-Seventh and McClintock streets approximately north of the scene of the accident, turned her bicycle at that point and proceeded to cross El Cajon avenue between street intersections by riding due south. There is no merit in this contention. Plaintiff testified that she rode along the north side of El Cajon avenue from Cherokee street to Thirty-Seventh street; that she turned south upon reaching Thirty-Seventh street and crossed El Cajon avenue to a point where she could and did fall in with the east-bound traffic; that she then proceeded easterly along the south side of El Cajon avenue to the point of collision. Her testimony to the effect that she pursued said course was corroborated to some extent by the testimony of other witnesses. But, whether corroborated or not, plaintiff's testimony alone was sufficient to justify the jury in finding in accordance therewith.

[3, 4] Appellants' second contention in connection with the defense of contributory negligence is that the evidence established that, in violation of the requirements of section 105 of the California Vehicle Act (St. 1923, p. 550), plaintiff's bicycle was not equipped with a lamp on the front nor with a reflex mirror or lamp on the rear exhibiting a red light. It was admitted that the bicycle carried no light at all. Appellants contend that such fact establishes negligence per se upon the plaintiff's part barring recovery. A violation of the provisions of the statute by plaintiff would not bar her from recovery on the ground of contributory negligence unless such violation of law proximately contributed to the accident. Berges v. Guthrie, 51 Cal. App. 547, 197 P. 356; Godeau v. Levy, 72 Cal. App. 13, 236 P. 354. Presumably the jury concluded that, in view of the lack of attention of the driver of the automobile to the road ahead and the good light which

the headlights of the automobile reflected ahead for a distance of 300 feet, the absence of lights on the bicycle was not a contributing factor in the accident. Such was the view of the trial court as expressed in denying appellants' motion for a new trial. Such a conclusion had ample support in the evidence.

[5] Appellants' third contention in connection with said defense is that the evidence established contributory negligence as a matter of law, in that it was shown without conflict that plaintiff, in violation of the provisions of a city ordinance in effect at the time, operated her bicycle at a greater distance than 5 feet from the right-hand curb of the roadway. The provisions of the ordinance in question are: "Section 26. * * * The rider of a bicycle upon a roadway shall ride as nearly as practicable within five feet of the right-hand curb or edge of the roadway, except when passing a standing or other vehicle or making a left-hand turn at an intersection."

The evidence disclosed that automobiles were parked along the right-hand curb of the roadway at the scene of the collision. The ordinance therefore did not oblige plaintiff to ride her bicycle within 5 feet of the right-hand curb of the roadway. There is nothing in the situation that would warrant us in holding that plaintiff violated the provisions of the ordinance.

All of the questions raised here in support of the contention that plaintiff was guilty of contributory negligence were for the determination of the jury in the first instance and for consideration by the trial court upon motion for a new trial.

[6, 7] The next point raised involves the action of the court in refusing to give the second paragraph of an instruction numbered 14 requested by defendants. Said instruction narrated the facts as contended for by defendants in connection with their defense of contributory negligence, and concluded with the statement: "* * * And if you further find that the manner in which said movement was so executed by plaintiff was the *approximate* cause of the injury to plaintiff, then you will find that the plaintiff was guilty of contributory negligence, and your verdict must be for the defendants." (Italics ours.) Upon the authority of Waniorek v. United Railroads of San Francisco, a Corp., 17 Cal. App. 121, 128, 118 P. 947, and of Renton, Holmes & Co. v. Monnier, 77 Cal. 449, 19 P. 820, appellants contend that it was reversible error for the court to refuse to give the second paragraph of said instruction for the asserted reason that a party has a right to have an instruction given to the jury based upon his theory of the case if there is any evidence to support it. It will be noted that the instruction made use of the expression "approximate cause" instead of "proximate cause" in connection with the injury to plaintiff. In the case of State Compensation Ins. Fund v. Jorn, 186 Cal. 782, 200 P. 624, 625, the trial court erroneously used the word "approximately" instead of "proximately" in submitting a special issue to the jury in connection with the question of contributory negligence. It was there said: "Standing alone it might be misleading and prejudicial. * * * In common parlance the two words, 'proximate' and 'approximate,' are used interchangeably, and the dictionaries give them as synonyms. It is true, however, that the word 'proximate' has a distinct and separate legal significance; but, in view of the explicit instructions making the negligence to depend upon the 'proximate' cause, the jury could not well have been misled by the substitution of the word 'approximate' in the submission of the special issue. The courts have frequently held such an interchange of these terms in instructions without prejudice. [Citing cases.]"

While the use of the expression "approximate cause" was probably inadvertent, thereby the instruction was rendered faulty. The court was not required to modify it to make it correctly state the law. Dover v. Archambeault, 57 Cal. App. 659, 208 P. 178; Williamson v. Tobey, 86 Cal. 497, 25 P. 65. Plaintiff also requested the court to give an instruction whereby she undertook to recite the facts from her point of view and to conclude with a direction that, if the jury found such facts had been established, plaintiff should have judgment. Said requested instruction was also refused. It was not error to refuse said instruction requested by defendants.

[8, 9] Appellants also complain of a portion of the instructions of the court to the effect that bicycle riders had the same right as automobile drivers to the use of the streets. The complaint rests upon the contention that, under the provisions of the city ordinance, bicycle riders were required to ride within 5 feet of the right-hand curb. We have already shown that under the circumstances said provision of the ordinance was not applicable. The instruction was not erroneous. Complaint is also made of the instruction: "Bicycle riders * * * are not required to look back for vehicles approaching from behind to avoid collisions, or to avoid being run over from behind." No particular error is pointed out in said instruction; and we see none.

The instructions given correctly and fairly stated the law upon all phases of the case.

[10-12] Complaint is also made concerning the action of the trial court in the examination of an important witness called by the defendants. Aside from the occupants of

the automobile, this was the principal witness relied upon by the defendants to establish their defense of contributory negligence. Shortly after her examination began, the court intervened several times to require her to indicate upon a plat what she meant by "here" in her description of the accident. Such action of the court was proper and tended to clarify her testimony. Somewhat further along in the examination of the same witness the court asked questions concerning the facts and circumstances of the accident; and this examination proceeded to considerable length. It is said that the court virtually took the witness from counsel and conducted the examination to the prejudice of appellants. If counsel is proceeding by proper questions and without delay or repetition to elicit the evidence, it is better to permit him to develop his own case, particularly in jury trials. Here the questions propounded by the court were fair and competent and showed no desire to discredit the witness. On the whole, the examination by the court developed strong evidence in behalf of defendants. Counsel did not object to the court's examination at the time. Therein we find no error.

[13, 14] The remaining point is that the verdict was excessive. The plaintiff was of the age of 41 years at the time of trial, and was the mother of two children of the ages of 9 and 13 years, respectively. The trial was conducted thirteen months after the accident. The only expert witness called to testify to plaintiff's injuries was the physician who attended her after the accident, although she was examined at the instance of the defendants by their physician. In the accident plaintiff suffered fractures of the eighth, ninth, and tenth ribs in a line directly under the arm; and the eighth rib was also fractured near the spine. The right transverse process of the third lumbar vertebra was fractured. There was a lacerated wound of the scalp; and there were lacerations and contusions of the liver, resulting in hemorrhage into the abdomen. Plaintiff was confined to a hospital for five weeks following the accident, and was obliged to lie flat on her back for one month; and soon after leaving the hospital she was required to return to her bed for a month. Between the time of the accident and the trial she spent considerable time in bed. At the time of the trial she was anæmic and suffered from palpitation of the heart upon exertion. Her physician testified that the valves of her heart did not function properly and that she suffered from endocarditis, or inflammation of the lining of the heart; that, due to said heart trouble, he doubted if she would live; that, if she survived, her activities would be very much limited; and that the probabilities were that the heart trouble would greatly shorten her life. In his opinion the injuries sustained had lessened her resistance, and the lack of resistance had led to the heart trouble. Before the accident she was in good health. A motion for a new trial upon the ground, among others, that the verdict was excessive, was denied by the trial court. It is only where the verdict is so grossly disproportionate to any reasonable limit of compensation warranted by the facts as to shock the sense of justice, and raise at once a strong suspicion that it is based on prejudice or passion rather than sober judgment, that the court is at liberty to interpose its judgment as against that of the jury. Smith v. Royer, 181 Cal. 165, 183 P. 660; Zibbell v. Southern Pacific Co., 160 Cal. 237, 116 P. 513. Under the conditions shown to exist here, we cannot hold that the amount of the award bears no just relation to the injuries sustained, nor that it was excessive. It finds support in the evidence.

The judgment is affirmed.

We concur: WASTE, C. J.; IRA F. THOMPSON, J.; PRESTON, J.; LANGDON, J.; SHENK, J.; SEAWELL, J.

131 Cal.App. 448

ABDALLAH v. BARTH et al.

Civ. 4801.

District Court of Appeal, Third District, California.

April 26, 1933.

Rehearing Denied May 26, 1933.

1. Trover and conversion ⇐66.

Whether buyers negligently failed to return empty near beer bottles and cases for unreasonable time after seller's demand for return was question of fact in action for their value.

2. Trover and conversion ⇐40(5).

Evidence supported findings that buyers negligently failed, for unreasonable time after seller's demand, to return near beer bottles and cases, subsequently destroyed by fire, and judgment for seller for their value.

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Action by John J. Abdallah, transacting business under the name of C. M. Abdallah & Co., against Otto F. Barth and Marie Barth. From a judgment for plaintiff, defendants appeal.

Affirmed.

Sydney C. Bennett, of Stockton, for appellants.

Levinsky & Jones, of Stockton, for respondent.

PLUMMER, Justice.

The plaintiff had judgment in an action brought to recover the value of empty beer bottles and cases obtained by the defendants from the plaintiff and contracted to be returned by the defendants to the plaintiff. From this judgment the defendants appeal.

It appears from the record that the plaintiff and the defendants, in 1926, entered into an agreement whereby the plaintiff, as a wholesaler, agreed to sell and deliver to the defendants, as retailers, near beer at a price agreed upon between them. The cases in which the bottles containing near beer should be contained were to be redelivered by the defendants to the plaintiff, and also the bottles as soon as the same were emptied. In other words, the bottles containing the beer and the cases in which the bottles were placed for shipment were to be retained by the defendants until the beer was sold and consumed, and then returned by the defendants to the plaintiff. The agreement also was to the effect that, in the event the defendants failed to return any of the bottles or cases, payment was to be made by the defendants to the plaintiff for the bottles and cases not returned. The cases and bottles were to be returned according to the agreement when the bottles were emptied. This duty devolved upon the defendants. The time specified for the return of the bottles and cases depended upon their being emptied, but upon being emptied the agreement called for their return. After the entering into this agreement, the plaintiff continued to supply the defendants with near beer bottled and delivered in cases according to the agreement of the parties. From time to time, as empty bottles accumulated, they were placed in cases and returned by the defendants to the plaintiff. This business arrangement was continued between the plaintiff and the defendants until early in the year 1929. On or about the 6th day of June, 1929, a warehouse operated by the defendants, in which they had stored a large number of cases and bottles which they previously had obtained from the plaintiff, was destroyed by fire. The cases burned, and the bottles were ruined. The plaintiff sued for the value of the cases and bottles, alleging that the defendants had negligently failed and neglected to return the same within a reasonable time after demand had been made therefor, and consequently were liable for the value of plaintiff's property destroyed by the fire.

The trial court found that the fire was not attributable to any carelessness or negligence on the part of the defendants, and, after finding the value of the property, made two findings upon which the liability of the defendants is predicated, to wit:

"That on numerous occasions prior to the 6th day of June, 1929, the said plaintiff demanded of the said defendants that they return to him the bottles and cases belonging to him, and which had not been returned by them to him, and the said defendants failed, neglected and refused to return them, or any part or portion thereof, except the 60 hand cases delivered by them to the said plaintiff on or about the 30th day of May, 1929.

"That said defendants were careless and negligent, and particularly after demand was made upon them, in failing and neglecting to return to the said plaintiff the aforesaid cases and bottles belonging to him. That the said defendants, under the circumstances, were careless and negligent, and particularly after demand was made upon them, in keeping the aforesaid cases and bottles for such a long period of time; that by reason of the carelessness and negligence of the said defendants, as aforesaid, said cases and bottles were destroyed by the fire that occurred on the premises of the said defendants."

The sufficiency of the testimony to support these findings is challenged by the appellants.

No controversy is tendered as to the agreement between the parties as to the price at which the near beer was to be sold, that it was to be delivered in cases and bottles, and that the defendants were to redeliver the cases and bottles as soon as the bottles were emptied, and also to pay for any cases and bottles not redelivered.

It is first contended by the appellants that the finding of the trial court as to a demand being made for the return of the cases and empty bottles is unsupported. After stating that the defendants had ceased buying beer from the plaintiff, the testimony of the witness Abdallah is as follows:

"Q. State if you ever heard there was a fire out at their place? (Referring to the defendants' place of business.) A. Yes.

"Q. Can you state how long prior to the time of the fire, if at all, you demanded of the defendants, the return of the empty bottles and cases? A. Yes, sir.

"Q. About when, how long before the fire? A. It was not very long, mostly every month we ask the customer for cases, but I don't remember the dates, or how long.

"Q. At the time when they stopped buying beer from you, state whether or not there were any empty bottles or cases they had not returned? A. Yes, sir.

"Q. And state whether or not you demanded the return of them? A. Yes, I did."

The testimony of this witness was further to the effect that, after the fire, and before the beginning of this action, demand was

made for the return of the empty bottles and cases.

The defendant Otto Barth testified as follows:

"During the years 1926–1929, we did business with the plaintiff; purchased beer from him. On the 6th day of June, 1929, we had a fire. I had between 150 and 200 cases, shipping cases, on hand, 3 dozen bottles to the case, and I think there is approximately 600 or 700 cases of two dozen bottles each. Of these, 194 cases containing 3 dozen bottles each, and also 1360⅔ dozen bottles in addition to that, belonging to the plaintiff, were on the premises at the time of the fire. Previous to the fire I had collected them; I do not know how long; a month or two; perhaps 2 or 3 months; I always waited until a certain amount accumulated before returning them; I would have to have a man take them, have enough for a cargo, to get a truck to return them; one hundred and fifty-two dozen cases would be sufficient to return. At the time of the fire there were between 600 or 700 two dozen cases on the premises; a good many of them belonged to Abdallah; I think the majority of the bottles in the two dozen cases were from Abdallah.

"'Q. Why didn't you return them? A. I just didn't happen to get a truck to haul them away, to haul them to the depot.' The cases and bottles were stacked in a warehouse adjoining my store. I had them against the wall on the outside, some in the basement, some in the frigidaire. I returned cases and bottles to Mr. Abdallah when I started to do business with him from time to time as various cases and bottles were empty. The bottles contained near-beer when I bought them; that was my part of the bargain—that I must ship the cases back—all those, after they were empty.

"Q. Had Mr. Abdallah ever demanded of you that you return the bottles and cases? A. Yes. Once in awhile he would tell me; said that they were short of cases at the brewery, and if I had any on hand, to return them.

"Q. Did you ever count the cases containing three dozen bottles, that were in your possession at the time of the fire? A. Well, I roughly counted sometimes, yes.

"Q. How many cases were there of the three dozen type? A. Two or three hundred cases always around. I counted the bottles that were owned by plaintiff that we had in our possession at the time of the fire, like the rest of them; I checked them once every month or two; it might have been a month or two weeks or three weeks before the fire that I counted those bottles."

The record shows that the plaintiff and the defendants discontinued doing business with each other on the 10th day of May, 1929, and the fire occurred 27 days later. The record further shows the value of cases, bottles, and beer delivered by the plaintiff to the defendants to be the sum of $13,803.40, against which there is a credit of $250 in cash and the value of property returned in the sum of $13,008.20, leaving the value of property unreturned by the defendants to the plaintiff in the sum of $795.20. The number of cases containing thirty-six bottles each returned by the defendants to the plaintiff at different times, ranges all the way from 10 cases to 255 in number. The record also shows that, during the course of business conducted between the plaintiff and the defendants, numerous redeliveries were made practically every month; that occasionally, however, as many as 20 days would intervene between deliveries, and once or twice during the winter time it appears that at least a month intervened between deliveries. During the summer season, however, deliveries appear to have been made in most instances at intervals, with only a week or ten days intervening. The number of cases and bottles handled ran into the thousands. In only six instances, however, during nearly the four years' time that elapsed while the plaintiff and the defendants were doing business with each other, did the number of cases at any one delivery exceed 150 cases, specified in the defendants' testimony as being sufficient to constitute a redelivery shipment.

As against this, the record shows deliveries of cases of not over 10 in number, ranging from that as the lowest up to one delivery of 190, one delivery of the number of 244, another delivery of 255, one of 211, one of 201, and also one of 300. The average number of cases, however, as shown by the record, of the several deliveries was less than 100.

As contended for by the appellants, no stipulated time, that is, no fixed days as to dates and days, were determined upon by the agreement when the cases and bottles were to be returned, but as a matter of fact the agreement did call for the return of the cases and bottles as soon as the purposes for which they had been delivered, had been fulfilled.

A witness for the plaintiff, on cross-examination, testified as follows:

"Q. Whose duty was it, if you know, to request the return of the bottles and cases? A. That is an ordinary routine of work in our line, and I don't believe you could say anyone is appointed to make a request. The customer was always doing that himself; return the bottles.

"Q. And isn't it true that the customers, and this includes my client and your other clients, would return bottles and cases, which were returnable, at irregular intervals as they collected them, and in varying quantities, that is true, isn't it? A. Yes, that is true. We had no stipulated agreement with any client more than to return a certain quantity—they returned them as they accumulated."

The record, as we have stated, shows that at least 26 days intervened from the time the cases and bottles sued for were collected by the defendants, and not delivered by them to the plaintiff. It also shows that a considerable number of the cases and bottles, just how many does not appear, had been on hand available for redelivery from one to two months. After the business relations between the parties had ceased, and before the fire, the plaintiff requested the return of the cases and empty bottles. Just exactly how long preceding the fire this request was made does not clearly appear, but upon this testimony the court found that the defendants had neglected to return the cases and bottles within a reasonable time after such request.

In 19 California Jurisprudence, 548, 549, the text reads: "Neglect may be active or passive in character, and may consist in heedlessly doing an improper thing, or in heedlessly refraining from doing a proper thing. One who does not do what he should do is chargable with neglect equally with him who does that which he should not. * * * Negligence is a comparative and not a positive term, whether applied to the acts of a plaintiff or of a defendant. It is determined in all cases by reference to the situation and knowledge of the parties and to all the attendant circumstances. What would be extreme care under one condition of knowledge and one set of circumstances, might be gross negligence with different knowledge and changed circumstances. Of necessity the question is nearly always one of fact for the jury."

[1, 2] In this case the question of whether the defendants negligently failed to return the empty cases and bottles for an unreasonable length of time after the plaintiff had requested their return was one of fact for the trial court. The same principle of law is approved in the case of Wolfe v. George, Inc., 110 Cal. App. 532, 294 P. 436, 437, where this court was considering the question of conversion. This court there said: "The period of time and the circumstances under which property, which is wrongfully withheld from the owner, will constitute conversion thereof, are largely questions of fact for the determination of the court or jury." In the case at bar the defendants understood that their part of the contract required the return of the cases and bottles as soon as they were empty, and by the testimony of one of the defendants it is admitted that 150 cases constituted a sufficient quantity to require a return thereof. Redelivery was not made. A number of these cases and the empty bottles, as we have stated, were retained by the defendants for one or two months, and the total number of 194 cases, and also the bottles sued for were held without effort to make redelivery from May 10 to June 6, 1929, and were withheld, as found by the trial court, for an unreasonable length of time after request for redelivery had been made.

These facts are sufficient to support the findings of the court and sustain the judgment without entering into any discussion of the law of bailments.

The judgment is affirmed.

We concur: PULLEN, P. J.; R. L. THOMPSON, J.

131 Cal.App. 265

PEOPLE v. VAUGHAN.

Cr. 2323.

District Court of Appeal, Second District, Division 1, California.

April 17, 1933.

1. Criminal law ⇐507(7).

In prosecution for violating statutes in relation to 11 year old girls, complaining witnesses were not required to be corroborated, not being "accomplices" (Pen. Code, §§ 288, 288a).

[Ed. Note.—For other definitions of "Accomplice," see Words and Phrases.]

2. Criminal law ⇐742(1).

In prosecution for violating statutes in relation to 11 year old girls, credibility of uncorroborated testimony of complaining witnesses is for jury (Pen. Code, §§ 288, 288a).

3. Witnesses ⇐268(1).

Great latitude should be permitted accused in cross-examining adverse witnesses in cases of lewd acts committed on female under 14 years of age, and similar offenses (Pen. Code, §§ 288, 288a).

4. Witnesses ⇐268(1).

In prosecution for committing lewd acts on 11 year old girl, refusal to permit cross-examination of complaining witness as to whether she was not afraid of accused when she went with him on certain fishing trip *held* prejudicial error (Pen. Code, § 288).

5. Witnesses ⇐268(1).

In prosecution for committing lewd act on 11 year old girl, exclusion of question asked accused's wife as to condition and demeanor of such girl and another girl after certain trip *held* prejudicial error (Pen. Code, § 288).

Exclusion of such question was error because defendant was entitled to inquire into physical appearance or apparent mental attitude of girls on their return from trip when alleged offenses were committed, and inquiry as to "condition"

of one girl and "demeanor" of both related to physical appearance.

[Ed. Note.—For other definitions of "Condition," see Words and Phrases.]

6. Witnesses ⇐268(1).

In prosecution for committing lewd acts on 11 year old girl, exclusion of question on cross-examination as to why complaining witness did not complain to her aunt on night of alleged offense *held* prejudicial error (Pen Code, § 288).

7. Criminal law ⇐768(1).

In prosecution for committing lewd acts on girls 11 years of age, refusing defendant's requested instructions as being cautionary and violative of constitutional prohibition against charging on facts *held* error (Const. art. 6, § 19; Pen. Code, § 288).

One of requested instructions was to effect that evidence of children must be scrutinized with great care, and that, in determining credibility of such evidence, jury must take into consideration probability or improbability of such evidence, whether children testifying tell a straight story or contradict themselves, whether testimony is corroborated or otherwise, whether testimony is consistent with physical facts as shown by evidence, whether witnesses have been coached, whether their testimony shows knowledge of things and use of words beyond knowledge of children of such tender years. The other requested instruction was to effect that charges of nature involved can easily be made and are difficult to disprove, that jury should not be moved by passion, sympathy, or prejudice to find a verdict of guilty on any count, and that they should acquit unless convinced beyond reasonable doubt from evidence of defendant's guilt.

8. Criminal law ⇐763, 764(18).

In prosecution for committing lewd acts on 11 year old girl, instruction that evidence of other similar acts of accused with prosecutrix other than act relied on for conviction was introduced as corroborative evidence to support specific offense charged *held* error, as charge on facts (Const. art. 6, § 19; Pen. Code, § 288).

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Joe Vaughan was convicted of violating Penal Code, §§ 288, 288a, and he appeals.

Reversed.

Orbison & Irwin, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John D. Richer, Deputy Atty. Gen., for the People.

DESMOND, Justice pro tem.

The defendant was convicted of violating section 288a of the Penal Code in relation to a girl eleven years old; also upon another count of the same information of violating section 288 of the Penal Code involving another girl of the same age. Attached to the verdict and ordered filed by the court was a slip of paper reading as follows: "If admissible, the jury would like to recommend leniency." Motion for a new trial was denied, and defendant sentenced on each count to San Quentin State Prison for the term provided by law, one sentence to follow the other.

[1, 2] The defendant claims upon his appeal that the evidence was insufficient to support either verdict, pointing out that there was no corroboration of the testimony of either girl as to the commission of the acts of which he was found guilty. It is not necessary, in order to sustain conviction of either of these offenses, that the testimony of a child of tender years be corroborated, since such a child cannot be classed as an accomplice. People v. Roy Johnson, 115 Cal. App. 704, 2 P.(2d) 216. It is for the jury, who see the child and hear her uncorroborated story, to say whether she is telling the truth. In this case the jury passed favorably upon that question in the case of both girls, but we feel that it is proper to say, from a mere reading of the record, and with no opportunity to appraise the character and intelligence of the witnesses, that certain phases of the incidents related seem almost beyond belief. In the case of the first girl the testimony was as follows: That the appellant, a neighbor of many years' acqaintance, undertook to care for the eleven year old girl and her four year old brother in their home on the night of January 28, 1932, while their mother, in company with appellant's wife, attended a church service; the father of the children, a police officer, being employed at night. The appellant and his wife were positive in their testimony that the occasion when appellant had charge of the children was February 11th instead of January 28, 1932, but whichever was the correct date there is no question that on a certain evening the appellant had the opportunity to commit the crime, if he were so minded, since he was in the house with the two children for a period of approximately three hours. The girl testified that after listening to the radio and putting her baby brother to bed, she went to her room and to bed, bidding appellant "good night"; that some time later she awoke in the darkness, found the bedclothes removed from her, the lower part of her pyjamas pulled down below the knees, and appellant upon his knees beside the bed committing the offense charged; that at just this instant, or possibly before, and perhaps awakening the girl, the doorbell

rang and appellant left the bedroom, answered the doorbell, and admitted the aunt of the little girl, who had called to see her mother. The aunt, according to her testimony, rang the bell that night at about 9 o'clock, stayed five or ten minutes, talked to the defendant and to the girl as she lay in bed in the next room and heard the girl say, as she looked around the partly opened door, "Good night, Aunt Clara," as the aunt took her departure. No complaint was made to the aunt of mistreatment nor was there any request by the girl that her aunt stay with her until her mother came home. There was no report of any improper conduct and no complaint to her mother that night, next day, or during many months thereafter; in fact, not until after school started in September, 1932. Under these circumstances, while it cannot be said that the commission of the act charged is inherently improbable, for men of depraved instincts and perverted desires seize opportunities as they are offered, still we find it hard, if not impossible, to believe that a child so assailed in the darkness of the night could at practically the same instant carry on an ordinary conversation with her aunt and lightheartedly bid her "good night" with no complaint of mistreatment so gross in its nature, and no attempt to hold, until the arrival of her mother, her aunt so providentially at hand as her deliverer and guardian. The testimony of the child was that she was asleep when her mother returned. Her failure to tell her mother next morning of what had occurred and her complete silence on the subject for many months thereafter was not explained at the trial, and to us, as we read the record, is inexplicable.

In regard to the other charge upon which conviction was had, prosecutrix testified that on the way to the beach and six or seven times on the way home from the beach, appellant mistreated her in the manner described in section 288, as she rode in the same seat with him and the other prosecuting witness, each of the girls taking turns steering the car as appellant drove. The testimony of this complaining witness was not corroborated as to a single event by the other girl, who was present during all the time, and no complaint was made to any one of mistreatment until a later date. These girls have lived for years within a few houses of each other and of the appellant and have grown up as playmates. While it cannot be said that the story of the second prosecutrix is as susceptible of doubt as that of the other girl, we cannot but wonder how these repeated attacks could be made upon her without being observed by her playmate sitting on the same seat of the automobile immediately next to her.

[3, 4] The appellant claims to have been aggrieved by various rulings of the trial court on questions involving the admission and rejection of evidence. Most of these claims, we find, are without merit, but that is not true of all. The prosecutrix under count I gave testimony of various lewd acts committed by the defendant upon her person at different times. One of the events, as so described, occurred in the late summer of 1932, when appellant took her to a neighboring beach on a fishing trip. Counsel for defendant asked this girl: "You were not afraid of him at that time, were you?" To this question the court sustained an objection on the ground that it was immaterial. We believe great latitude should be permitted in cross-examining the adverse witness in cases of this character, painful as that process may be, so that the jury may have all the facts before them in determining the truth or falsity of the recital. One of these facts might easily be the mental attitude of a prosecutrix toward a defendant, and we feel, therefore, that a question as to the attitude of this prosecutrix toward this defendant at the time of the proposed fishing trip was a pertinent inquiry that should not have been prohibited. In view of the bestial treatment which the witness, according to her testimony, had previously received from the defendant, we feel that her state of mind at the time of a proposal to be alone with him for a period of several hours might well be inquired into, for from that mental attitude, connected with other facts, the jury might determine the truth of her testimony as to the prior event. If, as respondent concedes in its brief, it might have been proper for counsel to ask the witness if she went with the defendant freely and voluntarily, then there is no reason why the question as framed should not have been asked, for in its essence it amounts to the same thing. It was error, therefore, to sustain the objection to this question.

[5] Mrs. Vaughan was asked in regard to this girl: "What was her condition as to being downcast or joyous, happy or sorrowful at the time you saw her immediately upon her return (from the fishing trip)?" An objection to this question on the ground that it was immaterial was sustained. A week following the first trip, the defendant returned from another fishing excursion with both girls. As to this event, Mrs. Vaughan was asked: "What was their demeanor and attitude as to being happy or otherwise?" Her answer, "Happy," was then ordered stricken on the ground that the question was wholly immaterial.

If either girl on either occasion had appeared flushed, nervous, distraught, or frightened, undoubtedly the prosecution, if witnesses had been available, would have claimed the right, and we believe properly, to bring out that fact as having a material bearing on the matter at issue. We see no reason, therefore, why the defendant may not inquire into the physical appearance or apparent mental attitude of the girls at a time which may al-

most be fixed as being within the rule of res gestæ. The inquiry in the first question as to "condition" and in the second as to "demeanor" both relate to physical appearance. People v. Wong Loung, 159 Cal. 520, 114 P. 829. See, also, 8 Cal. Jur. p. 153, § 235; 10 Cal. Jur. p. 978, § 236.

[6] The trial court also sustained an objection to an inquiry as to why the little girl did not complain to her aunt on the night of January 28 of defendant's abuse just committed, the record reading as follows:

"Q. He didn't say anything about not telling anybody? A. No.

"Q. Well can you tell me why you did not tell your auntie?

"Mr. Sullivan: Objected to as immaterial.

"The Court: Sustained."

It is our opinion that, if the query so propounded by defendant's counsel was not in the minds of the jury that tried this case, it should have been, and therefore an answer to the question should have been permitted. In the case of People v. Costa, 24 Cal. App. 739, 142 P. 508, the defendant, found guilty of ravishing a girl fourteen years of age, obtained a reversal upon rulings that excluded evidence bearing on the possible reason for withholding complaint for a period of two months, or until the prosecutrix came into the hands of the police. Incidentally, the record indicates that no complaint was made in the instant case until both these girls came to the attention of Juvenile Hall authorities. The Costa Case and the present case present points of dissimilarity, but the opinion in that case contains certain comments which seem applicable to our problem (page 740 of 24 Cal. App. 142, p. 508): "On cross-examination she was questioned as to whether she at the time said anything to her mother about the matter, when she first told her mother of what defendant had done, and whether she told any one about the matter, to all of which questions objections were sustained upon the ground that the evidence sought to be elicited was immaterial and not cross-examination. * * *" Page 742 of 24 Cal. App., 142 P. 508, 509: "The mere charge of an offense so heinous in nature is well calculated to arouse the feelings of the jury against the accused and excite its sympathy for the prosecutrix, particularly when the latter is a child of 14 years of age, thus placing the defendant, however innocent, at the mercy of her evidence. * * * In People v. Baldwin, 117 Cal. 249, 49 P. 187, it is said: 'It will be sufficient to say, in a general way, that in a case of this character the very widest latitude compatible with our somewhat technical and restricted rules of evidence should be allowed the defendant in his cross-examination of the witnesses of the people. More especially is this true with reference to the prosecuting witness. In this class of prosecutions the defendant, owing to natural instincts and laudible sentiments on the part of the jury, and the usual circumstances of isolation of the parties involved at the commission of the offense, is, as a rule, so disproportionately at the mercy of the prosecutrix's evidence that he should be given the full measure of every legal right in an endeavor to maintain his innocence.' See, also, People v. Christy, 65 Hun, 352, 20 N. Y. S. 278; People v. Mitchell, 5 Cal. App. 45, 89 P. 853; People v. Howard, 143 Cal. 316, 76 P. 1116. The rulings of the court in excluding the evidence were not only error, but highly prejudicial to the substantial rights of defendant. The court should have permitted the fullest investigation as to the circumstances, motive, and reasons for withholding any statement of the offense for a period of two months and then telling the officers who had her in custody under arrest. As said in People v. Howard, supra: 'If she was testifying to the truth, such investigation would not have injured the cause of the prosecution. If she was testifying to a falsehood, the defendant should have been allowed in every reasonable way to show it.'" See, also, People v. Degnen, 70 Cal. App. 567, 590, 234 P. 129.

In view of the foregoing, we believe the rulings of the court upon the questions propounded were prejudicially erroneous.

[7] Defendant complains bitterly because all fifteen of his requested instructions were refused, seven of them "except as otherwise given." Among those definitely refused without such exception noted were the following:

No. IV: "The court instructs the jury that the evidence of children must be scrutinized with great care and in determining the credibility of such evidence, you may take into consideration the probability or improbability of such evidence, whether the children testifying tell a straight story or contradict themselves, whether their testimony is corroborated or otherwise, whether their testimony is consistent with the physical facts as shown by the evidence, whether such witnesses have been coached or otherwise, whether their testimony shows a knowledge of things and the use of words beyond the knowledge of children of such tender years, and from these, together with all the other rules laid down in these instructions for your guidance, determine the weight, if any, you will give to such testimony."

No. V: "By reason of the fact that charges of the nature involved in this case can easily be made and are often not easy to disprove, I instruct you that it is your duty to treat with great care and caution the testimony of the complaining witnesses (here naming them). The fact that the charges here made, however, are ones not easy to disprove should not deter you from rendering a verdict of guilty in the event you are convinced by the evidence beyond a reasonable doubt that

the defendant is guilty as charged. On the other hand you are not to be moved by passion, sympathy or prejudice to find a verdict of guilty on any count of the information and unless you are convinced beyond a reasonable doubt from the evidence that the defendant is guilty as charged on one or more of the several counts of the information, you should find the defendant not guilty."

The learned trial judge at the time he denied defendant's motion for a new trial stated as his reason for refusing to give these instructions that they were cautionary, evidently viewing them as prohibited by section 19, article 6, of the Constitution, providing that judges shall not charge juries with respect to matters of fact. There is authority for this position. People v. Anthony, 185 Cal. 152, 160, 196 P. 47. However, a review of cases of this type would indicate that the courts generally have been reluctant, where testimony of the complaining witness is uncorroborated, to disregard the observation made by Chief Justice Murray in deciding the Benson Case, 6 Cal. 221, 65 Am. Dec. 506, involving a child of thirteen years: "From the days of Lord Hale to the present time, no case has ever gone to the jury, upon the sole testimony of the prosecutrix, unsustained by facts and circumstances corroborating it, without the Court warning them of the danger of a conviction on such testimony." For example, we find the following in People v. Caldwell, 55 Cal. App. 280, 298, 203 P. 440, 448: "Cautionary instructions of this character are proper in rape cases, under many decisions, either when the prosecutrix is a child of tender years, or when her testimony is uncorroborated."

And in the case of People v. Scott, 24 Cal. App. 440, 141 P. 945, 947, involving a moral offense against a girl about fourteen years old, the court says: "For reasons readily suggested, though, it is entirely proper for the court to caution the jury to weigh the testimony of the prosecutrix with the utmost care, that no wrong be done to the defendant." In People v. Currie, 16 Cal. App. 731, 117 P. 941, 943, where the girl was under the age of sixteen years, the following appears: "We think the court went far enough in its cautionary signal to the jury to awaken in their minds the importance of carefully scrutinizing the testimony of the prosecuting witness." In that case the following instructions were given (page 736 of 16 Cal. App., 117 P. 941, 943): "That a charge of this nature is particularly difficult for a defendant to clear himself of. No charge can be more easily made, and none more difficult to disprove. From the nature of the case, the complaining witness and the defendant are generally the only witnesses. You should be satisfied to a moral certainty, and beyond a reasonable doubt, that the case is made out by witnesses and corroborating evidence, if any, before you find the defendant guilty, if you find him guilty. * * * That the law does not require in this character of case that the prosecuting witness be supported by another witness or other corroborating circumstances, but does require that you examine her testimony with caution." While rape was charged in each of these cases, the reasoning and remarks of the various judges are equally applicable to cases of indecent and lewd treatment of young children, such as we are now considering.

The author of the note appearing in 60 A. L. R. 1134, says on this subject: "It is customary to caution the jury that because of the difficulty of disentanglement from so heinous an imputation, as compared with the ease with which it can be fastened on reputable persons, the utmost discretion should be exercised to avoid attaching undue weight to the uncorroborated accusation of a prosecutrix."

That the giving of the instructions in question, even though cautionary, would not have been ground for reversal, appears from People v. Hewitt, 78 Cal. App. 426, 440, 248 P. 1021, and cases there cited.

[8] Appellant also complains of certain instructions of the court given on its own motion. Among them is the following: "Solely in so far as Count I is concerned, testimony has been introduced by the prosecution tending to prove other acts of lewd and lascivious conduct of the defendant with said prosecutrix other than the act relied upon for conviction under Count I. This evidence is introduced for the purpose of proving and it will be for you to determine whether it does so prove the lewd and lascivious disposition and tendency of the defendant to commit lewd and lascivious acts. This evidence is not introduced to prove distinct offenses, but corroborative evidence tending to support the one specific offense for which the defendant is tried."

The characterization by the court of the testimony relating to other acts as "corroborative evidence tending to support the one specific offense" is objectionable under the rule set up by section 19, article 6, of the Constitution. See 8 Cal. Jur. §§ 344, 345, p. 286 et seq. The instruction seems objectionable also on grounds referred to in People v. Haugh, 90 Cal. App. 354, 356, 265 P. 891. See, also, People v. Bell, 96 Cal. App. 503, 508, 274 P. 393.

Discussion of other points urged by appellant seems unnecessary in view of our herein expressed conclusions.

Judgment and order reversed.

We concur: CONREY, P. J.; YORK, J.

131 Cal.App. 339

ROWE v. POLICY HOLDERS LIFE INS. ASS'N, ETC., Inc.

Civ. 799.

District Court of Appeal, Fourth District, California.

April 24, 1933.

1. Appeal and error ⇐671(1).

Appellate court determines whether, on record then before him, judge authorizedly made order appealed from.

2. Appeal and error ⇐901.

Appellant has burden of showing that, on record then before him, judge unauthorizedly made order appealed from.

3. Appeal and error ⇐675.

Without showing that additional affidavit was brought to judge's attention or that permission was obtained to file it, such affidavit should be disregarded on appeal.

4. Insurance ⇐618.

Under Constitution, action against insurance company on policy may be brought in county where contract was made or was to be performed or breach occurred (Const. art. 12, § 16).

5. Insurance ⇐618.

Action against insurance company on policy may be brought and tried in any county, though such county is not proper county for trial, unless company files affidavit of merits and demands change of venue (Code Civ. Proc. § 396; Const. art. 12, § 16).

6. Corporations ⇐519(1).

Defendant corporation has burden of showing that action was not brought in proper county (Code Civ. Proc. § 396; Const. art. 12, § 16).

7. Insurance ⇐618.

Insurance company, sued on policy, *held* not entitled to change of venue on showing merely that its principal place of business was elsewhere (Code Civ. Proc. § 396; Const. art. 12, § 16).

Appeal from Superior Court, Kern County; Allen B. Campbell, Judge.

Action by Anna Rowe against the Policy Holders Life Insurance Association, Etc., Inc. From an order denying a motion for change of venue, defendant appeals.

Affirmed.

Hugh Martin Young, of Los Angeles, for appellant.

Dorsey & Mack, of Bakersfield, for respondent.

BARNARD, Presiding Justice.

This is an appeal from an order made by the superior court of Kern county denying a motion for a change of venue to Los Angeles county.

The action is one to recover upon a contract of insurance and the complaint, although filed in the superior court of Kern county, is silent as to the place where the contract was made or to be performed, where the obligation or liability arose, or where the breach occurred. Upon being served, the defendant filed a demand and notice of motion for a change of venue together with the affidavit of its president to the effect that he believed that the defendant had a good defense to the action and that the defendant was and is a resident of Los Angeles county. The motion was argued and submitted on February 8, 1932. On February 17, 1932, the defendant filed in the clerk's office another affidavit made by its vice president, setting forth that the contract on which the suit was brought was entered into in the county of Los Angeles; that the defendant has its principal place of business in that county; that the insured died in that county; that the contract was to be performed in that county; and that the breach, if any, occurred there. On March 1, 1932, the order from which this appeal is taken was entered denying the motion for change of venue. On March 25, 1932, when the transcript was settled and upon application of the plaintiff, the court ordered the affidavit last referred to stricken from the transcript.

[1-3] The first question before us is whether the affidavit last referred to must be considered in passing upon the right of the trial court to enter the order complained of. Under section 396 of the Code of Civil Procedure, an action may be tried even in a county not otherwise proper unless the defendant files an affidavit of merits at the time he answers or demurs. Conceding that a court has the power, upon a proper application, to grant relief where the affidavit filed is insufficient and to allow and consider amended or additional affidavits, the record before us fails to show that any such relief was here asked for or given or that any permission was granted to file any supplemental or additional affidavit. It further appears that the affidavit here in question was filed in the clerk's office nine days after the motion had been submitted for decision, and there is nothing to show that the same was ever called to the attention of the trial court or was considered by it in deciding the motion. It is the duty of an appellate court to determine whether, upon the record before it at the time the order was made, the trial court was legally authorized to make an order complained of. Nason v. Feldhusen, 34 Cal. App. 789, 168 P. 1162. Aside from any other considerations,

the burden is upon an appellant to show that, upon the record before it at the time such an order was made, the trial court was not legally authorized to make the order, and in this we think this appellant has failed.

The only remaining question is whether the court erred in making this order, in view of the affidavit presented to the effect that the principal place of business of the appellant was and is in Los Angeles county, which fact appears to be uncontradicted. The appellant relies upon Hammond v. Ocean Shore Dev. Co., 22 Cal. App. 167, 133 P. 978, and Krogh v. Pacific Gateway Co., 11 Cal. App. 237, 104 P. 698. In the first of these cases, while the opinion contains a statement to the effect that when a corporation has shown that its principal place of business is in another county the burden of proof is upon the plaintiff to show that for other reasons the action was brought in a proper county, the case was decided upon the ground that the trial court was justified, by the complaint and the evidence, in concluding that the contract sued on was made and to be performed in a county other than that in which the suit was filed. In the second case cited it was held that it appeared from the face of the complaint that the place where the contract was made, the place where it was to be performed, and the place where the breach occurred, could not have been in the county where the suit was filed and, therefore, the place of residence of the defendant was determinative.

In Lakeside Ditch Co. v. Packwood C. Co., 50 Cal. App. 296, 195 P. 284, 286, the court uses language which, while it may not have been necessary to the decision therein, is quite persuasive upon the question before us. The court there said:

"In other words, the plaintiffs had the right to commence the action in the county where the contract was made or where it was to be performed, or where the obligation arose. [Citing cases.] And, having the right, under the constitutional provision in question to commence the action against the corporation in the county where the contract sued on was made or performed or the liability of the defendant arose, they have the right to have the action tried or prosecuted to a finality in that county, unless the place of trial is changed for some other sufficient reason than that of the residence of the corporation defendant. * * *

"The result is that a corporation against which such an action is brought has no absolute right to have the action either commenced or removed to the county in which it has its principal place of business, which is the county of its residence, merely upon that ground or for that reason, but can only secure a removal 'as in other cases' or upon some ground, legally recognized, other than the fact that its residence is in a county other than the county in which the action has been commenced. * * *

"If, therefore, the only showing of venue in this case was in the title of the action, there would be at least a prima facie showing of venue in Tulare county which would be sufficient to cast the burden upon the defendant to show that the contract was not made nor to be performed, or that the breach thereof by it or its liability by reason of the breach thereof did not occur or arise in said county. This necessarily follows from the proposition, before stated, that a corporation defendant is not entitled as of right, as in cases of transitory actions in which the defendants are natural persons, to have an action against it removed from the county in which it is commenced to the county of its residence, where the action is brought in a county other than that in which its principal place of business is. The defendant here did not undertake to discharge the burden thus resting upon it. It relied merely upon the mere fact that its residence was in the city and county of San Francisco."

In Chase v. Railroad Company, 83 Cal. 468, 23 P. 532, 533, a case very similar in principle to the one now before us, the court said: "The only venue laid in the complaint is in the title thereof; there is nothing in the body of it to show within what county the defendant refused to perform its duty as a common carrier towards plaintiffs; but, as the court has jurisdiction of the subject-matter of this action, (Const. Cal. art. 6, § 5; Code Civil Proc. § 76,) and as an action upon the breach of such an obligation may be brought in the county where the breach occurred as well as in the county where the defendant has its principal place of business, (article 12, § 16, Const., supra,) the action was presumptively brought in the proper county, and it devolved upon the defendant to show, upon its motion, that the breach of its obligation as a common carrier declared upon by plaintiffs did not occur in Santa Cruz county. Having failed to do this, the motion was properly denied. * * *"

[4-7] In Hobson v. Metropolitan Casualty Ins. Co., 114 Cal. App. 349, 300 P. 87, it is pointed out that section 16 of article 12 of the Constitution providing where a corporation may be sued is permissive and does not prevent the filing of an action against a corporation in any other county of the state. Under section 396 of the Code of Civil Procedure, an action commenced in a county which is not the proper one for trial may still be tried there, in the absence of a proper demand and showing on the part of the defendant. Without doubt a plaintiff has the right to bring such action as this in any county where the contract was made or was to be performed, or where the breach occurred. It seems equally true that a plaintiff has the right to bring such an action in any other

county in the state and that it may be there tried unless the defendant takes the proper steps to have it removed. This being true, the burden is not on a plaintiff to show that such an action was brought in the proper county or that he comes within an exception to any general rule, but the burden is on a corporation defendant to show that the place of filing such an action as this is not the proper county for trial, which may not be done by a showing of residence alone. We conclude that the burden was upon the appellant to show grounds for removal other than the fact that its principal place of business was in another county and that, having failed to meet this burden, the motion was properly denied.

The order appealed from is affirmed.

We concur: MARKS, J.; JENNINGS, J.

NIELSEN et al. v. INDUSTRIAL ACCIDENT COMMISSION et al. *

Civ. 8877.

District Court of Appeal, First District, Division 2, California.

April 27, 1933.

Hearing Granted by Supreme Court June 26, 1933.

1. Master and servant ⇨418(7).

Upon Supreme Court's denial of Industrial Accident Commission's petition for transfer of cause, decision of Court of Appeals became final.

2. Master and servant ⇨417(9).

Appellate court's decision that employee's death was result of industrial injury and compensable and remand of cause for further proceedings in accordance with opinion settled compensability and left Industrial Accident Commission free to determine only other questions of fact.

3. Master and servant ⇨417(9).

Industrial Accident Commission's hearing to determine compensability of death already determined by appellate court was contrary to order remanding cause, and determination that death was not compensable was error.

4. Courts ⇨91(1).

Industrial Accident Commission, as well as appellate court, is bound by decisions of Supreme Court.

5. Evidence ⇨574.

Where direct evidence of those who observed and treated injured employee shows that injury was industrial, Industrial Accident Commission may not refuse compensation solely on opinion evidence based on state of facts not shown to exist.

6. Evidence ⇨553(2).

Hypothetical question in compensation case which omitted essential facts disclosed by autopsy, on which physicians who examined and treated deceased based their conclusion as to cause of death, was incompetent.

Original proceeding in certiorari by Camilla Nielsen and others against Industrial Accident Commission of California, Carl Bersch, an individual doing business as the Bay City Cabinet Company, and the State Compensation Insurance Fund, to review an order of the Industrial Accident Commission denying compensation for the death of Anton Nielsen.

Order annulled, and application remanded with directions.

John C. Scott and H. C. Kelsey, both of Oakland, for petitioners.

A. I. Townsend, of San Francisco, for respondents.

B. E. Pemberton and Ivan A. Schwab, both of San Francisco, for respondent State Compensation Insurance Fund.

NOURSE, Presiding Justice.

[1] This is an original proceeding in certiorari to review an order of the Industrial Accident Commission denying compensation for the death of Anton Nielsen. The identical matter was heard by this court on a former petition upon which we annulled the order and remanded the proceedings to the commission "for further proceedings and findings in accord herewith." Nielsen v. Ind. Acc. Comm. (Cal. App.) 13 P.(2d) 517, 518. The petition of the commission to have that cause transferred to the Supreme Court was denied by that court and the decision thereupon became final.

In the former opinion we gave a statement of facts as follows: "Deceased was employed as a cabinet maker by respondent Bersch, who was insured by the respondent State Compensation Insurance Fund. The deceased was forty-seven years old at the time of his death, and had been working steadily at his trade with respondent for a period of fifteen years. During all this time he had never displayed any symptom of illness or disability or any abnormal condition of health. On November 25, 1930, deceased, with five others, carried an altar top from Bersch's place of business to a truck and took it to a church, where it was to be installed. Seven other men helped deceased carry the altar top into the church, but, when they arrived there, it was found necessary to remove the old altar top. Deceased took a hammer and a chisel and worked upon the old top for about five minutes when he was stricken with a heart attack and soon thereafter died. The work of that morning was done in a great hurry,

the new altar top was carried up the aisle of the church in an awkward and hurried manner, which no doubt caused an intense strain upon the deceased. * * *

[2] "The evidence upon which the Commission denied the application does not present a substantial conflict. Dr. Koford, the family physician, was present at the autopsy held immediately after the death. He testified that the deceased had 'coronary and aortic sclerosis and the aorta was acutely dilated, being covered with numerous small red hemorrhages and broken capillaries.' Also that 'the dilatation had ruptured many of these fine blood vessels and that the rupturing had been very recent. I am convinced in my own mind that the heavy lifting caused an increased pressure in the blood stream, which the degenerated aortic wall could not withstand; this produced an acute dilatation and death.' The autopsy surgeon at the inquest reported 'arteriosclerosis, hemorrhages and dilatation of the aorta.' Dr. Koford also testified that he had known the deceased for several years immediately prior to the death, and that the deceased had never displayed or complained of poor health or illness, and that he had not known anything abnormal in his physical condition. The wife of deceased, who had lived with him for more than twenty years immediately preceding his death, testified substantially to the same effect. Dr. DuBray, without any examination of the deceased and without a full knowledge of the facts found at the autopsy, gave his opinion that death was caused by coronary occlusion and was not caused by the exertion of the employment. Dr. Gibbons, likewise without any examination of the deceased and without full knowledge of the true facts disclosed at the inquest and the circumstances leading to the death, also expressed an opinion that death was not caused by the employment. Dr. Harbaugh, another physician called by the commission, reviewed the entire record and expressed the opinion that the pre-existing disease was the major factor in the case, but that the extra exertion and the testimony of the physicians who actually saw and performed the autopsy could not be disregarded."

Upon these facts we reached the conclusion that the death of the deceased was the result of an industrial injury and compensable as such. The order of the court directed "further proceedings and findings in accord herewith." The effect of this judgment was to set at rest the question of the compensability of the injuries and to leave to the commission the duty of determining the remaining issues such as the fact and extent of dependency and similar details following upon the determination that the injury was industrial. Notwithstanding the judgment on the former hearing, the commission pretended to hold a new hearing and to take new evidence. The extent of this hearing was the calling of one of the witnesses at the previous hearing who was permitted to repeat his testimony given at the first hearing.

[3-5] We are now confronted with two questions—first, Was the so-called "new hearing" in conformance with the order remanding the proceedings and, second, Was the medical opinion given at the second hearing founded upon such hypothetical basis as to render it competent and admissible? Both questions must be answered in the negative. The former opinion of this court determined that the injury was an industrial one and compensable as such upon the evidence which was reviewed at that time. Right or wrong, this was a final decision on that subject. When the order was made for further proceedings "in accord herewith," that order contemplated such further proceedings as should be necessary to complete an award for a compensable industrial injury such as had been found to exist. That decision was based upon the rule of law laid down by the Supreme Court in Winthrop v. Ind. Acc. Comm., 213 Cal. 351, 354, 2 P.(2d) 142. As we are bound by the rule of that decision so are the respondents, and, until that rule has been modified, we must take it as settled law that when the direct evidence of those who have observed and treated the injured employee shows that the injury was industrial the commission may not refuse compensation solely upon opinion evidence based upon a state of facts not shown to exist.

[6] Secondly: The hypothetical question submitted on the second hearing was but a repetition of the error of the first hearing. It not only failed to correctly state the facts admitted in the record but it omitted the essential elements revealed by the autopsy upon which those physicians who examined and treated the deceased based their conclusion that the strain of the heavy lifting had caused an increased pressure in the blood stream which produced an "acute dilatation and death." Hence, if a new hearing on this issue were permissible under the remanding order, it is apparent that no new hearing was had and no bona fide effort was made to offer any competent evidence on the issues involved. The pretense of repeating the testimony of one of the witnesses at the first hearing was but a subterfuge to evade the order heretofore made. In order that there may be no further excuse for similar evasions we will expressly emphasize that the further hearing shall be limited to the issues of dependency and such incidental matters necessary to make an effective award, but that the issue of compensability shall be deemed a matter adjudicated by the former decision.

The order is annulled and the application is remanded with directions to the respondents to proceed in accordance herewith.

We concur: STURTEVANT, J.; SPENCE, J.

131 Cal.App. 307

SIMS v. MAINS et al.

Civ. 4859.

District Court of Appeal, Third District, California.

April 20, 1933.

1. Venue ⇐56.

Demand for change of venue to county where defendants resided *held* sufficient demand that trial be had in proper county (Code Civ. Proc. § 396).

2. Venue ⇐72.

Upon demand for change of venue, issues involved are determined by condition of pleadings as they then existed, and no additional issue can be injected into case (Code Civ. Proc. § 396).

3. Venue ⇐6.

Complaint to recover personalty or its value, brought in county where personalty was situated, showed that action was transitory, warranting change of venue to county where defendants resided (Code Civ. Proc. § 396).

Complaint alleged that plaintiff was owner and entitled to possession of personal property consisting of house situated in county where action was brought; that property was valued at $900; that property was in possession of defendants, who wrongfully claimed some right or interest in it; that plaintiff demanded possession of property but defendants wrongfully withheld possession thereof from plaintiff, who prayed for possession of property or value thereof.

Appeal from Superior Court, Merced County; H. S. Shaffer, Judge.

Action by Harry Sims against E. P. Mains, Phoebe S. Mains, and others. From an order denying their motion for change of place of trial, named defendants appeal.

Reversed, with direction.

William N. Graybiel, of Turlock, for appellants.

W. Coburn Cook, of Turlock, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

This is an appeal by the defendants E. P. Mains and Phoebe S. Mains from an order denying their motion for change of place of trial. The allegations of the complaint are as follows:

"1. That the plaintiff is the owner and entitled to the possession of that certain personal property consisting of a six-room house situate in the southeast quarter of the northeast quarter of section 8, in township 6 south, range 10 east, M.D.B.&M., in the county of Merced, state of California;

"2. That said personal property is of the value of $900.00;

"3. That the defendants, and each of them, claim some right, title or interest in and to said personal property, and that the claim of said defendants, and each of them, is without right, and that said personal property is in the present possession of said defendants;

"4. That the plaintiff has demanded of the defendants, and each of them, the possession of said personal property, but that the defendants, and each of them, wrongfully withhold possession thereof from the plaintiff."

The complaint then prays for possession of the property, or for $900, the value thereof, etc.

The defendants, E. P. Mains and Phoebe S. Mains, Maud B. Graybiel, A. Bethel Colwell, and Cora M. Graybiel, appeared by filing a demurrer to the plaintiff's complaint. At the time of the filing of the demurrer, the defendants E. P. Mains and Phoebe S. Mains filed a demand for a change of place of trial from the county of Merced to the county of San Diego, stating in the demand that the defendants E. P. Mains and Phoebe S. Mains are both residents of the county of San Diego, and that no one of the defendants stated in the complaint is a resident of the county of Merced.

Accompanying the demurrer and demand, and filed at the same time, was an affidavit of merits, a notice that the defendants, E. P. Mains and Phoebe S. Mains, would, at a day and time named in the motion, move the court for a change of place of trial to the county of San Diego. The affidavit filed by E. P. Mains and Phoebe S. Mains sets forth that the defendants E. P. Mains and Phoebe S. Mains are both residents of the city and county of San Diego; that none of the defendants named in the complaint were residents of the county of Merced at the time of the beginning of the action, and were not residents of the county of Merced at the time of filing the affidavit. The affidavit of the defendants E. P. Mains and Phoebe S. Mains as to the residence of other defendants is made upon information and belief.

The plaintiff filed an opposing affidavit in which it is set forth that the defendants will claim that said personal property is a part of the real estate upon which it is situate. It also sets forth that affiant is informed and believes that the defendants E. P. Mains and Phoebe S. Mains have no information as to the residence of certain defendants named in the action, to wit, Tony Fontana, Lillian F. Fontana, and Olive Gordon, and that said de-

fendants were within recent years residents of the county of Merced. It will thus be seen that there is no claim that any of the defendants were, at the time of the commencement of the action, or were, at the time of the filing of the affidavits, residents of the county of Merced. The only denial in the plaintiff's affidavit of any of the facts set forth in the affidavit filed by the defendants E. P. Mains and Phoebe S. Mains is as to their information and belief, which, of course, raises no issue as to the facts of the defendants all being nonresidents of the county of Merced.

[1] Upon this hearing the point is made that the demand does not conform to the requirements of section 396, Code of Civil Procedure, in that it does not, in express terms, demand that the trial of the action be transferred to the proper county. The demand does set forth that the defendants are both residents of the city and county of San Diego, and demands that the trial of the action, on account of their residence, be transferred to the county of San Diego. In other words, the facts showing the proper county to be San Diego are set forth instead of the words "proper county." This shows the contention of the respondents to be untenable.

In the case of Brown v. Happy Valley Fruit Growers, 206 Cal. 515, 274 P. 977, the sufficiency of an affidavit on information and belief, was before the Supreme Court, and it was there held that such an affidavit, made in relation to other defendants being nonresidents, was sufficient. To the same effect is the holding in the case of Pacific Coast Automobile Ass'n, a corporation, v. Ahlf, 115 Cal. App. 21, 300 P. 841.

The respondent also relies upon the case of Pieper v. Centinela Land Co., 56 Cal. 173, in which the following language occurs: "Under these circumstances, all the defendants should have joined in this motion, and as they did not do so, the motion was properly denied"—citing authorities. The opinion in this case shows, however, that the motion for change of the place of trial was based upon two grounds, to wit, residence of the moving parties, and convenience of witnesses. An examination of the cases which hold that all of the parties appearing must join in a motion for new trial reveals that the question of convenience of witnesses is really the turning point of the decisions. This appears from the opinion in the case of McSherry v. Pennsylvania Consolidated Gold Mining Co., 97 Cal. 637, 32 P. 711, where it is held that, when the motion for change of place of trial is based only upon residence, "it is not necessary that all the defendants in an action should join in a demand for a change of venue."

This distinction is also pointed out in the case of McKenzie v. Barling, 101 Cal. 459–461, 36 P. 8. See, also, Rathgeb v. Tiscornia, 66 Cal. 96, 4 P. 987, in which case, however, the defendants who had been served did join in the motion.

[2] Upon a demand, notice of motion, affidavit of merits, and motion for change of venue, the issues involved and the right of the defendants to a change of venue are determined by the condition of the pleadings as they then existed. The affiants cannot inject into the case any additional issue. This rule is set forth in 25 California Jurisprudence, 907, as follows: "Upon motion for a change of place of trial to the proper county, the right thereto will be determined by the conditions revealed by the pleadings existing at the time the party claiming the right first appears. Thus, the nature of the cause of action, so far as it affects or determines the place of trial, will be ascertained from the complaint alone, and the court will inspect the complaint for the purpose of determining the character of the action and the judgment which may be rendered. The averments of the complaint will be taken as true in considering the motion, and ambiguities will be resolved against the pleader."

Supporting this rule is the language contained in the opinion in the case of Sheeley v. Jones, 192 Cal. 256, 219 P. 744, where it is said: "For the purpose of considering the motion for a change of place of trial the court is permitted to inspect the complaint for the purpose of determining the character of the action, and the judgment which might be rendered thereon"—citing McFarland v. Martin, 144 Cal. 771, 78 P. 239. See, also, Weygandt et al. v. Larson et al. (Cal. App.) 19 P. (2d) 852.

No question is made as to the sufficiency of the notice of motion, nor of the sufficiency of the motion, nor of the sufficiency of the demand, or of affidavit supporting the motion, save as herein stated which, from the authorities set forth herein, are shown to be untenable.

[3] That the action is transitory in its form is the only conclusion that can be reached upon an inspection of the complaint. It is directed only to the recovery of personal property or its value.

It therefore follows that the order of the trial court denying the defendants' motion for a change of place of trial must be reversed. And it is so ordered; and the court is hereby directed to grant the defendants' motion.

We concur: PULLEN, P. J.; R. L. THOMPSON, J.

PEOPLE v. ROBERTS. *

Cr. 2316.

District Court of Appeal, Second District, Division 2, California.

April 25, 1933.

Rehearing Denied May 9, 1933.

Hearing Denied by Supreme Court May 25, 1933.

1. Criminal law ⇐704.

Objection to defendant's offer of proof in opening statement to jury that deceased made statements indicating animosity toward defendant *held* properly sustained, in view of immaterial portions.

Defendant's counsel offered to prove, after objection to his preliminary statement, that defendant was married, had two children, including deceased, left wife and children in another state many years before trial, came to California, subsequently returned to such other state, educated deceased, brought him to California and took him into business with defendant, that deceased's mind was so poisoned by his mother and consideration of wrongs done her by defendant that his purpose was to avenge such wrongs on defendant, and that he had made statements to such effect.

2. Homicide ⇐169(1).

Defendant's testimony in murder trial as to kinds of business in which he and deceased engaged *held* properly excluded as immaterial.

3. Criminal law ⇐1035(3).

To save point that court erred in limiting proof of deceased's hostile statements concerning defendant to threats on objection to opening statement of defendant's counsel, it was incumbent on latter to reopen question and present authorities to court, if necessary.

4. Criminal law ⇐1141(2).

Burden is on appellant to show error.

5. Criminal law ⇐1170(2).

Court's limitation of testimony as to deceased's hostile utterances concerning defendant, to showing of threats, *held* harmless, in view of other testimony as to deceased's animosity toward defendant and absence of attempt to show what else defendant expected to prove.

6. Criminal law ⇐687(1).

People's witness *held* properly permitted to testify after close of evidence where district attorney stated that he could prove that people did not know of significance of such witness' testimony until after such time (Pen. Code, § 1093).

7. Criminal law ⇐489.

Inquiries as to whether experts, testifying to defendant's sanity, took all steps necessary to ascertain whether he had syphilis, *held* properly excluded as immaterial.

8. Criminal law ⇐452(2).

Testimony of defendant's brother as to symptoms or form of insanity manifested by defendant's father *held* not admissible on ground of witness' intimate acquaintance with father, in absence of showing that he ever saw father after latter became insane.

9. Criminal law ⇐448(11).

Question to witness as to whether defendant was more preoccupied during certain period than before *held* improper as calling for conclusion.

10. Criminal law ⇐452(2).

Question to nonexpert witness as to whether she had formed opinion concerning defendant's sanity *held* improper, where her testimony failed to show that she was intimate acquaintance of defendant.

11. Criminal law ⇐1035(3).

Right to review ruling limiting proof of deceased's hostile utterances concerning defendant to threats *held* saved, where counsel offered to show through defendant's testimony deceased's statement to him of personal relations existing between them short time before killing.

12. Criminal law ⇐1169(2).

Ruling limiting proof of deceased's hostile utterances concerning defendant to threats *held* not reversible error, where much testimony completely describing defendant's and deceased's difficulties reached jury.

CRAIG and STEPHENS, JJ., dissenting in part.

Appeal from Superior Court, Los Angeles County; Fletcher Bowron, Judge.

John Roberts was convicted of murder, and he appeals.

Affirmed.

Edwin S. Douglas and Albert E. Coger, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Alberta Belford, Deputy Atty. Gen., for the People.

WORKS, Presiding Justice.

Defendant was found guilty of murder. The crime was a filicide. That defendant shot his son to death was undisputed. Under his plea of not guilty the sole defense was that his action in firing the fatal shots was committed in self-defense. He also entered a plea of not guilty by reason of insanity. He appeals from the judgment and from an order of the trial court denying his motion for a new trial.

It was the theory of the defense that appellant, on the day of the killing and pursuant to previous engagement, walked into the business office of his son at a time when the latter was using his telephone, that the son then, without relinquishing his hold on the telephone receiver, pointed an automatic pistol at his father and pulled the trigger, but

*Rehearing denied 22 P.(2d) 25.

that the weapon snapped and was not discharged, and that appellant then shot his son down.

[1] The first contention made by appellant is that the trial court erroneously denied him the right to introduce evidence showing a feeling of animosity toward him by his son, persisting continuously and for a long time before the day of the shooting. It is said that this evidence, if permitted, would have sustained the theory that the son snapped his pistol at the father, thus in turn supporting the theory that the father shot the son in self-defense. The question thus presented first arose in this wise, premising that the killing occurred on July 26, 1932: At the close of the evidence presented by the prosecution, counsel for the defense made a preliminary statement to the jury. Immediately after the commencement of the statement counsel for the defense said: "We are going to show to you that this defendant left his first wife and two children, one of whom was Earle Roberts [the decedent son], in 1893. * * *" At this point counsel for the prosecution interrupted the statement with the remark that "the People object to any such proof on the ground it would be immaterial, and therefore to any opening statement in that regard." The respective counsel then approached the bench for the purpose of discussing with the trial judge the situation thus presented, and a somewhat lengthy colloquy then and there occurred out of the hearing of the jury. During it, although, strictly speaking, the time for the introduction of evidence on the part of appellant had not yet arrived, the judge permitted his counsel to make an offer of proof. The offer was thus couched: "Well, we offer, then, to prove that the defendant was married, had two children, one of which was the deceased, Earle Roberts; that the defendant left his wife and children in Chicago, Illinois, about 1893, and went to St. Louis. He there accumulated about $2,000 and came here to California and became a successful contractor; that he then went back to Chicago and educated his son, Earle Roberts, and built a home for the first wife, she having married again; that after his son's education was completed in Armour Institute in Chicago, he then brought the son to California and took him into business with him; that the son's mind had been so poisoned by the mother and by his consideration and analysis of what he thought had been a great wrong to his mother that the son's purpose was to avenge his mother's wrongs on his father; that subsequently he made statements to that effect." The prosecutor made objection to the offer and said, in addition: "The People will not object to any offer of proof of any statement on behalf of the deceased against his father in the nature of threats to do bodily injury." The court then ruled, with italics supplied by us: "I think the objection is good. *Of course, at a later time, as your defense develops, I might see your point of view, but at the present time* I think I will have to require you to limit your proof to threats." Counsel for the defense then proceeded to complete his opening statement to the jury.

The court ruled correctly in sustaining the objection to the offer of proof. There was much in it which could not possibly have been material, and unless the whole offer was proper the objection was of course good. If we assume something it seems not necessary to decide, that is, that the trial judge was wrong in saying that "at the present time I think I will have to require you to limit your proof to threats," we must at once remark that the observation was not final. What we have italicized above from the judge's entire statement sufficiently demonstrates the truth of the assertion. The only then present effect of the judge's ruling was to place a limitation upon the opening statement of the defense to the jury, and it is not contended that from that aspect appellant was harmed, nor, indeed, that the imposition of the limitation was error. All question as to the *admissibility of evidence* concerning the matter as to which counsel sought to address the jury was left open by the trial judge. Disposition is thus effectually made of any possible claim that error occurred at the time when counsel for the defense was interrupted in his opening address.

[2] Immediately following the discussion in appellant's brief of the episode discussed above, quotation is made by appellant from the record and it is claimed that the court erred in a ruling included in the quotation. Appellant was on the witness stand. He testified that he and his son, after a certain time, had remained in business together until "the latter part of 1915, or the first part of 1916. I do not just recall the date.

"Q. And did differences arise between you? A. Yes, sir.

"Q. Leading to lawsuits? A. Yes, sir.

"Q. And what kind of business were you and Earle in? A. Well, we were into several kinds during that time.

"Q. Well, just tell us about them in your own way."

Objection was made that this last question was immaterial and the objection was sustained. It is insisted that the ruling was error, but we think it was not. We do not see how it could have been material for appellant to tell about the several kinds of business in which he and his son had been engaged. If the question was intended as preliminary—and we fail to see how it could have been so intended—appellant shows nothing from the record which informed the trial court of the fact. The objection was properly sustained.

[3] Appellant inserts in his brief the following quotation from the transcript of the

evidence: "Q. Now, this lady was with you, and Earle came along; is that right? A. Yes, sir. Q. Now tell what happened on that occasion, what he did or said. A. Well, I stopped him, as I had before, and dunned him for some money, and he gave me—[The District Attorney]: I move that be stricken out as immaterial, may it please the court. [Counsel for defendant]: I think now, if your Honor please—I can understand your Honor's ruling; I mean back in 1916; but here we are in the very year— The Court: It is not a question of remoteness. The deceased is not on trial. What he said other than by way of threats is immaterial. Just confine yourself to what your son said, if he said anything. A. He said, 'I've got no money, and if you don't lay off that money stuff it will be too bad for you.'" It is contended that the trial court here committed the same error which is claimed to have occurred at the time when the prosecutor halted, by objection, the opening statement made to the jury on behalf of appellant. The quotation we have just made from the brief is complete. It is not shown from the record that appellant's counsel stated to the court what he expected to show by the answer of appellant which was interrupted by the district attorney, to which, indeed, that officer might well have objected at the proper time that the witness had stated mere conclusions. It is true that the judge said, as he had remarked during the earlier episode, in effect, that what the son said "other than by way of threats is immaterial." It will be remembered, however, that at the close of the occurrence, while counsel for appellant was addressing the jury, the judge notified the advocate that his remark made at that time was not final, and that he might change his mind as the defense was developed. As to the particular time now under discussion, there is nothing in appellant's brief to show that counsel made any remonstrance as to the court's language with reference to threats, or that he then discussed the subject or asked leave, after the court had spoken, to discuss it. Indeed, counsel never at any time availed himself, so far as the brief shows, of the opportunity to present the point. When respective counsel and the court had their colloquy at the bench during the earlier episode, no authorities were presented to the judge upon the question involved in his statement as to a limitation upon the evidence to be introduced. It was the duty of counsel for the defense—nay, it was required of them if they desired to save the point—later to reopen the question and to present authorities to the court, if necessary. Judging from the portions of the record shown in the brief of appellant, his counsel tried the case, after the colloquy at the bench, as if he were entirely satisfied with the view of the judge upon the subject. Certainly, the court, so far as the brief shows, was never informed to the contrary.

[4] Under the well-known rule that the burden is upon an appellant to show error before a judgment can be reversed, we have disposed of the claims of error above discussed. We shall not, however, permit matters so to rest. The case is pitiful from any view. It would be bad enough, from the standpoint of both father and son, if the killing occurred in self-defense. The case is pitiful to a degree if the father shot his son not in self-defense, as the jury determined. Furthermore, appellant is nearly seventy-three years of age. He was sentenced to imprisonment for life. Under all these circumstances we shall go further than the law requires in order to demonstrate that appellant was fairly tried.

We have said above that certain things do not appear in appellant's brief. One reason for a failure to show them in the brief is that they do not appear in the record. The two points last discussed above arose while appellant was on the witness stand, and his very lengthy testimony in the record we have perused with meticulous care. Counsel made no assertion that the query, "Well, just tell us about them in your own way," was preliminary to anything material which was expected to be shown by the defense, nor did he ever present to the trial court the question whether the judge was right in what he tentatively said, when the opening address of appellant's counsel to the jury was interrupted, concerning the limit to be placed upon testimony as to what was said throughout the years by the son of appellant. Moreover, not only does appellant's brief fail to show that the cause was not tried upon the theory that the trial court's remark made during the opening address of the defense to the jury was correct, but the record shows actually that it was so tried. This, not only because counsel failed to present at any time the question left open to them by the judge, but also because of specific situations shown by the record. First, when the court sustained the objection to the question, "Well, just tell us about them in your own way," the counsel who was examining appellant immediately went on: "All right. Then Mr. Roberts, you and Earle severed your business relations, about the latter part of 1915 or the first part of 1916, is that right?" There was here an opportunity to test the question whether the court was right in saying that he thought the testimony concerning the son should be limited to a showing of threats, for appellant now assigns as error the sustaining of the objection which the court had just passed upon, on the theory that the judge was wrong. Nevertheless, with an "all right," counsel deserted the point. On another occasion appellant had

spoken of a meeting with his son. His counsel then said, "Well, tell what was said on that occasion, Mr. Roberts." To this query the district attorney made the peculiar objection, "I object to the entire conversation, except that portion containing a threat," thus leaving the witness to determine for himself what part of the conversation "contained" a threat. However, without awaiting a ruling on the objection—and it never was ruled upon—counsel for appellant proceeded: "All right. What did he say, Mr. Roberts, on that occasion in the nature of a threat?"

On the whole, we think it unnecessary to decide whether the trial judge was wrong, when he said on two occasions that the testimony concerning the son's utterances should be limited to a showing of threats. The trial, taking the entire record together, was conducted upon the theory that the judge was right. He never had an opportunity to rule upon the question.

[5] Further, however, the testimony concerning the son and tending to show a feeling of animosity toward the father was not limited to a showing of threats made by the younger man, who, be it here observed, was at the time of his death forty-four or forty-five years of age. We shall recite the testimony of appellant upon the subject of the son's feeling of animosity, including, however, the threats made by the son, as a part of the entire picture. The recital will show what an extreme state of affairs was exhibited to the jury by the testimony of the father. These are the different sections of the testimony of appellant on the subject: Father and son entered into business together as contractors, and in other lines of endeavor, in 1910. They severed their business relations in "the latter part of 1915, or the first part of 1916." Then this appears: "Q. And did differences arise between you? A. Yes, sir. Q. Leading to lawsuits? A. Yes, sir." The witness was asked whether after the severance of their business affairs the relations between him and his son were friendly or unfriendly. "A. Unfriendly. Q. And did Earle ever make any threats against you? * * * A. Yes, sir." Father and son met on a road in Antelope valley in "the latter part of 1916, it might have been the forepart of 1917." Each was driving a car. "I wanted to speak to him, so I stopped in the road and he attempted to go around me and got stalled in the sand and stopped. After he stopped I got out of my car and went over to near his car, and I asked him when he was going to pay me the money he had gotten out of the Lancaster Cattle Company. * * * I made a move towards him, knowing that he had a check book in his pocket, and when I made that move toward him he pulled a gun out and pointed it at my head, and he said, 'If you come any nearer to me I will blow your brains out.'" Appellant then thought he "had better quit" and the two separated. In May of 1932, probably the 18th, a little more than two months before the killing, appellant waited for his son in the hall of the building in which the office of the latter was located. This was shortly after 6 o'clock in the evening. "I met him in the hall and I spoke to him about paying me some money, and he gave me the usual conversation, that he had no money. Of course, I couldn't agree with him, and then I took hold of his arm to lead him into his office. First, I asked him if he was going in his office, and he said no. I took him by the arm, and I thought I could turn him towards his office, and that he would go in there, and we would have some kind of a settlement, as I needed money awfully badly. He would not go in. And I guess I held his arm kind of tight, and he started to strike me and kicking me; and after he had kicked me a few times he reached into his coat pocket and pulled out a revolver and pointed it at me, and told me to stop. I did." About a week before the son was killed he and his father met in Pershing square, in Los Angeles, across the street from which was situated the building where the son had his office. "I stopped him; and I asked him when he was going to pay me some money; that I was hard up and that I had to have some; and he says, 'I am hard up, too, and I can't pay you any money.'" After an interruption the witness gave the remark of the son, "I have got no money, and if you don't lay off that money stuff I will fix you." This was probably upon the same occasion already referred to in this opinion, when somewhat similar language is ascribed to the son, although the record is not clear upon the subject. Father and son, for some time before the killing—the record is not clear as to the length of the period—repeatedly made engagements to meet and discuss their financial affairs, but the son did not meet the engagements. "He would not keep an appointment with me." The feeling between the two was so strong that the father never visited the home of the son. The latter was married and had two daughters, one of seventeen and one of fourteen. The father was in fear of his life, because of the son's animosity toward him, "most of the time" after "about 1916 or 1917."

In the face of such a deplorable showing as this, in the absence of any attempt on the part of appellant's counsel to show what in addition they expected to prove, and in default of attempt to present the legal question which the trial judge had left open, we can see no harm that could have resulted from what the judge said as to the limitation which he thought should be placed upon the testimony of appellant concerning the utterances of the son. Anything more would have been but cumulative of the mass of al-

most unimaginable matter in the record. If appellant's counsel thought they were entitled under the law of evidence to present more testimony upon the subject, they should have given the trial judge the opportunity to admit it.

[6] After the case of the prosecution had been closed and after the defense had also rested, the district attorney asked leave to examine a witness whose testimony was logically a part of the main case for the people. Counsel for the defense objected to the testimony. The district attorney then said: "I might state to the court that this witness was unknown to us; and if counsel wants me to I can explain why the facts of this witness' testimony were unknown to us. Therefore, this not being a game, the People ask permission, in the interest of justice, to reopen the case for the purpose of receiving this witness' testimony." Appellant's counsel then argued in support of his objection and the district attorney further said: "I say to the court, as an officer of the court, that the People did not know of the significance of this witness' testimony until Saturday afternoon. It is as true as I am standing on this spot, and I can put on evidence to prove it if counsel doubts my word." The court then permitted the testimony to be given and it is now contended that the granting of the request was error. It is insisted that "more emphasis" was placed on the testimony by its late production than if it had gone in before the prosecution rested. We fail to see how any overemphasis was given the testimony, unless it was caused by the argument presented by counsel for the defense after the district attorney had made his first statement, and that emphasis was favorable to appellant. During the argument counsel said that it would be unfair to admit the testimony at the time. Section 1093 of the Penal Code provides, in effect, that after the testimony in chief of prosecution and defense in a criminal case has been received, "the parties may then respectively offer rebutting testimony only, unless the court, for good reason, in furtherance of justice, permit them to offer evidence upon their original case." Under this section we think the court properly allowed the introduction of the belated testimony. The statements of the district attorney gave the court "good reason" for the course it took.

[7] The next point made by appellant is argued under the heading "Exclusion of inquiries directed to show failure of experts to properly examine defendant." The inquiries thus referred to are not pointed out to us in the brief. We are not told to what experts they were addressed, nor are we referred to places in the transcript where the questions and objections to them may be found. After nearly three pages of argument, however, counsel do say: "The court excluded inquiries directed to the ascertainment whether there had been an organic change in the brain tissue, as the result of syphilis, which had produced insanity. The court ruled that, unless the defense intended to prove the existence of syphilis, these questions were improper." We shall proceed to discuss the point thus stated, without regard to the form or character of the questions which are supposed to have presented it to the trial court.

In order to aid in a determination of appellant's plea of not guilty by reason of insanity the trial judge appointed three alienists, and the district attorney one, to examine appellant and to testify concerning his state of mind. Three testified that he was sane, one that he was insane. The argument of appellant upon the question now under consideration is principally based upon portions of the testimony of one of the experts who was of the opinion that appellant was sane. This alienist, whom he shall call Dr. O., testified that the pupillary reflexes of appellant "were rather sluggish in their reaction to light." He also found an absence of "knee jerks" in his subject. He then observed, because of these conditions, that if appellant "were a private patient of mine I would advise them to have an examination" of the spinal fluid. He also testified: "* * * And in order to be absolutely positive whether a person has syphilis you have to make what is known as a spinal puncture? A. You should. It is not 100 per cent accurate. Q. But good medical practice requires that you should do that? A. Yes. Q. And a spinal puncture test will show the germ of syphilis present or absent? A. That is what it is for. Sometimes it does not show even when it is present. I say that because very often they repeat it. The repeated examination will show what the first examination does not." Immediately following the quotation from the testimony of Dr. O., appellant says that "with all due respect to the experts, they or any of them do not know whether the defendant has such degenerated condition of the brain tissues, from syphilis, as to produce insanity." Indeed, the entire burden of appellant's argument on the head now under consideration is that he was halted in attempts to inquire of some of the experts whether they had taken all the steps necessary to ascertain whether appellant was afflicted with syphilis. Further, that is the only subject dealt with during the portion of the examination of Dr. O., quoted in the brief, which covers about two and one-half printed pages. But the purpose of the experts was not to ascertain whether appellant was a syphilitic, but to ascertain whether he was legally insane. They were all qualified, of course, and the qualifications of none of them is disputed. Indeed, the qualifica-

tions of Dr. O. were admitted by appellant. Being qualified to testify as to the sanity or insanity of appellant, they were all incontrovertibly and necessarily qualified to conduct such an examination of appellant as would enable them to testify upon the ultimate question at issue under appellant's special plea. Three out of four of the experts, their qualifications not being disputed, examined appellant and testified that he was sane. In other words, the effect of the testimony of the experts was, whether he had syphilis or not, that he was sane. These observations would seem to answer the point made by appellant, although the instance of Dr. O., upon whose testimony the point is based, may be pointed to as a specific illustration of the situation. In addition to the testimony of the doctor, which we have mentioned above, he also said that "good medical practice requires" that a specimen of the spinal fluid should be taken in order to determine whether a patient is *afflicted with syphilis*. Nevertheless, as already observed, he testified that appellant was sane, although he had taken no such specimen. And he testified to that effect in no uncertain terms. He said that "he has always been sane. He never has been insane either medically or legally." The fact that the three experts were qualified, the fact that they made an examination of appellant, the fact that they swore that he was sane, all go together to show that the question whether or not he was a syphilitic was an immaterial point in the case. It is perhaps well to observe here that there is no testimony in the record to the effect that appellant was afflicted with syphilis or that he had ever had the disease.

[8] There was testimony that the father of appellant was insane during the latter part of his life and that at the time of his death and for a considerable period prior to that event he was confined in an institution devoted to the care of such unfortunates. A brother of appellant was a witness at the trial. This question was addressed to him: "Can you tell us something of the particular symptoms or form of insanity that your father manifested?" Objection was made that the question was immaterial and the objection was sustained. It is contended in the opening brief that this inquiry was properly addressed to the witness as an "intimate acquaintance" of his father. This contention is unsound for the reason that there is nothing in the testimony of the witness to show that he ever saw his father after he became insane. It is insisted in the reply brief that the question should have been allowed because the only objection was that it was immaterial. We think the objection was good. Certainly, the question was improper under the law, the witness not having qualified either as an expert or as an intimate acquaintance, and an answer to it could not properly have aided the jury. The trial judge would have been within his province if he had ruled the question to be improper, without objection. The trial of a lawsuit is not a game of chess, and no party, not even a defendant in a criminal case, is entitled to the testimony of a witness required by law to possess certain qualifications before he can testify, and who does not possess the qualifications. The crux of the entire present situation is shown by the question: How can a man testify as to the symptoms or form of insanity of a demented person whom he never saw after he became insane? In what we have said we do not decide that the particular inquiry now before us would be proper if addressed to one who was admittedly an intimate acquaintance of the person inquired about.

[9] The defense produced a witness who was asked whether there had been a change in appellant's demeanor and actions at a certain period as compared with an earlier one. Two questions of this nature were answered without objection, and then came this: "Q. Well, I mean with respect to his mind, whether he was more preoccupied and had his mind more on himself than he had before?" The question was objected to as calling for a conclusion of the witness. "The Court: Objection sustained. Yes, it obviously calls for a conclusion." The ruling was proper.

[10] Another witness, not an expert, was asked certain questions as to her acquaintance with appellant. She was then asked if she had formed "any opinion as to his sanity or insanity." The question was properly ruled out for the reason that the testimony of the witness, which we have read in full, failed to show that she was an intimate acquaintance of appellant. This is so plain that it is unnecessary to recite her testimony here.

Judgment and order affirmed.

STEPHENS, Justice.

[11] I concur in the judgment but not in those parts of the main opinion wherein it is held that the attorney for defendant at the trial effectively consented to the court's ruling made in the offer of proof. I think the point was reopened when the attorney offered to make a showing through the father's testimony of the son's statements to him of the personal relations existing between them but a short time before the tragedy. The court's remarks were anything but indefinite or tentative, concluding with "What he said other than by way of threats is immaterial. Just confine yourself to what your son said, if he said anything." While the attorney could have pressed the matter, the court's ruling was intimation enough that it cared for no argument or authority and most certainly

the attorney was under no pain of losing his exception by accepting the ruling as final in the trial.

[12] Whether or not the court was right seems of little consequence in this appeal for much testimony giving a very complete description of the father's and son's difficulties and mutual ill-feelings reached the jury.

I concur: CRAIG, J.

131 Cal.App. 275

BRINK v. BENTON et al.

Civ. 575.

District Court of Appeal, Fourth District, California.

April 17, 1933.

Mortgages ⇐218.

Independent action on note secured by trust deed *held* not maintainable until security is exhausted or is shown to be without value.

Appeal from Superior Court, Orange County; G. K. Scovel, Judge.

Action by C. V. Brink against Paul T. Benton and another. From a judgment in favor of the defendants, the plaintiff appeals.

Affirmed.

Alfred E. Dennis, of Los Angeles, for appellant.

Harry C. Westover, of Santa Ana, for respondents.

MARKS, Justice.

Appellant instituted this action to obtain judgment against respondents for the unpaid balance due on a promissory note which contained the following recital: "This note is secured by Deed of Trust to National Title Insurance Company, a corporation, of Los Angeles, California." The complaint contained no allegation that the security for the note had been exhausted or applied towards its payment, or that it had become worthless. The trial court found in favor of respondents, and entered judgment accordingly. This appeal is taken on the judgment roll.

Appellant urges that, since there is no evidence before us, we cannot conclude, from the bare recital to that effect contained in the note, that it was in fact secured by a deed of trust. The answer to this is found in the findings of fact, wherein the trial court found that the note was secured by a deed of trust.

The recent case of Bank of Italy National Trust & Savings Association v. Bentley (Cal. Sup.) 20 P.(2d) 940, holds that an independent action on a promissory note secured by a deed of trust cannot be brought by the holder of the note until the security is exhausted or is shown to be without value. This case settles all of the questions on this appeal against the contentions of appellant.

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

131 Cal.App. 486

PEOPLE of the State of California, Plaintiff and Respondent, v. J. W. HALL, Defendant and Appellant.

Cr. 1707.

District Court of Appeal, First District, Division 1, California.

April 28, 1933.

Appeal from Superior Court, Alameda County; Frank M. Ogden, Judge.

Leo A. Sullivan, of Oakland (J. L. Royle, of Oakland, of counsel), for appellant.

U. S. Webb, Atty. Gen., and Seibert Sefton, of San Francisco, for the People.

PER CURIAM.

Application for admission to bail pending appeal. From an examination of the record, we are satisfied that the trial court did not abuse its discretion in denying defendant's motion to be admitted to bail pending the hearing on appeal. The application is therefore denied.

131 Cal.App. 456

PEOPLE of State of California, Plaintiff and Respondent, v. Hazel Vallejo KING, Defendant and Appellant.

Cr. 1714.

District Court of Appeal, First District, Division 2, California.

April 27, 1933.

Appeal by defendant from a judgment of the Superior Court, City and County of San Francisco, Louis H. Ward, Judge, of conviction of forgery and from an order denying motion for new trial.

Hazel Vallejo King, in pro. per.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, of San Francisco, for the People.

SPENCE, Justice.

The defendant was convicted in the superior court in the city and county of San Francisco of the crime of felony, to wit, forgery.

The transcript on appeal was filed in this court on January 9, 1932. No brief has been filed on behalf of appellant. The cause was regularly placed on the calendar for oral argument on February 14, 1932, and regularly continued to April 10, 1932. No appearance was made for appellant at either of the times at which the case was called for hearing.

Pursuant to the provisions of section 1253 of the Penal Code, the judgment and order are affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

131 Cal.App. 329

NEWCOMB v. TITLE GUARANTEE & TRUST CO. et al.*

Civ. 8750.

District Court of Appeal, First District, Division 1, California.

April 24, 1933.

Rehearing Denied May 24, 1933.

Hearing Denied by Supreme Court June 22, 1933.

1. Fraud ⇐30.

Where sale is conducted by real estate operator who is not owner's agent, owner, ignorant of representations, is not chargeable with operator's fraud.

2. Principal and agent ⇐156.

Representations of authorized agent are deemed representations of principal.

3. Principal and agent ⇐156.

Where agent makes fraudulent representations in effecting sale, principal, though not intending to deceive purchaser, is equally responsible with agent, regardless of whether representations were made in principal's presence.

4. Vendor and purchaser ⇐334(2).

Where real estate broker negotiated land contract for real owners, though legal title was held by corporation as trustee, contract procured through broker's fraud was subject to rescission by purchaser, and trustee receiving purchase money was charged with repayment thereof out of trust funds.

5. Vendor and purchaser ⇐337.

Where land contract was procured by fraud of real owners' agent and legal holder of title, as trustee, received purchase money, court *held* authorized, on rescission of contract, to create lien on lot and on portion of purchase money remaining in trustee's hands, but not against other lands, credits, and accounts in trustee's hands.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by Emma F. Newcomb against the Title Guarantee & Trust Company, Ninon Hudson, the Ninon Hudson Organization and others. From a judgment in favor of plaintiff, named defendants appeal.

Modified and, as modified, affirmed.

Fred W. Morrison, of Los Angeles, for appellants.

Y. B. Arsen, of Los Angeles, for respondent.

GEARY, Justice pro tem.

This is an appeal from a judgment rescinding an installment agreement for the purchase and sale of a lot in Burbank, Cal., and for the recovery of the money theretofore paid on the purchase price, based upon the ground that the sale was brought about by means of false and fraudulent representations.

The record title to the lot stood in the name of the Title Guarantee & Trust Company; and as owner it executed said agreement and accepted all payments made thereunder by respondent, as purchaser. The sale was negotiated and the alleged fraudulent representations were made by Ninon Hudson, a real estate broker operating under the fictitious name Ninon Hudson Organization, and two salesmen in her employ named Moore and Moss. Both salesmen were made parties defendant, but they are not affected by the judgment, the appeal having been taken by the remaining defendants. The trial court found that the charges of fraud were proved; and the evidence is legally sufficient to support such findings. It further found upon sufficient legal evidence that said trust company was acting in the transaction merely as trustee for certain undisclosed principals and "had no knowledge or information about the promises, misrepresentations and false and fraudulent statements" made by those negotiating the sale. The court's legal conclusions were that respondent was entitled to a rescission of the agreement and to recover from the Title Guarantee & Trust Company "as trustee and not otherwise, from the funds of said trust matter and not otherwise," and Ninon Hudson, the amount theretofore paid to said trustee on said purchase price, with interest. The form of the judgment followed generally the foregoing legal conclusions and created a lien "against said land and premises and all other lands, premises, credits and accounts in the hands of said trustee, the Title Guarantee and Trust Company, a corporation, as such trustee," to secure the pay-

ment of the amount found to be due respondent.

[1-3] Where a sale of property is conducted by a real estate operator, who is not the owner's agent, the owner is not chargeable with the fraud of such operator if he had no knowledge of the representations made. Wicks v. Rampart Boulevard Co., 176 Cal. 140, 167 P. 862; Security Commercial, etc., Bank v. Seitz, 43 Cal. App. 353, 185 P. 188. On the other hand, representations of an authorized agent are, in law, the representations of the principal. Accordingly, where false and fraudulent representations are made by an agent in effecting a sale, the principal is equally responsible with the agent, although the former had no intent to deceive the purchaser, since it is obvious that the principal cannot accept the benefits of the transaction and at the same time disclaim liability for fraud which induced the purchaser to enter into it. So far as the purchaser is concerned, such representations have the same effect to bind the principal as though they were made by him in the first instance, and this is equally true whether they were made in his presence or absence. See 25 Cal. Jur. 548, and cases cited.

[4] In the present case respondent did not allege or prove nor did the court make any finding that Ninon Hudson or her employees were the authorized agents of the trust company; and therefore, in view of the finding that the trust company had no knowledge of the fraud practiced by the parties mentioned, appellants contend that no ground for rescission exists. The trust company's interest in the transaction, however, was admittedly merely that of trustee for the real owners of the property whose identity was not disclosed; and the evidence shows without dispute that Ninon Hudson was employed by said owners, under a written contract, as their agent to sell said property; and in the absence of a finding by the trial court to that effect this court, in the exercise of the authority granted by section 956a of the Code of Civil Procedure, so finds. It having been thus established, therefore, that the agreement in question was made for and on behalf of the real owners and for their benefit, and that it was procured by and through fraudulent means of their duly authorized agents, it was clearly subject to rescission under the legal rules above mentioned. To hold otherwise would be to allow the real owners to profit by the fraudulent acts of their authorized representatives. As stated, however, no part of the purchase money was paid to the owners. All of it was paid to and accepted by the trust company as trustee for the owners. Therefore the trial court was justified in holding as it did that as such trustee the trust company was charged with the repayment thereof out of the trust funds. The question of the additional liability of the owners for the repayment of the money does not seem to be involved in the action.

[5] Furthermore, in order to secure the repayment thereof it was within the power of the court in the exercise of its equity jurisdiction to create a lien on the lot in question and on whatever portion of the purchase money remained in the hands of the trustee at the time of the entry of the judgment. But as will be noted the terms of the judgment extend too far and purport to create a lien against "all *other* lands, premises, credits and accounts in the hands of said trustee." (Italics ours.) Accordingly the portion thereof last quoted should be stricken therefrom, and it is so ordered. The remaining points urged by appellant are either unimportant to the decision of the appeal or are lacking in merit. As above modified the judgment is affirmed, the respondent to recover her costs.

We concur: KNIGHT, Acting P. J.: CASHIN, J.

13 Cal.App. 334

ANDREWS et al. v. REIDY et al.

Civ. 4634.

District Court of Appeal, Third District, California.

April 24, 1933.

1. Appeal and error ⇐1010(1).

District Court of Appeal will not balance evidence for and against, but will uphold findings of lower court if any evidence appears in record which supports them.

2. Appeal and error ⇐931(1).

Appellate court must accept as true all evidence tending to establish correctness of lower court's finding.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action for declaratory relief by C. L. Andrews and another against P. M. Reidy, Jane Reidy, and others, consolidated with action by Louis E. Kearney interpleading the parties. From a judgment in favor of plaintiffs, named defendants appeal.

Affirmed.

I. Henry Harris, of Los Angeles, for appellants.

Leonard J. Meyberg, of Los Angeles, for respondents.

KING, Justice pro tem., delivered the opinion of the court.

The action of Andrews v. Reidy et al. was brought for declaratory relief, etc. The Andrews owned a note secured by mortgage for $31,000. This note and mortgage had been assigned to a bank as collateral security for a loan. The bank began foreclosure proceedings which proceeded to judgment. The Andrews entered into an arrangement with P. M. Reidy whereby he should advance money necessary to pay off the Andrews' loan to the bank and the interest and costs of the foreclosure proceedings. Under this arrangement Reidy was to bid in the property at the foreclosure sale and hold the commissioners' certificate of sale as security for the money advanced. This was done. Reidy bid in the property for the full amount due on the judgment, advancing $12,000 to pay off the Andrews' loan to the bank and crediting the balance on the judgment, which had been assigned to him. The commissioner's certificate of sale was issued to Reidy. Thereafter the property was redeemed by the owners, the commissioner receiving $42,837.21 on the redemption. At this point the present action arises. The Andrews brought the suit, claiming that the $12,000 was loaned by Reidy with the understanding that in lieu of interest he was to receive $1,000 additional if repaid his loan at once; $1,500 if paid within three months; $2,000 if after three months and within six; with an additional $500 for each three months of delay up to thirteen months, receiving $3,000 if the payment were made more than nine and less than thirteen months after the money was advanced. The Andrews claimed that Reidy was entitled to only the original $12,000 advanced with the additional $3,000 for bonus or interest, and that they were the owners of the balance of the redemption money. Reidy, on the other hand, claimed that he was to receive his original payment of $12,000, and that the remainder of the fund was to be divided equally between himself and the Andrews. The commissioner, Louis E. Kearney, commenced an action interpleading the two claimants, deposited the money in court, and was granted a judgment in interpleader. The two actions were consolidated.

Plaintiffs had judgment and defendants, Reidy, appeal.

Appellants first attack nine of the findings, stating that there was no evidence upon which to support them, and allege that the conclusions of law and the judgment based thereon are without support in the findings. It would serve no good purpose, and unduly prolong the opinion to quote the conclusions of law here. It is sufficient to say that in the opinion of the court that the findings of fact, as made, do support the conclusions of law and the judgment, and thus the first point resolves itself into a discussion as to whether the findings are supported by the evidence.

[1, 2] The courts have frequently held that the findings of the lower court are not to be set aside if there be any evidence whatever which supports them. This court will not balance the evidence for and against, but will uphold the findings if any evidence appears in the record which supports them. An appellate court must accept as true all evidence tending to establish the correctness of the finding as made. Bancroft-Whitney Co. v. McHugh, 166 Cal. 140, 134 P. 1157; Clopton v. Clopton, 162 Cal. 27, 121 P. 720; Fales v. New York Life Insurance Co. (Cal. App.) 17 P.(2d) 174.

"The determination reached by the trial court upon all matters of fact is binding upon an appellate court, except only in the single instance where there is no substantial evidence to support its findings. Therefore the only action within the power of this court is to inquire and determine whether there is any substantial evidence to support the findings of the trial court, and, if such evidence is found in the record, then the findings must stand, notwithstanding the satisfactory character of appellant's evidence." King v. California Bank, 73 Cal. App. 136, 238 P. 108, 109.

Finding IV, which is objected to by appellants, finds that no pledgee's sale has ever been had or made of said judgment by the bank, and that the bank at all times held the judgment of $38,320.96 as a pledge of Charles L. Andrews and Anna L. Andrews to assure their indebtedness to the bank. Evidently the objection to this finding is an error because appellants' counsel in his opening brief (pp. 9 and 10) states that the mortgage was assigned to the bank as security, and that when the mortgagor defaulted, the bank foreclosed and took judgment for $38,320.96.

Findings V to XIII, inclusive, find all the facts as claimed by respondent, and are all attacked by appellant except No. XI, which finds that the redemption from the foreclosure sale took place and the money was paid to the commissioner and by him deposited in court.

The reporter's transcript has been carefully read from beginning to end, and without specifying the evidence, it satisfactorily appears that the transcript contains substantial evidence on each and every fact found supporting the findings, and therefore the "determination reached by the trial court is binding upon" this court.

Counsel for appellants devotes considerable space in his brief to a discussion of what is designated as "Point II," which is as follows: "The attitude and conduct of the trial judge throughout the proceedings, toward counsel for the appellants humiliated and

degraded him. As a result, counsel for appellants lost his poise, self-possession and normalcy, and was unable to properly conduct his clients' cause." We have examined the entire record bearing upon this subject, and while it is often true that the trial of a lawsuit, with the high tension to which zealous lawyers and trial judges are subject, causes regrettable controversies and unpleasant clashes to occur, yet this court is unable to find any ground in the events narrated in the transcript in the instant case to justify a reversal of the decision of the trial court.

The judgment is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

PEOPLE v. CRAVEN.*

Cr. 2285.

District Court of Appeal, Second District, Division 1, California.

April 25, 1933.

Hearing Granted by Supreme Court May 25, 1933.

Licenses ⇐18½.

Assignor's assignment of fractional interests in oil and gas produced under his leases, without permit from corporation commissioner to sell such interests, *held* dealing in assignor's own property, and not in violation of statute (St. 1917, p. 673, § 2, as amended by St. 1929, p. 1251).

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

J. M. Craven was convicted of violating the Corporate Securities Act, and he appeals.

Reversed and remanded.

Rex B. Goodcell, Manley C. Davidson, and Joseph H. Grossman, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for the People.

YORK, Justice.

Defendant was tried by the court without a jury, and was found guilty as charged in the indictment of a violation of the Corporate Securities Act (St. 1917, p. 673, as amended), in that he sold interests in oil and gas leases without a permit from the corporation commissioner. The indictment was in seven counts, upon five of which he was found guilty. This appeal is taken from a judgment entered pursuant to such finding of guilt.

Defendant, claiming to own certain oil and gas leases on several pieces of property situated in the Middle West, sold by assignment to various individual purchasers all his right, title, and interest in so far as it covered an overriding royalty of a fraction of seven-sixteenths of all the oil and gas produced and saved on the property named, together with all personal property used or obtained in connection therewith.

Appellant here contends that "the state may not regulate the use or sale by an individual of his own property unless that property is clothed with a public interest"; that the sale of an interest in an oil and gas lease such as is here under consideration is not affected by a public interest; and that the Legislature under the guise of police power cannot, for the purpose of preventing fraud, infringe the constitutional right of an individual to sell his own property.

In the case of Butrick v. Seines, 209 Cal. 567, 289 P. 616, where an owner of leases of land for the development of oil and gas wells sold by deed certain fractional interests in and to all oil, petroleum, gas, and other hydrocarbon substances extracted from the land under the leases, it was held that there was no violation of the Corporate Securities Act, citing People v. Pace, 73 Cal. App. 548, 238 P. 1089, 1091. In the latter case, the question presented was "whether or not an individual, who is a bona fide owner of securities, may lawfully sell such securities, or any part of them, in repeated and successive transactions of like or similar character, without first complying with certain requirements of the Corporate Securities Act required of brokers, and without securing a broker's license." In other words, how far shall legislative enactments be permitted to encroach upon the rights of the individual to acquire, possess, and dispose of his own property?

After a careful review of section 2 of the Corporate Securities Act (St. 1925, p. 962 et seq., and amendment in St. 1929, p. 1251 et seq.), the provisions of which apply to the facts of the instant case, this court in People v. Pace, supra, held that said section in so far as it attempts to require a natural person owning securities, of which he is not the issuer or underwriter, to secure a broker's permit as therein provided before he may lawfully sell such securities, even where the sale is made in the course of repeated and successive transactions of like or similar character by him, is unconstitutional and invalid as being in direct contravention of the inalienable right of every person to enjoy, acquire, possess, and protect his property, as guaranteed by the Federal and State Constitutions; and that nowhere in the authorities sustaining the regulation of the business

of brokers was authority found to sustain the contention made in the cited case, that the police power under the guise of general welfare may be invoked to interfere with the sale by an individual of his own property when the acquiring and possession of such property is not contrary to law.

Again, in the late case of People v. Lesser, 123 Cal. App. 489, 11 P.(2d) 668, involving the sale of stock, it was held that an owner of property such as there involved has the right to make a bona fide sale of it for such price as he can obtain in fair barter, and not be guilty of a violation of the Corporate Securities Act.

After an examination of the record in this case. we are of the opinion that in assigning fractional interests in the oil and gas produced, if any should be produced, under his leases, the defendant was dealing with his own property; that he was the sole issuer of interests under his leases, and therefore, under the authority of the cases hereinbefore cited, the conviction cannot be sustained.

The judgment appealed from is reversed, and cause remanded for new trial.

We concur: CONREY, P. J.; HOUSER, J.

131 Cal.App. 374

CRAWFORD v. ENGLER et al.

Civ. 7523.

District Court of Appeal, Second District, Division 1, California.

April 25, 1933.

1. Champerty and maintenance ⇐5(9).

Evidence failed to establish that note and trust deed sued on by attorney were purchased by him with intention of bringing suit thereon (Pen. Code, § 161).

2. Mortgages ⇐265.

Assignor's alleged fraud on defendant prior to assignment of note and trust deed *held* no defense to assignee's suit on note and deed in absence of allegations that assignee was party to fraudulent transactions or allegations of other facts voiding assignee's rights.

Appeal from Superior Court, Los Angeles County; Fletcher Bowron, Judge.

Action by Samuel J. Crawford against William F. Engler and others. From a judgment for plaintiff, defendants appeal.

Affirmed.

J. Edward McCurdy, of Los Angeles, for appellants.

George Acret, of Los Angeles, for respondent.

YORK, Justice.

This is an appeal from a judgment given for the amount of a deficiency judgment remaining due on a note secured by a deed of trust after a sale was had for $750. The original face of the note was $7,500.

[1] The first objection by appellants is that the plaintiff is an attorney and counselor at law and, therefore, is precluded from bringing this action, because he purchased the trust deed and note in violation of section 161 of the Penal Code. This contention is answered by the fact that there was no evidence introduced to show that this trust deed and the note secured thereby, or the guarantee of Catherine Kroeger, were purchased with the intention of, or for the purpose of, bringing suit thereon. Tuller v. Arnold, 98 Cal. 522, 33 P. 445.

[2] Appellants in their brief recite: "That fraud and misrepresentation was perpetrated upon the defendants and appellants by plaintiff's and respondent's assignor prior to the time of the signing of the instruments and that said fraud and misrepresentation was well known to the plaintiff and respondent." The record discloses the fact that the trust deed together with the note secured thereby was a second lien, and that the said note and trust deed were given as part consideration for the purchase price of certain real property. There is no allegation that the plaintiff was a party to any of the fraudulent transactions attempted to be alleged in the complaint, and there is nothing alleged in the special defense which would void the rights of the plaintiff. The facts alleged in the second, third, and fourth affirmative defenses set forth in the answer of the appellants are not sufficient to constitute any defense as against the plaintiff herein. No request was made in the trial court to amend or change this pleading in any way.

We hardly think it a proper case for the imposition of the penalty for a frivolous appeal, as respondent demands, but we see no real merit in any of the questions raised.

The judgment appealed from is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

TRADERS' CREDIT CORPORATION, Limited, v. RADIN & KAMP, Inc.

Civ. 801.

District Court of Appeal, Fourth District, California.

April 27, 1933.

Hearing Denied by Supreme Court June 26, 1933.

1. Principal and agent ⇐99.

"Ostensible authority" requires that there be intentional conduct or neglect on part of alleged principal creating belief in minds of third persons that agency exists, and reasonable reliance thereon by such third persons (Civ. Code, §§ 2300, 2334).

[Ed. Note.—For other definitions of "Ostensible Authority," see Words and Phrases.]

2. Principal and agent ⇐123(3).

In action for balance due for merchandise sold to one conducting business in leased space in department store, evidence supported finding that department store owner was not estopped from denying liability for merchandise.

Evidence disclosed that orders given by buyer were written by salesman and signed by buyer as individual, and there was nothing indicating he was acting in any other than individual capacity, though agent wrote on it to charge to department store owner, that all merchandise was shipped to department store owner and delivered to buyer through receiving room of department store, but that no one connected with department store had any knowledge of deliveries except receiving clerk, that invoices and statements of account were mailed to department store owner, but were apparently taken from mail by individual buyer, since they did not come to knowledge of department store owner until after practically all merchandise had been delivered.

3. Principal and agent ⇐123(3).

In action for balance due for merchandise sold to one conducting business in leased space in department store, evidence supported finding there was no ostensible agency of buyer for department store, so as to make department store owner liable for merchandise (Civ. Code, §§ 2300, 2334).

Appeal from Superior Court, Fresno County; C. E. Beaumont, Judge.

Action by Traders' Credit Corporation, Limited, against Radin & Kamp, Incorporated. From a judgment for defendant, plaintiff appeals.

Affirmed.

Stimmel & Grupp, of San Francisco, for appellant.

Frank Kauke, of Fresno, for respondent.

MARKS, Justice.

Listenwalter & Gough, Inc., and the Kaemper-Barrett Corporation, Limited, were corporations. They sold washing machines and ironers to L. W. Clifford. The unpaid balance of their accounts with Clifford were assigned to appellant for collection. Respondent is a corporation operating a department store in the city of Fresno, wherein L. W. Clifford leased space and conducted the business of selling these washing machines and ironers. He disappeared in January, 1931, leaving an unpaid balance of $3,153.11 due appellant's assignors. This action is brought to recover judgment against respondent for this amount.

The evidence shows clearly that Clifford had no actual authority to order the merchandise for respondent or to have it charged to its account. If appellant is to recover at all, it must do so upon the theory either of ostensible agency or estoppel.

"Ostensible agency" is defined by section 2300 of the Civil Code as follows: "An agency is ostensible when the principal intentionally, or by want of ordinary care, causes a third person to believe another to be his agent who is not really employed by him."

The liability of a principal for the acts of an ostensible agent is defined by section 2334 of the Civil Code as follows: "A principal is bound by acts of his agent, under a merely ostensible authority, to those persons only who have in good faith, and without want of ordinary care, incurred a liability or parted with value, upon the faith thereof."

[1] The necessary elements of an ostensible agency are set forth in 1 Cal. Juris. 739, as follows: "There are two essential features of an ostensible authority, viz., the third person must believe that the agent had authority, and such belief must be generated by some act or neglect of the person to be held. To state the same requirements in different terms and in reverse order, there must be some intentional conduct or neglect on the part of the alleged principal creating a belief in the minds of third persons that an agency exists, and a reasonable reliance thereon by such third persons."

Appellant admits the true rule that an estoppel cannot occur unless the one to be estopped has, by some act or omission, induced another to believe in the existence of a particular state of facts and the other acts on such belief to his prejudice.

[2, 3] The first order given by Clifford was taken by a salesman of Listenwalter & Gough at Clifford's place of business in the

Radin & Kamp store. It was written by the salesman on a Listenwalter & Gough order blank and signed, "L. W. Clifford." There is nothing to indicate that Clifford was acting in any other than his individual capacity in giving the order, although the agent wrote in it, "Charge to Radin & Kamp. Town—Fresno." This is a sample of several other orders signed by Clifford. Others were made out in San Francisco by the employees of appellant's assignors when orders were received from Clifford over the telephone. All merchandise was shipped to "Radin & Kamp" at Fresno and delivered to Clifford through the receiving room of respondent. No one connected with respondent had any knowledge of these deliveries except the receiving clerk and Clifford.

Invoices and statements of account were mailed to Radin & Kamp at Fresno. They were apparently taken from the mail by Clifford, for they did not come to the knowledge of any officer, agent, or employee of respondent until December 2, 1930, after practically all of the merchandise had been delivered to Clifford. On that date respondent wrote Kaemper-Barrett Corporation, Limited, which had then succeeded to the business formerly conducted by Listenwalter & Gough, in part as follows: "Radin & Kamp are not responsible in any manner, shape or form for merchandise purchased by Mr. Clifford, and therefore, cannot accept these trade acceptances made out in the name of Radin & Kamp."

Clifford wrote one letter on Radin & Kamp stationery which he signed individually. He sent three telegrams to appellant's assignors which he signed, "Radin & Kamp." No responsible officer, agent, or employee of respondent knew of the letter or telegrams and no direct or implied authority to Clifford to sign "Radin & Kamp" to the telegrams was shown.

The evidence falls far short of establishing either an ostensible agency or an estoppel and the trial court found against both. The findings are supported by a preponderance of the evidence and the judgment is supported by the findings of facts and conclusions of law.

Appellant has specified many assignments of error upon rulings of the trial court in the admission or rejection of evidence. Its arguments in support of these assignments are all based upon the mistaken assumption that estoppel was established by the evidence. None of these assignments of error possesses any merit.

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

131 Cal.App. 371

CURRIER v. OAKLAND ASS'N.

Civ. 8613.

District Court of Appeal, First District, Division 2, California.

April 25, 1933.

1. Appeal and error ⇐756.

Appellant's opening brief containing no heading showing nature of question to be presented or point to be made *held* insufficient (Supreme Court and District Courts of Appeal Rules, rule 8, § 2).

2. Brokers ⇐86(1).

In action to recover reasonable value of services in negotiating sale of baseball player under contract, evidence *held* to support finding for plaintiff.

3. Principal and agent ⇐171(1).

Where baseball club accepted benefits of agent's unauthorized act in directing third party to negotiate sale of baseball player with full knowledge of facts, baseball club ratified unauthorized acts and became liable to third party for value of services rendered.

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Action by J. Currier against the Oakland Association, also known as and called Oakland Base Ball Club, and another. From a judgment in favor of the plaintiff, the defendant named appeals.

Judgment affirmed.

Preston Higgins and A. D. Ericksen, both of Oakland, for appellant.

Philip O. Solon, Wm. H. Hollander, and I. R. Gladstein, all of Oakland, for respondent.

SPENCE, Acting Presiding Justice.

Plaintiff, as assignee of William H. Hollander, brought this action against defendant Oakland Association, a corporation, also known as the Oakland Base Ball Club, to recover the sum of $1,500 as the alleged reasonable value of the services of plaintiff's assignor in negotiating the "sale" for the sum of $1,500 of "Buzz" Arlett, a baseball player under contract with defendant, to the Philadelphia National league club. From a judgment in favor of plaintiff, defendant appeals.

[1] In examining appellant's opening brief we find that there are no headings "showing the nature of the question to be presented or the point to be made" as required by section 2 of rule VIII of the Rules of the Supreme Court and District Courts of Appeal. The only headings are "Statement of the case," "Argument," "The law," "Evidence," "Summary of evidence," and "Conclusion." These headings

are insufficient to comply with the rule and we again call attention to the penalties which may be imposed for failure to meet the requirements. Section 4 of said rule VIII; Herlihy v. Ward (Cal. App.) 18 P.(2d) 992; Landa v. Steinberg (Cal. App.) 14 P.(2d) 532; Frank Graves Sash, Door & Mill Co. v. Keener (Cal. App.) 16 P.(2d) 195; Skipitarey v. Fitts (Cal. App.) 17 P.(2d) 159; Milano v. Bulleri (Cal. App.) 13 P.(2d) 521; Kaltenberger v. Alexander Hotel Co., 124 Cal. App. 198, 12 P.(2d) 59.

[2] We have, however, examined the briefs and the record herein. It appears that plaintiff's assignor had been a professional baseball player, having played with the Oakland club and certain clubs in the eastern states, and that he thereafter acted as agent for the St. Louis national club on the Pacific Coast. In 1930 he had an oral agreement with the defendant, confirmed by letter, whereby he was to receive from defendant the sum of $350 for any player recommended to defendant by him provided the player "made good" with defendant. In January of 1931, Carl Zamloch, the playing manager of defendant, went to plaintiff's assignor and told him that the defendant club had been trying to sell Arlett and had "exhausted all efforts to sell him to major league clubs." He stated that they had been offered $5,000 by the San Francisco club, but that they did not desire to sell him to any club in the Pacific Coast league "for if they did and he made good, he would make a goat out of them." Zamloch asked plaintiff's assignor if he knew any club that might be interested and received an affirmative reply. Plaintiff's assignor refused to disclose any information in this regard unless authorized to sell Arlett, whereupon Zamloch said: "You have the authorization right now." Plaintiff's assignor then assured Zamloch that he would "get busy" and a series of telegrams thereafter passed between plaintiff's assignor and the Philadelphia national league baseball club. The telegrams sent by plaintiff's assignor contained information requested by the Philadelphia club, which information was furnished to plaintiff's assignor by Zamloch and also contained information regarding price and terms of the proposed sale. On January 26, 1931, the manager of the Philadelphia club wired to the defendant referring to the negotiations with plaintiff's assignor who "says he is authorized by manager Zamloch to do business" and stating, "If this is an order we hereby accept proposition. Wire confirmation." To this telegram defendant replied by wire the same day, "Terms for Arlett accepted." Thereafter the sale was consummated and defendant received the sum of $15,000 as agreed. It is undisputed that the entire negotiations were handled by plaintiff's assignor. The president of the defendant corporation testified on cross-examination, "We did nothing in as much as you were handling it." Referring to the sending of the final telegram this witness stated, "That is all we did. We left everything to you." The word "you" found in the foregoing testimony referred to plaintiff's assignor, who was then conducting the cross-examination of the witness. After certain preliminary questions qualifying plaintiff's assignor to give his opinion regarding the reasonable value of the services rendered, he testified that the reasonable value thereof was $1,500. No testimony to the contrary was offered on the subject of the reasonable value of said services.

[3] It appears from appellant's briefs that the attack is directed at the alleged insufficiency of the evidence but in our opinion the foregoing evidence amply supports the findings and judgment. Upon the trial, appellant contended that Zamloch was merely the "playing manager" or "field manager" of defendant and not the "manager" and further contended that said Zamloch had no authority to bind appellant. The trial court so found, but further found upon competent evidence that appellant "with full knowledge of the facts and circumstances, ratified and confirmed the acts and conduct of said William H. Hollander and the authority delegated to him by said Carl Zamloch" and "subsequently thereto accepted the benefits of said transaction. * * *" Appellant also calls our attention to certain testimony in the record tending to support appellant's further claims as follows: First, that respondent's assignor was not authorized by Zamloch to send any telegrams; second, that in a subsequent telephone conversation during the negotiations, Zamloch told respondent's assignor, "If this deal should happen to go through, there is nothing in it for you"; and, third, that it was not the custom of minor league clubs to compensate agents for sales of players. All that need be said regarding these claims is that there was a direct conflict in the evidence concerning each of them.

We find no error in the record and accordingly the judgment is affirmed.

We concur: STURTEVANT, J.; GOODELL, Justice pro tem.

131 Cal.App. 463

COHN v. STANFORD.

Civ. 8723.

District Court of Appeal, First District, Division 2, California.

April 27, 1933.

Abatement and revival ⇐58(½).
Divorce ⇐83.

Where fraud is practiced in annulment or divorce proceedings, death of one of parties does not abate proceedings to purge record of alleged fraud.

Appeal from Superior Court, City and County of San Francisco; Wm. T. O'Donnell, Judge.

Action by S. Morton Cohn against Lillian E. Cohn, for annulment of marriage. Judgment for plaintiff, and, from an order denying defendant's motion to set aside the judgment for fraud, defendant, by her guardian ad litem, appeals. Defendant having died pending appeal, Marie Stanford, as administratrix of defendant's estate, was substituted as defendant.

Appeal dismissed.

Milton K. Young, of Los Angeles, and Byron Coleman, Harry I. Stafford, and Dean Cunha, all of San Francisco, for appellant.

John H. Riordan and Walter McGovern, both of San Francisco, for respondent.

NOURSE, Presiding Justice.

Plaintiff sued for an annulment of his marriage with Lillian E. Cohn upon the alleged ground that she was insane at the time of the marriage contract. At the time of the trial Mrs. Cohn had been adjudged insane and she appeared herein through her guardian ad litem. Plaintiff had a judgment of annulment under circumstances which thereafter appeared to her guardian to be fraudulent, and her guardian moved to set aside the judgment upon that ground. This motion was denied, and the guardian perfected this appeal. After her opening brief was filed, and before a reply had been made by the respondent, Mrs. Cohn died. An administratrix was thereupon appointed, and she now moves for a dismissal of the appeal.

No authorities are cited in support of the motion, but the moving party rests on the mere statement that Mrs. Cohn is deceased. Where fraud is practiced in annulment or divorce proceedings the death of one of the parties does not abate the proceedings to purge the record of the alleged fraud. McGuinness v. Superior Court, 196 Cal. 222, 232–236, 237 P. 42, 40 A. L. R. 1110.

For this reason the dismissal of this appeal should not be taken as an affirmance of the order appealed from in so far as the court or other interested parties are concerned. The dismissal is limited to the single ground that the parties to the record have agreed that this particular proceeding should be terminated.

Appeal dismissed.

We concur: STURTEVANT, J.; SPENCE, J.

131 Cal.App. 295

MOUNT v. MADDUX, Inc., et al.

Civ. 8773.

District Court of Appeal, Second District, Division 2, California.

April 18, 1933.

Appeal and error ⇐1078(1).

Grounds of appeal not discussed in briefs are abandoned (Rules of Supreme Court and District Courts of Appeal, Rule 1, § 4, and Rule 5).

Appeal from Superior Court, Los Angeles County; John L. Fleming, Judge.

Action by Dr. Florence Mount against Maddux, Inc., C. A. Cross, and others. From judgments of nonsuit as to defendants other than defendants named, defendants named appealed, and the other defendants moved for a dismissal of the appeal as to them or for an affirmance of the judgments of nonsuit as to them.

Appeal dismissed as to the moving defendants.

Syril S. Tipton, Elmer E. Sawyer, and Charles W. Garland, all of Los Angeles, for appellants.

Everett W. Mattoon, Co. Counsel, and S. V. O. Prichard, Deputy Co. Counsel, both of Los Angeles, for defendant Los Angeles County.

George L. Greer, of Los Angeles, for defendant William I. Traeger.

ARCHBALD, Justice pro tem.

Defendants William I. Traeger and county of Los Angeles have moved for a dismissal of the appeal as to them or for an affirmance of judgments of nonsuit as to them, granted by the trial court.

Defendants Maddux, Inc., and C. A. Cross have appealed from such judgments of nonsuit. The motion above referred to is made under rule V of the Rules for the Supreme Court and District Courts of Appeal.

We fail to see how appellants could be parties aggrieved by the order granting the motions for nonsuit made by their codefendants. Regardless of that fact, however, the opening briefs filed by appellants do not even suggest that any error was committed by the trial court in granting said motions. The briefs filed are entirely silent on such grounds of appeal. In such case it hardly needs the citation of authority to the effect that such grounds of appeal are abandoned. The effect of the record before us is that, so far as defendants Traeger and county of Los Angeles are concerned, no briefs have been filed by appellants within thirty days after the filing of the transcript, as required by section 4, rule I, of this court, and under rule V the motion of such defendants should be granted.

Appeal dismissed as to defendants Traeger and county of Los Angeles.

We concur: WORKS, P. J.; CRAIG, J.

131 Cal.App. 455

PEOPLE v. HARRY WONG TOY.

Cr. 1701.

District Court of Appeal, First District, Division 2, California.

April 27, 1933.

Criminal law ⇐395.

Use in evidence of property seized is no part of search and seizure without warrant in violation of constitutional guaranty.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Harry Wong Toy was convicted of violating the State Narcotic Act, and he appeals.

Affirmed.

Raine Ewell, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, of San Francisco, for the People.

SPENCE, Justice.

The defendant was convicted in the superior court in the city and county of San Francisco of a violation of the State Narcotic Act (St. 1907, p. 124 as amended).

The transcript was filed in this court on November 21, 1932. The cause was regularly on the calendar for oral argument on February 14, 1933. At that time appellant was granted fifteen days' time within which to file his brief, but no brief has been filed on his behalf and no further extensions of time have been granted or requested. Although it might be proper to affirm under the circumstances without making an independent search for error, we have nevertheless examined the record and find no error therein. From a review of the transcript, it is safe to assume that the only point which appellant intended to raise on this appeal was that his constitutional rights were violated by the admission in evidence of certain narcotics taken from his room by the officers without a search warrant. It is well settled in this state, however, that the use in evidence of the property seized is no part of the offense of search and seizure in violation of the constitutional guaranty. People v. Mayen, 188 Cal. 237, 205 P. 435, 24 A. L. R. 1383; In re Polizzotto, 188 Cal. 410, 205 P. 676; People v. Wren, 59 Cal. App. 116, 210 P. 60; 23 Cal. Jur. 180.

The judgment and order are affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

131 Cal.App. 321

In re GARTHWAITE'S ESTATE.

PEOPLE v. CITIZENS' NAT. TRUST & SAVINGS BANK OF LOS ANGELES et al.

Civ. 8637.

District Court of Appeal, Second District, Division 1, California.

April 21, 1933.

Hearing Denied by Supreme Court June 19, 1933.

1. Statutes ⇐206.

Effect must be given to each sentence, phrase, and word of statute, if possible.

2. Statutes ⇐206.

Unless exigencies of situation as presented from consideration of statute as whole imperatively demand that some word, phrase, or sentence be discarded, no such part should be considered unnecessary.

3. Constitutional law ⇐70(1).

Court cannot add words to statute except for most cogent reasons.

4. Descent and distribution ⇐71(4).

Presumption is that every deceased person leaves heirs.

5. Evidence ⇐65.

Presumption is that, in exercising its prerogative, Legislature enacts in view of and with reference to existing laws and judicial decisions.

6. Wills ⇐3.

Fact that, in second sentence of statute respecting bequests or devises for charitable uses, provision is made for case of one leaving legal heirs, manifests Legislature's intent that phrase "leaving legal heirs" should not be added to first sentence (Probate Code, § 41).

7. Wills ⇐16.

Statute makes void a will devising or bequeathing property for use of charitable corporation, where not executed at least 30 days before testator's death, whether testator leaves legal heirs or not (Probate Code, § 41).

Appeal from Superior Court, Los Angeles County; Marshall F. McComb, Judge.

In the matter of the Estate of Alice E. Garthwaite, deceased. On the petition of the Citizens' National Trust & Savings Bank of Los Angeles, executor, and against the objection of the People, intervener, the probate court made an order directing that the estate be distributed in accordance with the provisions of a will, and the State appeals.

Reversed.

U. S. Webb, Atty. Gen., and John L. Flynn, Deputy Atty. Gen., for the People.

Loyd Wright, Charles E. Millikan, and Herschel B. Green, all of Los Angeles, for respondent.

HOUSER, Justice.

At a time less than thirty days preceding the date of her death, Alice E. Garthwaite executed her will by means of which she devised and bequeathed her entire estate in trust to charitable uses. No "legal heirs" survived the testatrix. In the course of administration of her estate, over the objection of the people of the state of California, the probate court caused an order to be made and entered by which the said estate was directed to be distributed in accordance with the provisions of said will. It is from such order that the instant appeal is prosecuted.

As is stated in the opening brief of the appellant, the question presented is whether a bequest in a will is void, which was executed "within thirty days prior to death by a testatrix leaving no legal heirs, to a person to be held in trust for the use and benefit of a charitable corporation."

Admittedly the controlling statute in the premises is what is now known as section 41 of the Probate Code. It is as follows: "No estate, real or personal, may be bequeathed or devised to any charitable or benevolent society or corporation, or to any person or persons in trust for charitable uses, unless done by will duly executed at least thirty days before the death of the testator. If so made at least thirty days before death, such devises and legacies shall be valid, but they may not collectively exceed one-third of the estate of a testator who leaves legal heirs, and if they do, a pro rata deduction from such devises and legacies shall be made so as to reduce the aggregate thereof to one-third of the estate. All dispositions of property made contrary hereto shall be void, and go to the residuary legatees or devisees or heirs, according to law."

Formerly, and prior to its placement in the Probate Code, the substance of the present statute was included within section 1313 of the Civil Code.

From an examination of the provisions of such statute, it will appear that by the terms thereof contained in its opening sentence, in order to constitute by will an effective direction for the disposition of an estate to charitable uses, the will of the testator must have been executed at least thirty days preceding the date of his death. As is stated in Estate of McCauley, 138 Cal. 432, 436, 71 P. 512, 514: "Section 1313 invalidates the charitable bequest unless the will is 'duly executed at least thirty days before the decease of the testator.'" And in Estate of Dol, 182 Cal. 159, 167, 187 P. 428, 432: "The fact that makes the bequest void is that it is made to a charitable or benevolent society or corporation, or to any person or persons in trust for charitable uses within 30 days before the death of the testator. The purpose in mind of the testator and his motive are alike immaterial." And in the same case, as reported in 186 Cal. 64, 65, 67, 198 P. 1039, it is said: "The will was executed less than 30 days prior to the death of the testator. If the respondent is a 'charitable or benevolent' corporation, the bequest is void under the provisions of section 1313 of the Civil Code. * * * It seems clear that the respondent corporation was a charitable and benevolent corporation within the meaning of section 1313 of the Civil Code, and, the bequest having been made within 30 days prior to the death of the testator, it is void under the provisions of that section." And in Estate of Halm, 196 Cal. 778, 783, 239 P. 307, 308, where it appeared that the will was executed seven days before the death of the testator, it was held void as to a bequest to a charitable institution, the court saying: "The will of the decedent herein not having been thus executed [that is, thirty days preceding the date of death of the testator] and said bequest thus being void, it follows that the order and decree of said court, in so far as it undertook to distribute the sum named in

said bequest to that particular legatee, was erroneous. * * *" To the same effect, see Estate of Lubin, 186 Cal. 326, 199 P. 15; In re Pearsons, 98 Cal. 603, 33 P. 451; Estate of Robinson, 63 Cal. 620; Estate of Hinckley, 58 Cal. 457, 484.

But by the respondent herein it is urged that since in substance, as expressed in the second provision of the statute, a devise or bequest contained in a will made "at least thirty days prior to death" is valid as to an aggregate of one-third of the estate of a testator who leaves "legal heirs," the construction which should be placed upon the former provision of the statute by which "no estate" may be bequeathed or devised to any charitable use, "unless done by will duly executed at least thirty days before the death of the testator," is that, no matter when made, if the testator left no "legal heirs," the will should be deemed valid and effective for the disposition of the estate of the testator in accordance with the provisions of the will. In other words, the contention is that, notwithstanding the statutory requirement for the validity of a will by which the estate of the testator is devised or bequeathed to charitable uses that it be executed at least "thirty days before death," if the testator leaves no "legal heirs," a valid will by which the testator directs the disposition of his entire estate to charitable uses may be executed at any time.

Reverting to the statute in question, it may be noted that if in construing the statute we should arrive at a conclusion in accordance with the suggestion of respondent in that regard, with the exception of its explanatory part, the first provision of the statute, which contains not only the thirty-day restriction, but also apparently is made applicable to all testators (whether leaving or not leaving "legal heirs"), is surplusage, and properly may be discarded or left out of consideration.

[1, 2] One of the important rules of construction of a statute is that, if possible, effect must be given to each sentence, phrase, and word thereof; that is to say, that such a construction should be given to a statute as will actively employ, give force to, and preserve, every part thereof; and in that connection, that, unless the exigencies of the situation as presented from a consideration of the statute as a whole imperatively demand that some word, phrase, or sentence thereof be discarded, or rendered useless, or deprived of meaning, no such part should ever be considered unnecessary or as surplusage. 23 Cal. Jur. 758, and authorities there cited.

It would therefore appear clear that, unless some urgent and compelling reason is presented for the deletion from the first provision of the statute of the thirty-day period therein contained, those words are mandatory in character, and must be observed.

[3] Equally as strong and imperative is the rule of law which in effect denies to courts authority in any wise to add to, or to supply, words to a statute "except for the most cogent reasons." 23 Cal. Jur. 737, and authorities there cited.

In support of the position assumed by respondent, that is, that the words "leaving legal heirs" should be incorporated into the first provision of the statute, reliance is placed principally in the language contained in the opinion in Estate of Dwyer, 159 Cal. 664, 115 P. 235; Id., 159 Cal. 680, 687, 115 P. 242, 244, wherein, in substance, it is declared that "it is only when he [the testator] leaves such [legal] heirs that his power of disposition by will is restricted." However, an examination of that case reveals the fact that each of the several statements therein contained with reference to the question here at issue was dictum. The sole point there involved was whether the one-third of the estate of the testator devisable to charitable uses affected property belonging to the testator located in this state only: or whether it included the testator's property wherever located.

[4] In the text of volume 18, Corpus Juris, at page 873, where an abundance of authority for the statement is cited, it is said that "it will generally be presumed that an intestate left heirs, unless the contrary is proved. * * *" In 9 Ruling Case Law, p. 18, the rule is announced that "the presumption is that every deceased person leaves heirs or next of kin capable of inheriting." Likewise, in Estate of Friedman, 178 Cal. 27, 34, 172 P. 140, 144, occurs the declaration, in effect, that it is a "very strong presumption that decedent did leave heirs." Citing People v. Roach, 76 Cal. 294, 297, 18 P. 407, and State v. Miller, 149 Cal. 209, 211, 85 P. 609. Also, in State v. Superior Court, 148 Cal. 55, 57, 82 P. 672, 673, 2 L. R. A. (N. S.) 643, it is said that "it is a presumption of law that a person has next of kin who will succeed to his estate upon his death, leaving no will."

[5] It is also a presumption that in exercising its prerogative in enacting laws the Legislature does so in view of, and with reference to, existing laws and judicial decisions; and that a particular statute was enacted by it "in the light" of such judicial decisions as had a direct bearing upon such statute. 23 Cal. Jur. 782, and authorities there cited.

[6] Applying such general principles of law to the facts herein, it must be apparent that, since presumably on his decease "a person leaves heirs or next of kin capable of inheriting," of which fact the Legislature had pre-

sumptive knowledge, the indicated result is that the first provision of the statute in question should be construed as though such words were intentionally omitted therefrom. The fact that in the very next sentence of the statute provision is made for a case of one "leaving legal heirs" is also a manifestation of the intent of the Legislature with reference to the effect of the preceding provision.

In 23 California Jurisprudence, at page 778, the principle is announced that, "where a statute, with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject is significant to show that a different intention existed," citing People v. Buster, 11 Cal. 215, 221. See, also, Fairbanks v. Dawson, 9 Cal. 89, 93.

[7] The construction for which the respondent contends would be entirely opposed to the plain language of the statute. By every fair intendment the provision in question now carries a complete and a very definite meaning, which is that it includes all testators, whether they do or do not leave "legal heirs"; and to supply the statute with additional words which would have the undoubted effect of altogether changing in substance the manifest intention of the Legislature in remedying the identical "publick mischief" which was the declared object and purpose of the original statute of "mortmain" (9 Geo. II, cap. 36), from which our statute is derived, would be but to "fly in the face" of nearly the unanimous weight of authority which forbids the judicial interpolation of words into a statute except for the most cogent reasons and in circumstances which judicially will admit of no other course. To agree with the contention of the respondent herein, and thereby, in effect, to interject into the first provision of the statute the words "leaving legal heirs," would require for its justification "an unwarranted reading into the law of language not put there by the Legislature and not necessitated either by reason of ambiguity or obvious error." Street v. Bertolone, 193 Cal. 751, 753, 226 P. 913; Spreckels v. Graham, 194 Cal. 516, 535, 228 P. 1040.

As a summarization of the foregoing, it may be said that, by the first provision of section 41 of the Probate Code, an absolute and unqualified restriction is placed upon the disposition by will of any part of the estate of the testator (whether or not he leaves "legal heirs") within thirty days of the date of his death; and that by the second provision of said statute an exception is created to that which is provided in the first provision, in that (within the time limit), if the will be executed by one leaving "legal heirs," one-third of his estate may be devised or bequeathed to charitable uses.

The order from which the appeal is taken is reversed.

We concur: CONREY, P. J.; YORK, J.

131 Cal.App. 312

WOOD v. PETERSON FARMS CO. et al.

Civ. 1205.

District Court of Appeal, Fourth District, California.

April 20, 1933.

1. Appeal and error ⇐607(1).

Trial court *held* not to have abused its discretion in terminating proceedings for procuring transcript on appeal, where more than two months elapsed after notice of appeal was filed before appellant completed arrangements with reporter for preparation of transcript (Code Civ. Proc. § 953a).

2. Appeal and error ⇐607(1).

Duty rested upon appellant to take necessary steps to secure transcript, and for appellant's want of diligence it is within trial court's power to terminate proceedings therefor (Code Civ. Proc. § 953a).

3. Appeal and error ⇐607(1).

Whether appellant exercised due diligence to secure transcript rests in discretion of trial court, whose determination is conclusive, absent clear abuse of discretion (Code Civ. Proc. § 953a).

4. Appeal and error ⇐607(1).

Whether appellant made sufficient showing for relief from default in failing to duly file transcript rested in discretion of trial court, whose ruling is conclusive, absent clear abuse of discretion (Code Civ. Proc. § 953a).

5. Appeal and error ⇐607(1).

Trial court *held* not to have abused its discretion in denying appellant's motion for relief from default in failing to duly file transcript (Code Civ. Proc. § 953a).

Appeal from Superior Court, Kings County; Frank Lamberson, Judge.

Action by Louisa G. Wood against the Peterson Farms Company and others. Judgment in favor of plaintiff. From orders terminating proceedings for preparation of transcript on appeal and denying motion for relief from default in failing to file transcript

within time allowed by law, defendant Cora Van Aernam Peters appeals.

Affirmed.

Charles M. Johnson, of Los Angeles, for appellant.

Harry W. Chase, of Glendale, for respondent.

JENNINGS, Justice.

This is an appeal by the defendant Cora Van Aernam Peters from an order of the trial court terminating proceedings for the preparation of a transcript on appeal undertaken to be prepared in accordance with the provisions of section 953a of the Code of Civil Procedure, and from an order of the court denying the said defendant's motion to be relieved from the default of the clerk and of said defendant in failing to file the reporter's transcript of the evidence produced upon the trial of the action within the time prescribed by law.

The following facts pertinent to this appeal are presented by the record herein: Judgment in favor of plaintiff was rendered on December 27, 1930. Notice of entry of judgment was given on January 2, 1931. On the latter date the aforesaid defendant gave notice of appeal from the judgment, and on this same date there was filed in her behalf a notice directed to the clerk to prepare the transcript on appeal. Here the matter rested until March 2, 1931, when plaintiff's counsel gave notice that on March 16, 1931, he would move to terminate the proceedings theretofore instituted for the preparation of the transcript on appeal. Upon the hearing of this motion an affidavit made by defendant's counsel was filed. This affidavit recites that on January 5, 1931, affiant was advised by the clerk of the court at Hanford, Cal., that it would be necessary for affiant to arrange for the preparation of the transcript on appeal with the official reporter who was present during the trial of the action, Mr. Ambrose Phillips of Madera, California; that forthwith on January 5, 1931, affiant addressed a letter to the aforementioned reporter at Madera, Cal., requesting him to prepare a transcript of the proceedings and to furnish affiant with an estimate of the cost thereof; that affiant received no reply to his letter from the said court reporter and again wrote the clerk at Hanford requesting the clerk either to get in touch with the reporter or to furnish affiant more detailed information regarding the reporter's address; that thereafter affiant received a more definite address of the reporter and on January 27, 1931, again wrote the reporter; that "several days later" he received a communication from the reporter advising him that the transcript would be prepared upon receipt of the sum of $50; that thereupon affiant addressed a letter to defendant requesting that the aforesaid sum of $50 be sent him for the purpose of defraying the expense of preparing the transcript; that affiant was, however, unable to get in touch with defendant until the latter part of February, 1931, for the reason that the defendant "was away looking after property interests"; that immediately upon receipt of the aforesaid sum of $50 from defendant on March 4, 1931, affiant forwarded the same to the court reporter, who advised him that the transcript would be prepared and filed at Hanford on about March 14, 1931. The affidavit concludes with a recitation of affiant's diligence and lack of neglect in attempting to have the transcript prepared and of affiant's familiarity with the facts of the case and his belief that the appeal will be successful. With the aforesaid affidavit, affiant presented and filed with the court the reporter's transcript on appeal.

Upon the showing thus made the trial court entered its order terminating the proceedings relating to the preparation of the transcript on appeal.

[1-3] It is apparent that the aforesaid affidavit fails to state facts which sufficiently excuse the delay in the preparation of the transcript. More than two months elapsed after notice of appeal was filed before appellant succeeded in completing arrangements with the reporter for the preparation of the transcript. During this interval it appears that no stipulations extending the time were requested and no order of the court extending the time was made. Under the circumstances here presented it can hardly be said that the trial court abused the discretion reposed in it in making the order terminating the proceedings for procuring a reporter's transcript to be used on appeal. The duty rested upon appellant as the moving party to take the necessary steps to secure the filing of a transcript and for want of diligence in this regard on appellant's part it is within the power of the trial court to terminate the proceedings for procuring such transcript. Smith v. Jaccard, 20 Cal. App. 280, 128 P. 1023, 1026. The question of whether due diligence has been exercised is one that necessarily rests largely in the discretion of the trial court and its determination of this question will not be disturbed unless it plainly appears that such discretion has been abused. Crocker v. Crocker, 76 Cal. App. 606, 245 P. 438; O'Banion v. California C. P. Growers, 109 Cal. App. 328, 292 P. 975; Western Concrete Pipe Co. v. Grabovich, 118 Cal. App. 367, 5 P.(2d) 71.

[4] The problem of determining whether a sufficient showing was made by appellant to entitle her to be relieved from her default in the matter of the preparation of the transcript was likewise one that rested largely in the sound discretion of the court and it must clearly appear that this discretion was abused if the court's ruling in this regard is to be disturbed.

[5] Upon the hearing of appellant's motion to be relieved from her default in procuring the reporter's transcript two affidavits were filed by appellant. One of these affidavits was made by appellant's counsel, and while it is somewhat more extended and more detailed than the affidavit of this same individual which was filed upon the hearing of respondent's motion to terminate the proceedings for procuring a reporter's transcript, no new facts are set forth which tend to excuse the obvious delay. The second affidavit was made by appellant's husband, who states therein that he acted as appellant's agent in the matter of arranging with her counsel for the preparation of a transcript to be used on appeal. Not only does this second affidavit fail to strengthen appellant's position in the matter of her default, but it effectually weakens it. This affidavit sets forth in haec verba a letter written by appellant's counsel to the affiant on February 2, 1931, which affiant admits he received during the first week in February. This letter states that the attorney had been advised by the reporter that a deposit of $50 will be required to defray the cost of preparing a transcript and concludes with the following language: "Please get me check for this amount at once." Nevertheless, although thus plainly advised of the necessity of promptly taking care of the matter, the affidavit shows that he left the place of his residence for a trip of several weeks' duration without attending to it and without seeing appellant's counsel. The affidavit further shows that during his absence from his home he received a second letter from the attorney, but being unaware of the importance of making the payment of $50 required for the preparation of the transcript he did nothing until he returned to his home and there received a third letter from the attorney on February 28, 1931. It appears that affiant then called upon the attorney during the week following the receipt of this third letter and finally became convinced of the importance of making the payment so unequivocally demanded in the letter of February 2d. Affiant paid the money required for the preparation of the transcript on March 4, 1931, two days after respondent had given notice that she would move the court to terminate the proceeding for procuring a transcript to be used on appeal. Under the circumstances thus presented, it is obvious that the trial court did not abuse its discretion in denying appellant's motion to be relieved from her default in the preparation of the reporter's transcript.

The orders of the court from which this appeal has been taken are therefore affirmed.

We concur: BARNARD, P. J.; MARKS, J.

WILLIAMS v. SPAZIER et al. *
ORR v. SAME.

Civ. 8422.

District Court of Appeal, First District, Division 2, California.

April 19, 1933.

Rehearing Granted May 19, 1933.

1. Fraud ⇐13(2).

Representations regarding values of stock, made as statements of fact, when defendant was without knowledge to warrant representations and defendant's failure to disclose source of his information, made case of fraud against defendant notwithstanding failure to prove conspiracy charged in complaint.

2. Fraud ⇐59(2).

Damages for fraud in stock transaction *held* not difference between actual value and value stock would have had if representations were true, where valuations as represented contemplated consolidation of corporations, were known to exceed true value, and there was no evidence of value of stock for consolidation purposes.

3. Fraud ⇐59(2).

Rule that damages for fraud is difference between actual value and value stock would have had if misrepresentations had been true is generally applied where intent to deceive is clearly shown (Civ. Code, § 1572, subd. 2; §§ 1709, 1710, subd. 2).

4. Fraud ⇐50.

Intent to deceive or to induce another to alter his position to his injury or risk cannot be presumed, since innocence of fraud is presumed (Civ. Code, § 1572, subd. 2; §§ 1709, 1710, subd. 2).

5. Fraud ⇐59(3).

Damages for fraud in stock transaction *held* difference between what plaintiffs gave and what they received, in absence of direct evidence of intention to deceive or to induce plaintiff to change his position to his injury (Civ. Code, § 1572, subd. 2; §§ 1709, 1710, subd. 2).

Appeals from Superior Court, Monterey County; Maurice T. Dooling, Judge.

Actions by Oliver J. Williams and by Calvin M. Orr against M. Spazier and others. From judgments for plaintiffs, named defendant appeals.

Modified, and, as modified, affirmed.

Anthony Brazil, of Pacific Grove, and Philip Selig, Jr., of San Francisco, for appellants.

Wyckoff, Gardner & Parker, of Watsonville, for respondent Orr.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 25 P.2d 851.

Harry G. McKannay, of San Francisco, for respondent Williams.

NOURSE, Presiding Justice.

These two causes were consolidated for trial, and are presented on the same briefs. The plaintiffs each sued defendants for damages for fraud. The causes were tried by the court without a jury, and each plaintiff had a judgment. The defendant Spazier alone prosecutes an appeal upon typewritten transcripts.

The plaintiffs charged a conspiracy on the part of the defendants to induce them to purchase fifty shares each in the Peninsula Title Guarantee Company at the price of $5,000; that defendant Spazier represented that he planned to incorporate a title insurance company which would take over all the plant of the title company and that the stockholders of the title company would take three shares of stock in the new corporation for one held in the title company; that defendant Spazier, "pursuant to and in furtherance of the said conspiracy," made representations to the plaintiffs as to the value of the stock and plant of the title company which were untrue, and which, if true, would have made the stock of the title company worth $400 a share; that the actual value of said shares was $88 each; and that each plaintiff was therefore damaged in the sum of $16,000.

There is little conflict in the evidence. The defendant admitted having made some of the representations charged, but defended on the ground that they were mere matters of opinion, the source of which he disclosed to the purchasers. The plaintiffs admitted that they made no investigation of the properties of the title company though they had frequent opportunities to do so, but both contended that they relied implicitly upon the representations made by appellant. The parties were casual acquaintances, having met on a golf course maintained by a club of which they were members and operated in connection with a new suburban tract in which they had purchased homesites.

The representations of which the plaintiffs complain were (1) that the title company had earned a net profit of $10,000 during the previous twelve months; (2) that it was free of liabilities and had a surplus of $7,500; (3) that its plant had a value of $150,000 and the company could pay a dividend of 30 per cent. The original complaints alleged that the shares of stock had no value and claimed damages in the sum of $16,000. During the trial the complaints were amended to allege an actual value of $88 a share and a value of $400 a share if the representations had been true. The trial court found in accordance with this amendment that the actual value of the 50 shares was $4,350, and that, had the representations been true, they would have had a value of $10,550. Judgment in each case went for the difference between these two valuations.

[1] We find evidence sufficient to sustain the finding that the representations were made as statements of fact at a time when the appellant had no knowledge of or information on the subject sufficient to warrant the making of the representations. There is also evidence sufficient to support the finding that appellant did not disclose to either plaintiff the source of his information. Thus a case of fraud is made against this appellant notwithstanding the failure to prove the conspiracy charged in the complaint. Blair v. Guarantee Title Co., Inc., 103 Cal. App. 260, 270, 284 P. 719. For this reason each plaintiff was entitled to damages in some amount, and we may therefore disregard all other points raised except that relating to the measure of damages.

The evidence discloses that the parties were dealing at arm's length; there was no confidential or fiduciary relation between them. There is no evidence of malice, oppression, or bad faith on the part of appellant. The evidence is that he believed all that had been told him about the property, had purchased 50 shares in the title company for $5,000, and passed his information on to the plaintiffs, urging them to buy on the same terms. His carelessness in not seeking the truth of the representations must be conceded. That the valuations placed upon the company stock were highly excessive must have been evident to all and the negligence of the plaintiffs in failing to make any investigation cannot be denied. The whole setup discloses unmistakably that the parties were not dealing in terms of shares in the title company, but that they were concerned solely with the proposed plan to organize a title insurance company for which purpose the title company was to be used only as a means of organization.

[2] The evidence coming from the lips of the plaintiffs is that they were not investing in the stock of the title company, that their interest was in the organization of a title insurance company only, and this was their excuse for not investigating the value of the title company. This insurance company was organized in accordance with the agreement, but the consolidation failed because of the defalcation of the manager of the title company. It is not a case of a simple sale of corporate stock as in Spreckels v. Gorrill, 152 Cal. 383, 389, 92 P. 1011 and similar cases, and the rule of those cases is not applicable, because, unlike those cases, this case involves a purchase for a specific purpose, and the valuations placed upon the property sold were placed in contemplation of the consummation of that purpose only and were known to be in excess of the true value of the shares of stock independent of the consolidation plan. Here there is no evidence of the value of the

shares for consolidation purposes, and, as that was the only purpose for which the representations of value were made it is not a case where the court can find the difference between the actual value and "the value which it (the stock) would have had if the fraudulent representation had been true."

In Hines v. Brode, 168 Cal. 507, 511, 143 P. 729, 730, the Supreme Court referred to the rule of the Spreckels Case as the "extreme rule" which should be applied "only in clear cases and upon just terms." In Macdonald v. Roeth, 179 Cal. 194, 201, 176 P. 38, 41, it referred to the rule as one which gave to the plaintiff "the benefit of his bargain." Other cases cited which applied the same rule involved transactions in which the defendant charged with the fraud acted either as owner or agent for the owner of the property sold. Here the evidence discloses that the appellant merely induced the plaintiffs to purchase stock in a corporation in which he had purchased a like amount. It wholly fails to prove an agency or a conspiracy on appellant's part. When the appellant paid $5,000 for fifty shares of the title company stock, he expected to receive fifty shares of treasury stock. The manager of the title company fraudulently sent him fifty shares of his own stock and appropriated the proceeds. When appellant delivered to the title company the two checks which he received from plaintiffs, he expected them to receive treasury stock. The manager fraudulently delivered to them fifty shares each from his own stock and appropriated the proceeds. Knowledge of these frauds did not come to the appellant until after the manager of the title company had decamped with the proceeds of these sales.

[3-5] Generally speaking the rule of damages contended for has been applied only in those cases where the intent to deceive has been clearly shown, and this naturally follows in all those cases where the owner, or the agent of the owner, makes the false representations for the purpose of selling his own or his principal's property to his own profit. But here the basis of the cause of action must rest either in subdivision 2 of section 1572 of the Civil Code which defines a fraud as "the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true," or in subdivision 2 of section 1710, Civil Code, which defines deceit as "the assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true." Here the evidence shows carelessness and negligence on the part of appellant. There is no direct evidence of an "intent to deceive" as required by section 1572, or of an intention to induce plaintiff "to alter his position to his injury or risk" within the meaning of section 1709, Civil Code. This intent cannot be presumed, because the presumption is that one is innocent of fraud. Truett v. Onderdonk, 120 Cal. 581, 588, 53 P. 26. The most that we have here is an inference of an "intention to deceive" which might be drawn from the direct evidence of carelessness and negligence on the part of appellant. For these reasons we are satisfied that the equities of the entire case do not justify the application of the "harsh" rule of damages, particularly when it is evident that both plaintiffs were equally negligent in not availing themselves of the opportunities at hand to investigate the truth of the representations. Such being the case, the plaintiffs were entitled to no more than the "detriment proximately caused," which, under all the evidence which is before us, would be the difference between what they gave and what they received, or, to put it in another way, the actual damages which they suffered by the negligence of the appellant.

Inasmuch as both plaintiffs have admitted a value of approximately $88 a share, or a total of $4,350, there is no need for a retrial of any of the issues, but the judgment in each case may be modified by awarding to each plaintiff the difference between the actual value of the property received and the sum paid therefor, to wit, $650.

Judgment in each case is modified by striking out the "$6,200.00" and by inserting in lieu thereof "$650.00," and, as so modified, both judgments are affirmed; each party to bear his costs.

We concur: STURTEVANT, J.; SPENCE, J.

THOMPSON v. BOYER.

Civ. 811.

District Court of Appeal, Fourth District, California.

April 27, 1933.

Rehearing Denied May 27, 1933.

Hearing Granted by Supreme Court June 26, 1933.

1. Damages ⇐132(3).

$11,000 to 21 year old girl for injuries including concussion of brain, fractures of several dorsal ribs, sprained neck, fracture of pelvis and symphysis, and separation of sacroiliac joint, *held* not excessive.

2. Damages ⇐216(1).

Instruction authorizing jury to award such damages for injuries as in their opinion was proper *held* erroneous.

3. Trial ⇐296(11).

Error in instruction authorizing jury to award such damages as in their opinion was

proper *held* not to warrant reversal, in view of other instructions.

4. Damages ⇐216(10).

Instruction authorizing damages for mental suffering from any disfiguring or humiliating injuries *held* erroneous under evidence.

5. Appeal and error ⇐1068(4).

Error in giving instruction authorizing damages for mental suffering from disfiguring or humiliating injuries *held* reversible, in view of verdict.

Appeal from Superior Court, Fresno County; C. E. Beaumont, Judge.

Action by Evelyn Thompson against C. F. Boyer. From a judgment in favor of the plaintiff, the defendant appeals.

Reversed, and case remanded for a new trial.

See, also, 15 P.(2d) 541.

Ray W. Hays, of Fresno, for appellant.

Ford & Johnson and Jesse E. Nichols, all of Oakland, for respondent.

MARKS, Justice.

Respondent recovered judgment in the sum of $11,000 for personal injuries received in an automobile collision which occurred in the city of Fresno on December 28, 1930. She was then 21 years of age. It is admitted there is evidence in the record which supports the judgment against appellant, in so far as his liability is concerned. But two questions are presented here: First, is the verdict excessive; and, second, did the trial court commit prejudicial error in the giving of two instructions at the request of respondent?

[1] The evidence discloses that, after the accident, respondent was taken to a hospital in Fresno, where she remained until January 19, 1931. She was then taken by ambulance to a railroad station in Fresno, placed on a train, and taken to Oakland, where she lived, entering a hospital there. After about four weeks in this hospital she was removed to her home, but was unable to leave her bed for two more weeks. About two more weeks elapsed before she could leave her room.

Her injuries, besides bruises, are described as concussion of the brain, which caused her to become unconscious; fractures of her second, third, fourth, fifth, and sixth dorsal ribs at a point about one and a half inches to the left of her spine, and a fracture of another rib at a similar point on the right side of her spine; a sprained neck; a fracture in the left side of the pelvis in the junction of the ascending ramus with the acetabulum; and also a fracture of the symphysis, together with a separation of the sacroiliac joint. As we understand it, this last is another way of describing a fracture of the lower portion of the pelvis at or near the hip joint, and a dislocation of the left sacroiliac joint.

Upon bending her body, two lines, running from her abdomen to one of her breasts, appeared in her skin. The physicians had not seen such phenomena before. At least one of them was of the opinion that the lines were caused by scar tissue under the skin. These lines were tender at the time of the trial, a little less than eleven months after the accident.

The evidence discloses that the fractured bones had properly united at the time of the trial, and that the other injuries were making a progressive recovery. One of her physicians testified from an X-ray taken early in February, 1931:

"Q. * * * You still see evidences, doctor, of that irregularity, the malposition of the pelvic girdle having been shoved from the left over to the right, do you? A. Yes, sir.

"Q. And is that a condition which will be permanent throughout the girl's life? A. Yes, sir, it is.

"Q. Doctor, in the position which it is now in the box, do the fractures appear to be healing? A. Yes, sir, they do.

"Q. They have held in normal girls? The girl has a normal pelvis except for that irregularity? Is that correct? A. I think that is partially correct. Still there is some irritation about her left sacroiliac joint. * * * The joint has, in my opinion, held very, or rather fairly well. The ligaments are all healed as they were, and there is some little distortion in the cartilagineous structure due to the distortion of the pelvis.

"Q. Is that something that can ever heal? A. Sometimes they can regain their former contour, and sometimes they do not."

No X-ray pictures were taken after February, 1931.

Respondent complained of having headaches after the accident which continued with lessening severity and frequency up to the time of the trial. One of the physicians testifying gave secondary neuritis resulting from an injured nerve as the cause of the headaches. It was his opinion that the nerve would return to normal and that the headaches would ultimately disappear.

Respondent testified that she had suffered from menstrual trouble since reaching the age of puberty, but that these troubles had increased following the accident. The physicians all testified that the separation of the sacroiliac joint had lessened, at the time of the trial, and described it as "slight." Her physicians could not predict a complete recovery of this joint, nor could they express the opinion that this injury was permanent. All

the physicians agreed that the "tipping" of the left side of the pelvis was "slight."

At the time of the accident respondent had completed her junior year at the University of California. She returned to her classes in August, 1931, but was unable to continue her studies more than six weeks. She testified that, after walking any considerable distance or taking any vigorous physical exercise, she had pains in the region of her pelvis which required her to lie down.

It was admitted that at the time of the trial respondent's gait when walking was normal, and that she showed no visible outward signs of any physical injury. The only evidence of injury at that time was her subjective symptoms of headaches and the occasional pains in the region of the pelvis; and objective symptoms, shown through examination of X-ray pictures or by accurate measurements of her body.

We have carefully studied all the evidence in the case, and, while the judgment is large, in view of the injuries described, it does not of itself force the conclusion that the verdict was the result of passion or prejudice on the part of the jury. Reneau v. Hirsch, 88 Cal. App. 1, 262 P. 1100.

Appellant raises the question as to the sufficiency of the complaint to justify the reception of evidence of loss of earning capacity on the part of respondent, and as to the permanency of her injuries. These questions are settled adversely to his contention by the cases of Girard v. Irvine, 97 Cal. App. 377, 275 P. 840; Leiner v. Eng-Skell Company, 104 Cal. App. 228, 285 P. 905; and Machado v. Harm, 112 Cal. App. 748, 297 P. 626.

[2, 3] Appellant complains of an instruction given at the request of respondent, whereby the jury was informed that it might "award her such damages as *in your opinion* will compensate her for the pecuniary loss sustained by her and proximately caused by the wrong complained of." (Italics ours.) This part of the instruction should not have been given. Melone v. Sierra Railway Co., 151 Cal. 113, 91 P. 522; Fries v. American Lead Pencil Company, 141 Cal. 610, 75 P. 164. We think the error here is not sufficiently prejudicial in itself to require a reversal of the judgment as there were other proper instructions on the same subject.

[4] The trial court at the request of respondent gave the following instruction: "The law says that a recovery may be had for mental suffering. This means a recovery for something in addition to that form of mental suffering ordinarily described as physical pain, but includes the numerous forms and phases that mental suffering may take, which will vary in each case with the nervous temperament of the individual, her ability to stand shock, the nature of the injuries, whether permanent or temporary, disfigurement or humiliation. Mental worry, distress, grief, mortification, where they are shown to exist, or where it is shown with reasonable certainty that they will exist in the future, are all proper component elements of that mental suffering for which the law entitles the injured party to redress in monetary damages."

We have examined the transcript carefully, and find no evidence indicating that respondent had suffered, or would suffer, mental worry, distress, grief, or mortification from any disfiguring or humiliating injuries. There was no evidence that she was disfigured, or had any injury liable to cause her humiliation. Her outward appearance was normal in every way and gave no visual evidence of her having received any injury. There was no evidence that she at any time feared that her injuries would have any permanent effect, or that she would have any permanently impaired faculties. There is no evidence of any "mental worry, distress, grief or mortification." This instruction should not have been given. It instructed the jury that it might go beyond the evidence in fixing the amount of the damages, and gave it permission to consider matters entirely beyond the evidence in arriving at the amount of the verdict.

It is true that the mental condition of respondent resulting from her injuries might have been a material question in the case, and that mental suffering occasioned by a reasonable apprehension of a future or permanent disability or deformity resulting naturally and proximately from the injury might have been a proper element to be considered by the jury in assessing damage, if it had been made to appear by any evidence that such mental condition existed. Boa v. San Francisco-Oakland T. Rys., 182 Cal. 93, 187 P. 2. In the absence of all evidence of any such mental condition, the jury should not have been permitted by the trial court to consider these elements in arriving at its verdict, and in fixing the amount of the damages which were awarded to respondent.

[5] We must consider whether the giving of this instruction resulted in prejudice to appellant. As we have already observed, the amount of the verdict is large in view of the injuries suffered. The instruction permitted the jury to take into consideration unproved elements of damage. The first instruction referred to permitted the jurors to award such damages as in their opinions might be proper. The second instruction permitted them to form this opinion on elements of damage not proven. The verdict is large, and the improper instructions gave the jurors the opportunity to consider unproved elements of damage in forming their *opinions* on the amount of damage suffered. Under the facts of this case, we conclude the instructions prejudicially erroneous. This will require a reversal of the judgment on the question of the

amount of damage only. Pretzer v. California Transit Co., 211 Cal. 202, 294 P. 382.

The judgment is reversed, and the case remanded for a new trial, solely upon the issue of the amount of damages, with directions to the trial court to render judgment in favor of respondent for the amount of damages so found, upon a determination of that issue.

We concur: BARNARD, P. J.; JENNINGS, J.

131 Cal.App. 487

CALIFORNIA PAC. TITLE & TRUST CO. v. CROCKER FIRST NAT. BANK OF SAN FRANCISCO.

Civ. 8680.

District Court of Appeal, First District, Division 2, California.

April 28, 1933.

Rehearing Denied May 27, 1933.

Hearing Denied by Supreme Court June 26, 1933.

1. Executors and administrators ⇐450.

Evidence *held* insufficient to support finding that coexecutor's indorsement of coexecutrix' name to check payable to both, was not made with latter's authority.

2. Executors and administrators ⇐124.

Authority of coexecutrix to indorse check payable to coexecutor and coexecutrix *held* delegable to coexecutor, no particular form of writing being required (Code Civ. Proc. § 1355).

3. Executors and administrators ⇐124.

Power of attorney given by coexecutrix to coexecutor *held* sufficient authority in writing to authorize coexecutor to indorse coexecutrix' name to check payable to both (Code Civ. Proc. § 1355).

4. Banks and banking ⇐148(2).

Where indorsement of check payable to coexecutor and coexecutrix was made by coexecutor with written authority from coexecutrix, indorsement did not constitute forgery (Code Civ. Proc. § 1355).

5. Principal and agent ⇐126(3).

Statute providing method in which attorney in fact must execute instruments, *held* inapplicable to indorsement of check (Civ. Code, § 1095).

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action by the California Pacific Title & Trust Company against the Crocker First National Bank of San Francisco. From a judgment in favor of the plaintiff, the defendant appeals.

Judgment reversed.

Redman, Alexander & Bacon and Alfred B. Weiler, all of San Francisco, for appellant.

McCutchen, Olney, Mannon & Greene, of San Francisco, for respondent.

SPENCE, Acting Presiding Justice.

Plaintiff brought this action to recover the sum of $12,559.25, alleged to have been the balance due to plaintiff as a depositor in the defendant bank. The cause was tried by the court sitting without a jury and from a judgment in favor of plaintiff, defendant appeals.

The defendant bank came into being as the result of a consolidation and the name of the plaintiff corporation was changed during the time referred to herein but neither the consolidation nor the change of name is material here so we may simply refer to the institutions involved as plaintiff and defendant. In 1922, plaintiff issued a check on the defendant bank in said sum of $12,559.25 payable to "Mary Baldwin Wood, Extrx., and Baldwin Wood, Extr., of the estate of William Sidney Wood, dec'd." It is this check which is the center of controversy. Said check was indorsed by Baldwin Wood by signing the names of both payees in the same manner as said names appeared upon the check and he thereafter deposited the same in an account carried in the American National Bank in the name of "Estate William S. Wood, Deceased." This estate account was a very active account, the funds in which were subject to withdrawal upon the signature of Baldwin Wood alone. The record does not disclose what, if anything, was done with the money received by Baldwin Wood in payment of this particular check after said money was placed in the last mentioned account. Mary Baldwin Wood testified, "The check was not paid to me," but it also appears from her testimony that Baldwin Wood regularly deposited large sums in her personal account from 1908 until his death, which occurred some time subsequent to 1925. She did not know the exact source of the funds so deposited, but testified, "I got enough to spend seven or eight hundred dollars a month from 1908 until his death."

It was the theory of plaintiff that the indorsement of said check in the manner described constituted forgery on the part of said Baldwin Wood and that plaintiff was entitled to judgment against the bank for the full amount represented by said check. This action was not commenced until 1928, being six years after the payment of said check by the defendant bank. The bank defended upon the ground that all money on deposit had been paid out upon plaintiff's order, and the defendant bank further pleaded the statute

of limitations. In other words, the bank took the position that the indorsement was not forged but was an authorized indorsement, and further took the position that even if the indorsement was forged, plaintiff's claim was barred. The trial court found against the bank on both of these defenses and gave judgment in favor of plaintiff for the full amount of the check.

On this appeal the defense of the statute of limitations is not urged, for it is now well settled that under the statute in force at the time of the commencement of this action this defense was not available to appellant. Atwell v. Mercantile Trust Company, 95 Cal. App. 338, 272 P. 799; Merchants National Bank v. Continental National Bank, 98 Cal. App. 523, 277 P. 354. Appellant's main attack is therefore directed at the findings of the trial court to the effect that said indorsement was unauthorized and forged. We will therefore briefly set forth the evidence relating to this issue which is found solely in the testimony of Mary Baldwin Wood.

William Sidney Wood died in 1908 and shortly thereafter his widow, Mary Baldwin Wood, and his son, Baldwin Wood, were appointed executrix and executor respectively of his will. The proceedings in the probate court were apparently still pending at the time this litigation was commenced in 1928. It is quite evident that Mrs. Wood relied entirely upon her son and paid little, if any, attention to the estate affairs. Shortly after being appointed executrix, she went to Europe and subsequently made two other trips there. She also spent two years in the Orient and later she lived in New York for a period of two years. We quote the following excerpts from her testimony: "After my appointment I qualified as executrix, but I have not been acting as such because I have been out of town so much. * * * I signed a power of attorney after my husband's death. I gave my power of attorney to my son. I think it was about when I went abroad. * * * I gave the power of attorney to my son so that he could handle all of my affairs —everything. * * * The only paper that I ever signed after my husband's death was that one power of attorney. * * * Part of the estate was what they called the Wood Building at Merchant and Kearny streets. I never signed any papers in connection with leases for that estate, my son entirely attended to that. I suppose he told me he received rents, but I never knew. I had enough to live on from month to month, and that was all that was necessary. My son paid me the money to live on through the Crocker National Bank, and I understood that that was coming from the estate. I do not remember signing any papers in connection with the business of my husband's estate at all. I took no part in the business of the estate at any time —never. The last time I had to do with the estate was the time I was in court before Judge Coffey—just after my husband died. I knew that all that I had to live on came from the Wood Building and possibly other sources coming into the estate. It came in to my son. I had not the slightest objection to his collecting this money and handling it. My son never paid me anything. I went to the Crocker Bank and drew out the money myself. My son never made me a personal payment at any time. He had all my collaterals. When I went abroad I gave him the collaterals and whatever monies I drew were monies that were in the Crocker Bank and I drew them out on my check. They were put there by my son from various sources. It was the estate property that my husband left to us. When I drew money from the Crocker Bank I signed my checks and handed them in and got the money. The account in the Crocker Bank was in my individual name alone, Mary Baldwin Wood, not as executrix. * * * I left everything to my son Baldwin to take care of. * * * I was not a business woman and just naturally left it to my son. I trusted him implicitly in that matter and that was the situation throughout the whole matter. * * * None of those claims were approved in my handwriting; never approved by me in the slightest way. He paid them and that was sufficient. I consented that they should be paid. I do not remember if there were proceedings in 1909 when some stocks and bonds were distributed to me, some to my son, and some to the trust company for Mrs. Welty, because I had my own stocks and bonds. I think that I got some stocks and bonds which were part of the estate immediately after my husband died. * * * I never got any money from my son or from the estate in any other way than through the Crocker Bank in the way I have described. He never gave me any check on an account in the American National Bank. I never knew anything about the American Bank. I did not know of the existence of an account there. I never discussed with my son where he was putting the money that he got from the rents of the Wood Building and the question never came up. * * * I knew that my son was collecting the rents from the Wood Building. I knew he was collecting the coupons coming off the bonds and the interest coming in on the stocks and I raised not the slightest objection to that. * * * This money that was paid into the Crocker Bank by Baldwin Wood that I could draw on was from the securities that were distributed to me and also, perhaps, so far as I know, the rents from the real property in the estate. The building and everything all went into one and Baldwin handled it all. I thought I was getting half the income from the building and all the income from my personal securities which were distributed to me and which I gave him to handle. * * * I was perfectly satisfied all

along to have Baldwin handle everything. * * * My son paid me from time to time through the Crocker Bank in the way I have described up to his death. I got enough to spend seven or eight hundred dollars a month from 1908 until his death." When asked how many times she talked to her son about the estate, she answered, "I merely trusted him to attend to it; that was all."

[1-4] In view of the foregoing testimony we believe that the finding of the trial court that the indorsement of the name of Mrs. Wood on the check in question was not made "by or with her authority" is contrary to the evidence. Her evidence to the effect that she did not indorse the check, had never seen it, and did not know of its existence is in no way in conflict with the testimony set forth. The same may be said of her statement that she did not "tell him" he could sign her name as executrix, and we may further note that her bald conclusion that she did not give Baldwin Wood authority to represent her is negatived by the facts to which she testified. Much is said in the briefs regarding the question of whether one of two executors may act for both under the circumstances before us. On this subject there appears to be a conflict of authority and the parties are not agreed upon the rule in this jurisdiction in view of the provisions of section 1355 of the Code of Civil Procedure then in force. That section provided: "* * * Where there are two executors or administrators, the act of one alone shall be effectual, if the other is absent from the state, or laboring under any legal disability from serving, or if he has given his co-executor or co-administrator authority, in writing, to act for both. * * *" A discussion of the general question is unnecessary here, for while it is admitted that Mrs. Wood was neither absent from the state nor under any legal disability at the time the check was indorsed, we believe that Baldwin Wood had ample authority in writing to indorse the check. If the check had been made payable to Mrs. Wood individually, there could be no question regarding the authority of Baldwin Wood to indorse her name thereon by virtue of the power of attorney, and there is respectable authority for the proposition that the added words were mere descriptio personæ and should be treated as surplusage. Abney v. Citizens' National Bank (Tex. Civ. App.) 152 S. W. 734; Burrell v. Kern, 34 Or. 501, 56 P. 809; Litchfield v. Flint, 104 N. Y. 543, 11 N. E. 58; First National Bank v. Collins, 17 Mont. 433, 43 P. 499, 52 Am. St. Rep. 695; Roger Williams National Bank v. Groton Manufacturing Co., 16 R. I. 504, 17 A. 170; Kennedy v. Gelders, 7 Ga. App. 241, 66 S. E. 620. See, also, Story on Promissory Notes (7th Ed.) § 63; Daniels on Negotiable Instruments (6th Ed.) § 262. But treating the indorsement of the check as an act to be done in her representative capacity, it is clear from the provisions of the section above quoted that the authority to perform that act on her behalf as executrix could be delegated to her coexecutor. Under the terms of said section no particular form of writing was required. In our opinion the power of attorney which she stated was given to her son so that he handle "everything" was sufficient authority in writing to authorize him to act for both of them in their representative capacities in executing the indorsement. We therefore conclude that said indorsement of the check by Baldwin Wood in the manner described was authorized by Mary Baldwin Wood and that it did not constitute a forged indorsement.

[5] Citing section 1095 of the Civil Code, respondent apparently takes the position that, if the power of attorney is relied upon, Baldwin Wood was required to sign his mother's name as principal and his own name as her attorney in fact. That section, however, refers only to instruments transferring an estate in real property and is inapplicable here. Flat Top National Bank v. Parsons, 90 W. Va. 51, 110 S. E. 491; 2 C. J. 673 and cases cited.

In view of the conclusions which we have reached it becomes unnecessary for us to consider appellant's further contentions that respondent's claims were barred by accounts stated and that respondent failed to show that it had suffered any loss through the payment of the check upon said indorsement.

The judgment is reversed.

We concur: STURTEVANT, J.; GOODELL, Justice pro tem.

131 Cal.App. 444

HACK et al. v. SACRAMENTO CITY JUNIOR COLLEGE DIST. OF SACRAMENTO.

Civ. 8901.

District Court of Appeal, First District, Division 2, California.

April 26, 1933.

Hearing Denied by Supreme Court June 23, 1933.

1. Schools and school districts ⇐89.

School district *held* not liable for injuries to student, on whom stage scenery "flats" fell because of fellow students' negligence in carrying out instructor's request (School Code, § 5.770).

There was no allegation or proof that flats should have been secured to wall with rope or otherwise, nor any evidence

that they fell before fellow students pulled them down, that such students could not lift or carry flat, were inexperienced or required experience, that there was any danger, known to instructor, who was absent, but not to such students, or that they were district's employees.

2. Schools and school districts ⇐89.

School district cannot be sued for injuries caused by students' negligent acts, though committed in carrying out instructor's request (Pol. Code, § 1623, as amended by St. 1923, p. 298 [now School Code, §§ 2.800 to 2.804]).

Appeal from Superior Court, Sacramento County; John F. Pullen, Judge.

Action by Wilma L. Hack, by her guardian ad litem, Lois R. Hack, and another, against the Sacramento City Junior College District of Sacramento. Judgment for plaintiffs, and defendant appeals.

Reversed.

Butler, Van Dyke, Desmond & Harris, of Sacramento, for appellant.

Chester F. Gannon, of Sacramento, for respondents.

STURTEVANT, Justice.

In an action to recover damages for personal injuries, the trial court made findings in favor of the plaintiffs, and from the judgment entered thereon the defendant district has appealed.

On the trial of the action considerable evidence was introduced without objection, which was outside of the issues made by the pleadings; in other words, the parties treated those subjects as being within the issues. In making findings, the trial court found on the issues made at the trial as well as those made by the pleadings. Such findings show the following facts:

Wilma L. Hack is a girl seventeen years of age, and Lois R. Hack is her mother. On October 13, 1931, Lois R. Hack was appointed guardian ad litem of her daughter and commenced this action. The defendant is a duly organized school district located in the city of Sacramento. On September 4, 1931, Wilma Hack was a student duly enrolled in the school maintained by the defendant district. At about 4 p. m. on that date she was attending her class in the art building. The class was working on the subject of stage craft. In another room there were a number of "flats," one of which was wanted in the classroom. The "flats" were parts of movable scenery consisting of wooden frames covered with canvas. Each one weighed about twenty-five pounds, and was six by twelve feet square. There were twelve or fifteen of them, and they were leaning up against a wall, one immediately adjacent to the other. The one that was wanted stood next to the wall. Mr. William G. Halstead, the teacher in charge, directed two students, Arthur Hunt and George Thorne, to go and get the flat. They went, and, on observing the arrangement of the stack, one of the boys leaned the outer one further outwards while his associate stood there and supported it. The work so continued and was in progress when Wilma Hack and another girl came by to get some paint as directed by the teacher. Just as they were passing the flats, the load had become so heavy that the student who was attempting to support it stepped aside and allowed the flats to fall. As the flats fell, they knocked Wilma down and fell on top of her. It was found by the court that the stack of flats was not secured to the wall by means of a rope or otherwise. It was also found that the two students were physically incapable of and inexperienced in the handling of said flats. It was also found that "* * * the said defendant, its servants, agents, and employees, at said time and place so negligently, recklessly and carelessly removed said flat from the pile of flats * * *" that the flats fell on and injured Wilma. Other facts were found by the court stating the nature of the injury, etc. In response to an allegation contained in the amended answer, the trial court found "that it is true that plaintiff Wilma L. Hack did not file a verified claim for damages in writing with the clerk or secretary of said Sacramento City Junior College District of Sacramento, California, within ninety days after the occurrence of the accident referred to in plaintiffs' complaint and that it is true that no verified claim was filed containing the name and address of the claimant Wilma L. Hack or the dates and/or places of the accident and/or the extent of the injury and/or damages received." In connection with the foregoing it may be observed that the plaintiffs' complaint was filed October 13, 1931, and that the amended answer just referred to was filed on January 25, 1932, about one week before the trial was had.

The defendant district contends that the plaintiffs had no cause of action because they failed to file their claim. St. 1932, c. 1167. It also claims that the findings of negligence are not supported by the evidence. As we think that the latter point is well founded, it is not necessary to discuss the first point.

[1] As recited above, the trial court found that the stack of flats was not secured to the wall by means of a rope or otherwise. There was neither allegation nor proof that in the exercise of proper care such flats should be stored in any particular manner or that the stacks should be secured with a rope or otherwise. Manwell v. Durst, 178 Cal. 752, 174 P. 881, 1 A. L. R. 669. However, there

was no evidence to the effect that, however the flats were stacked or piled, they fell before being pulled down by Hunt and Thorne.

The trial court also found that Hunt and Thorne were physically incapable of, and inexperienced in, handling said flats. There was no evidence that either Hunt or Thorne, acting alone, could not lift or carry a flat weighing twenty-five pounds. There was no evidence that either Hunt or Thorne was inexperienced in handling said flats or that any experience was necessary. Again, there was no evidence that there was any danger in handling flats, and, if so, that the instructor knew of such fact or that Hunt and Thorne did not know such fact. Manwell v. Durst, supra.

It was also found that "* * * the defendant, its servants, agents and employees, at said time and place so negligently, recklessly, and carelessly removed said flat from the pile of flats * * *" that the flats fell on and injured Wilma. But there is not a particle of evidence that this defendant, or its officers, or its employees, participated, directly or indirectly, in the act complained of. The only officer or employee mentioned in the record is Mr. Halstead. He was not even present when the flats fell. There is no allegation, proof, or finding that Hunt and Thorne were employees of the defendant. Its employees are those, and only those, who are designated by the board of education (School Code, § 5.770) and there is not a word to the effect that they had been so designated.

[2] Prior to the amendment of section 1623 of the Political Code by chapter 145, p. 298, Statutes of 1923 (which is now School Code, §§ 2.800–2.804), a school district was not liable for the negligence of its officers or employees because a school district was a state agency and the state had not consented to be sued. Shannon v. Fleishhacker, 116 Cal. App. 258, 2 P.(2d) 835. This principle is exhaustively considered and applied by the Supreme Court of Oklahoma in a suit against a school district. Consolidated School District v. Wright, 128 Okl. 193, 261 P. 953, 56 A. L. R. 152. By the amendment of section 1623 of the Political Code, the state consented that a school district could be sued for the negligent acts of the officers or employees of the district (Ahern v. Livermore Union High School District, 208 Cal. 770, 284 P. 1105), but counsel have cited no authority, and we know of none, that holds that a school district may be sued for the negligent acts of the students.

The fact that the students were attempting to carry out certain requests made by their instructor, Mr. Halstead, does not change the rule. In conducting class work a teacher must frequently give directions. While carrying out such directions, the students may, in many ways, act without due care. But for their negligence in such matters the statutes have not gone to the extent of imposing a liability on the school district.

From what has been said we think it clearly appears that no act of negligence was alleged, proved, or found against an officer or employee of the defendant. The utmost that can be claimed is that negligence was committed by the students Hunt and Thorne, who are not parties to the action.

The judgment is reversed.

We concur: NOURSE, P. J.; SPENCE, J.

TODHUNTER v. SMITH.*

Civ. 8488.

District Court of Appeal, First District, Division 1, California.

April 27, 1933.

Rehearing Denied May 27, 1933.

Hearing Granted by Supreme Court June 26, 1933.

1. Action ⇐53(2).

Injuries to person and injuries to property sustained in automobile accident need not be joined in one complaint (Code Civ. Proc. § 427).

2. Judgment ⇐610.

Motorist's cross-complaint for property damage to automobile, filed in action in municipal court, did not bar subsequent action for personal injuries in superior court for amount exceeding municipal court's jurisdiction (Code Civ. Proc. §§ 427, 442).

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by George C. Todhunter against D. S. Smith. From a judgment for plaintiff, defendant appeals.

Affirmed.

McEnerney & Morris, of San Francisco, for appellant.

Vincent W. Hallinan and James J. Roach, both of San Francisco, for respondent.

KNIGHT, Justice.

Two automobiles owned and driven, respectively, by the appellant, Smith, and the respondent, Todhunter, collided at the intersection of Pacific avenue and Franklin street in San Francisco, as a result of which Smith brought an action in the municipal court against Todhunter to recover $800 as property damage to his automobile. Besides answering, Todhunter filed a cross-complaint

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 28 P.2d 916.

claiming property damage to his automobile in the sum of $100. The action was tried, findings were waived, and the court entered judgment that "* * * Smith recover from Geo. Todhunter nothing; each party pay costs." No order or finding was made as to Todhunter's cross-complaint; and no appeal was taken from the judgment. Some five months later Todhunter brought the present action in the superior court against Smith to recover damages in the sum of $10,000 for personal injuries which he claimed to have sustained in said accident. As a bar to the action, Smith pleaded the proceedings and judgment of the municipal court. The superior court ruled that the same did not constitute a bar, and thereupon the action was tried before a jury and a verdict rendered in favor of Todhunter for $500. From the judgment entered thereon, this appeal was taken; the sole question presented being whether the trial court erred in making said ruling. We are of the opinion that it did not.

[1, 2] As appears from section 427 of the Code of Civil Procedure, injuries to person and injuries to property constitute separate causes of action, and although, where they grow out of the same tort, they "may," under the provisions of said section, be joined in one complaint, even without separately stating them, a party is not required so to join them in one complaint. He may or may not do so, at his option; and, if separate suits are brought on each cause of action, the defendant has no legal ground to complain. Realty, etc., Mortg. Co. v. Superior Court, 165 Cal. 543, 132 P. 1048; 1 Cal. Jur. 346. And section 442 of the same Code provides that, whenever a defendant seeks affirmative relief against any party, relating to the accident upon which the action is brought, he "may," in addition to his answer, file at the same time, or by permission of the court subsequently, a cross-complaint. It is evident, therefore, that, even though Todhunter's cause of action for personal injuries had been so limited in amount as to have brought it within the jurisdiction of the municipal court, he would not have been required to join said cause of action with his cause of action for property damage in the cross-complaint filed in the municipal court; he could have sued upon the same separately. But, as will be noted, his claim for personal injuries was far in excess of the amount over which the municipal court had jurisdiction, and manifestly, therefore, under such circumstances, the fact that appellant brought his action first in the municipal court did not compel respondent to remit the greater part of his claim in order to sue thereon also in the municipal court; nor did his failure so to do operate as a bar to the prosecution of the same in the tribunal having jurisdiction thereof. Engleman v. Superior Court, 105 Cal. App. 754, 288 P. 723.

Appellant argues that, under the authority of the case last cited and of Gregory v. Diggs, 113 Cal. 196, 45 P. 261, upon which the former case is based, respondent could have filed his action for personal injuries in the superior court at any time before the action in the municipal court was tried and decided, and obtained a restraining order to stay the trial in the municipal court so that the rights of the respective parties might be determined by the superior court. Assuming this to be true, there is nothing in either of those cases indicating that it is mandatory upon a party to avail himself of the extraordinary remedy thus afforded, or that he will be deprived of the right to sue on his claim in the superior court if he fails to follow such course.

For the reasons stated, the judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

131 Cal.App. 327

ERICKSON v. MUNICIPAL COURT OF CITY AND COUNTY OF SAN FRANCISCO et al.

Civ. 8884.

District Court of Appeal, First District, Division 1, California.

April 22, 1933.

1. Appeal and error ⇐458(2).

Where judgment or order appealed from is self-executing, as where superior court affirmed proceedings in municipal court, and no process is required for its enforcement, no supersedeas will be allowed by appellate court.

2. Appeal and error ⇐478.

Where sale on execution was made before application to appellate court for supersedeas, application will be denied.

Petition of A. F. Erickson for writ of supersedeas to be directed to the Municipal Court of the City and County of San Francisco and Daniel S. O'Brien, Judge thereof.

Petition denied, and temporary stay theretofore granted terminated.

Stanley Burke, of San Francisco, for petitioner.

Leo J. Rabinowitz, of San Francisco, for respondents.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

PER CURIAM.

A petition for a writ of supersedeas.

It appears that an abstract of a judgment recovered against petitioner in the municipal court of the city of Los Angeles was filed in the office of the clerk of the municipal court in and for the city and county of San Francisco, and that an execution issued thereon to the sheriff of said city and county. Following this certain personal property belonging to petitioner was levied upon and seized by the sheriff. Petitioner thereupon applied for and there was issued by the superior court in and for said city and county a writ of certiorari. It was alleged in support of the application that the municipal court of said city and county was without jurisdiction to issue the execution. The superior court directed that all proceedings be stayed in the municipal court pending the hearing of said proceedings in certiorari, and a notice of such stay was served on the sheriff. On December 5, 1932, the last-named court entered its judgment affirming the proceedings in the municipal court, and on December 7, 1932, an appeal was taken from the judgment to this court.

On March 7, 1933, following the appeal, the sheriff, over objection by petitioner, sold the property under said execution and the same was bid in by the judgment creditor.

[1] In certain cases an appellate court has inherent power to issue a writ of supersedeas to preserve the status quo of the subject of the litigation until the final disposition of the matter on appeal. Ohaver v. Fenech, 206 Cal. 118, 273 P. 555; Rosenfeld v. Miller (Cal. Sup.) 15 P.(2d) 161. But it seems to be well settled that where the judgment or order appealed from is self-executing—as is the case here—and no process is required for its enforcement no supersedeas is allowed. Hulse v. Davis, 200 Cal. 316, 253 P. 136; Imperial Water Co. v. Hall, 199 Cal. 556, 250 P. 394; Tyler v. Presley, 72 Cal. 290, 13 P. 856; Wood v. Board of Fire Com'rs, 50 Cal. App. 594, 195 P. 739; In re Graves, 62 Cal. App. 168, 216 P. 386; Lickley v. County Board of Education, 62 Cal. App. 527, 217 P. 133.

[2] It also appears that before the application for supersedeas was filed the sale had been made. Such a sale, although in violation of a previous order of the superior court, would not be void, Bagley v. Ward, 37 Cal. 121, 99 Am. Dec. 256; Powell v. Bank of Lemoore, 125 Cal. 468, 58 P. 83; and the writ of supersedeas not being retroactive in its operation cannot undo what has already been done, Hoppe v. Hoppe, 99 Cal. 536, 34 P. 222; Smith v. Smith, 91 Cal. App. 743, 267 P. 709.

For these reasons the application for a writ of supersedeas is denied, and the temporary stay heretofore granted by this court is terminated.

HOPKINS v. GALLAND MERCANTILE LAUNDRY CO. et al.

S. F. 14815.

Supreme Court of California.

May 1, 1933.

Rehearing Denied May 29, 1933.

1. Municipal corporations ⇐122(2).
Presumption exists, in passing on validity of ordinance or statute, that it is valid.

2. Municipal corporations ⇐122(2).
He who claims that ordinance is invalid must assume burden of showing its invalidity.

3. Municipal corporations ⇐703(1).
Ordinance providing that no pedestrian shall cross a roadway other than by a crosswalk when within central traffic district, and defining an "alley" as a street with a roadway less than 20 feet, *held* valid.

In Bank.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by H. B. Hopkins against the Galland Mercantile Laundry Company and another. From a judgment for defendants, plaintiff appeals.

Affirmed.

Prior opinion, 14 P.(2d) 325.

Walter E. Dorn and Vida M. Jones, both of San Francisco, for appellant.

O'Connor, Fitzgerald & Moran, of San Francisco, for respondents.

PER CURIAM.

In order to give a more thorough consideration to the questions of law presented by the petition herein than it was possible under our system to give to them at the time the petition for hearing was first before us, this cause was ordered before us for further consideration and examination. Our further consideration of the case has led us to the conclusion that the decision of the District Court of Appeal, First District, Second Division, Sturtevant, J., writing the opinion of the court, has correctly applied the law to the facts of the instant case, and its conclusion should be determinative of the case. We have adopted said opinion as the law of the case, and herewith republish it as a decision of this court. We might add to the matters therein stated that there is no pedestrian lane or crosswalk marked upon Stockton street, or anything that could be said to constitute an invitation to pedestrians to cross from the westerly sidewalk of Stockton street at the point where the exterior lines of Campton alley would intercept Stockton street if projected westerly. If Campton alley be regarded as extending across Stockton street and to its westerly line, it would cut a short block into halves. The distance to the intersection of Stockton street with either Post or Sutter streets, where regular stop signals are maintained, is short, and the physical situation, as disclosed by the facts, was sufficient to apprise a person of ordinary caution that he was assuming a hazard in undertaking to cross Stockton street at the point where the unfortunate injury occurred.

We are of the view that the opinion deals with the situation in a reasonable and practical manner in the light of all the elements which are to be weighed and considered in determining the question of negligence as regulated by our modern traffic laws. The decision of the District Court of Appeal follows:

[1, 2] The plaintiff commenced an action to recover damages for injuries suffered in an automobile collision. The action was tried before the trial court sitting with a jury. At the end of the defendants' case the defendants made a motion that the jury be directed to bring in a verdict in favor of the defendants. They based their motion on three grounds, one of which was the contributory negligence of the plaintiff. Confining its order to the ground last stated, the court granted the motion and the jury returned a verdict in favor of the defendants. From the judgment entered on the verdict the plaintiff has appealed and has brought up a bill of exceptions.

The accident happened in Stockton street between Sutter and Post in San Francisco. Stockton street runs north and south. Grant avenue is parallel to Stockton and is the next street to the east. Between Grant avenue and Stockton there is an alley known as Campton place. On the 30th day of November, 1929, the intersections of Sutter and Stockton and Post and Stockton were under such traffic regulations that the traffic during alternating periods was allowed to pass and then to stop. At about half past 8 in the morning of that day plaintiff left his hotel to go to a laundry. He passed along the west sidewalk of Stockton street toward the south until he arrived at a point directly opposite Campton place. He then started to cross Stockton toward the right-hand sidewalk of Campton place leading from Stockton to Grant avenue. At the same moment the defendants' truck which had been standing near the sidewalk opposite the western end of Campton place started to back. As it did so it hit the plaintiff, causing the injury complained of. It was stipulated that the territory where the accident happened was located in a central traffic district. The defendants introduced in evidence Ordinance No. 7691, which was then

in full force and effect. That ordinance provides that no pedestrian shall cross a roadway other than by a crosswalk when within the central traffic district; that a "roadway" is that portion of a street between the regularly established curb lines; that a "crosswalk" is that portion of a roadway included within the prolongation of curb and property lines and street intersections; that an "intersection" is the area embraced within the prolongation of the property lines of two or more streets which join at an angle; that an "alley" is a street with a roadway less than twenty feet and that a street is the roadway set apart for public travel except alleyways. The defendants called as a witness a certain engineer from the city engineer's office, who testified that he had recently measured Campton place and that at the easterly property line of Stockton street the width was 19 feet 4 inches; that 50 feet east of that point the width was 19 feet 8 inches; and 100 feet east of that point the width was 19 feet 5 inches. If Ordinance No. 7691 is a valid enactment, it follows that at the place where he was injured the plaintiff was there in violation of the terms of the ordinance and that he was guilty of contributory negligence as a matter of law. But the plaintiff contends that the ordinance is unreasonable and void. In that connection he argues that a pedestrian cannot know the intersection he is entitled to cross unless he carries a yardstick and first measures it. It will be conceded that the argument is forceful. However, the defendants reply that the use of measurements of distance in regulatory enactments on the subject of traffic regulations is not unusual but quite common. They might also add quite necessary. Continuing, they enumerate other enactments, both civil and criminal, in which certain measurements are adopted regarding the dimensions of buildings, the value of property, and the weights of articles. It is not claimed that Campton place is the only thoroughfare in San Francisco that is less than 20 feet in width. On the other hand, it is stated in the briefs that there are hundreds of similar intersections. In passing on the validity of an ordinance or a statute it will be presumed that it is valid. He who would claim that it is invalid must assume the burden of showing its invalidity. 42 C. J. 623. Neither party cites an authority that is directly in point. In the time we have had to investigate the subject we have not found one. However, cases are numerous that are very helpful.

In the case of Euclid, Ohio, Village of, v. Ambler Realty Co., 272 U. S. 365, 47 S. Ct. 114, 71 L. Ed. 303, 54 A. L. R. 1016, the court was called upon to pass on the validity of a zoning ordinance. It was claimed that the zoning ordinance enacted by the village of Euclid was unreasonable. By the terms of that ordinance it applied or did not apply according to numerous measurements of length, breadth, and height. Commencing on page 386 of 272 U. S., 47 S. Ct. 114, 118, the court said: "Building zone laws are of modern origin. They began in this country about 25 years ago. Until recent years, urban life was comparatively simple; but, with the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities. Regulations, the wisdom, necessity, and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive. Such regulations are sustained, under the complex conditions of our day, for reasons analogous to those which justify traffic regulations, which, before the advent of automobiles and rapid transit street railways, would have been condemned as fatally arbitrary and unreasonable. And in this there is no inconsistency, for, while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world it is impossible that it should be otherwise. But although a degree of elasticity is thus imparted, not to the *meaning*, but to the *application* of constitutional principles, statutes and ordinances, which, after giving due weight to the new conditions, are found clearly not to conform to the Constitution, of course, must fall."

In the case of Snyder v. Campbell, 145 Miss. 287, 110 So. 678, 49 A. L. R. 1402, the Supreme Court of Mississippi was called upon to pass on the validity of the provisions of the traffic ordinance of the city of Laurel. That ordinance provided that crosswalks would be marked at certain intersections and that it was unlawful for pedestrians to cross the marked streets at other places. It was contended the ordinance was unreasonable. The court cited the Euclid Case, quoted from it, and held the ordinance to be reasonable.

In the case of People's Rapid Transfer Co. v. Atlantic City, 105 N. J. Law, 286, 144 A. 630, the court was called upon to consider an ordinance which prohibited certain autobuses from driving on or using certain streets at any time. There, as here, it was claimed that the ordinance was unreasonable; however, after a careful consideration of the authorities, the court held that the attack was not well founded.

In Village of Wonewoc v. Taubert, 203 Wis. 73, 233 N. W. 755, 72 A. L. R. 224, the Supreme Court of Wisconsin was considering an ordinance which required auto-

mobiles to be parked on the center line of the street. It was claimed the ordinance was unreasonable. On page 757 of 233 N. W., 203 Wis. 73, the court quoted as follows: "The plaintiff's contention, when reduced to its last analysis, is that, under this act of the Legislature, all automobile owners and drivers are given full license to stop their cars upon the public streets when and where they please and for such a length of time as suits their pleasure and convenience, and to leave them standing there, though to the great prejudice and inconvenience of the general public desiring to use the streets for their primary purposes; and the city whose duty it is to keep the streets open and free from nuisance, is rendered as helpless as the shackled prisoner at the bar. The mere statement of the proposition is its own answer."

[3] The very subject-matter of a traffic ordinance of necessity deals almost solely with courses and distances. Witness the testimony in every action based on a collision of automobiles. The regulation of traffic is itself a compilation of certain regulatory measures regarding courses and distances. California Vehicle Act, §§ 106, 107, 109, 113, 127, 128, 136, 138, et seq. (St. 1923, p. 517 et seq., as amended). The necessity of carrying a yardstick is no more burdensome with reference to one regulation than with reference to another regulation. Counsel cite us to no method of regulation that is more reasonable. None occurs to us.

218 Cal. 167

LACOE et al. v. WOLF et al.

DAVIDSON'S, Inc., v. HOTEL ST. JAMES CO.

L. A. 12803.

Supreme Court of California.

May 1, 1933.

1. Cancellation of Instruments ⇐47.

In action to cancel notes and deeds of trust, wherein cross-complaint was filed to establish indebtedness of maker of notes, evidence *held* to sustain finding of existence of indebtedness.

2. Appeal and error ⇐1119.

Rights of persons not parties to appeal cannot be considered or protected on appeal.

In Bank.

Appeal from Superior Court, San Diego County; Lloyd E. Griffin, Judge.

Action by R. D. Lacoe and others against H. S. Wolf and others, wherein Davidson's, Inc., and another, filed a cross-complaint against the Hotel St. James Company. From an adverse judgment, the plaintiff and cross-defendant Hotel St. James Company appeals.

Affirmed.

Curtis Hillyer, Glen Munkeet and Dwight D. Bell, all of San Diego, for appellant.

Wright & McKee, Titus & Macomber, Burton D. Wood, and Gray, Cary, Ames & Driscoll, all of San Diego, for respondent.

CURTIS, Justice.

The Hotel St. James Company, plaintiff and cross-defendant in the court below, appeals "from the judgment rendered against it in the above entitled action." An examination of the judgment discloses that the only judgment rendered against appellant was in favor of Davidson's, Inc., a corporation, for $34,-849.15, and in favor of Harry F. Bringhurst for $13,201.03, both of whom were defendants and cross-complainants in the court below. In its opening brief, appellant expressly limits its appeal to that portion of the judgment in favor of Davidson's, Inc. It is therein stated: "* * * The only ones which appellants are by this brief objecting to, are those in favor of Davidson's, Inc., for twenty-eight thousand seven hundred nine and 80/100 dollars ($28,709.80) * * * and the one in favor of Davidson's, Inc., for two thousand six hundred seventeen and 85/100 dollars ($2,-617.85). * * * We believe that each and all of the judgments in favor of the other defendants are contrary to the evidence, but we do not intend to go to the trouble and expense of showing these various small judgments in favor of the other defendants were erroneous * * * it does not warrant the extensive discussion of the evidence included in the more than two thousand seven hundred (2700) pages of transcript, which would be necessary to sustain our contention." It therefore follows that on this appeal there is but one appellant, the Hotel St. James Company, and but one respondent, Davidson's, Inc. This is important because in the court below there were four plaintiffs and some forty defendants. In addition, two of the defendants, Davidson's, Inc., and Harry F. Bringhurst, cross-complained, naming the Hotel St. James Company as cross-defendant. The original complaint was filed by three individuals who alleged that they were the owners of practically all of the stock of the Hotel St. James Company, and that the hotel company was joined as a defendant, for the reason that it was then under the control of certain of the named defendants. During the trial, it was stipulated by all the parties that the hotel company should be made a party

plaintiff. The relief prayed for in the complaint was that certain promissory notes of the hotel company held by the defendants and secured by deeds of trust be set aside and canceled. The trial court canceled the notes and trust deeds. The plaintiffs, including the appellant hotel company, thus secured the relief asked for in their complaint. The cross-complaints of respondent and Bringhurst were not predicated upon the promissory notes and trust deeds, but were predicated upon obligations alleged to have been incurred by the hotel company long before the notes and trust deeds were executed. After the obligations had been incurred, the notes were issued as evidence thereof. The trial court, although holding that the deeds of trust and notes should be set aside and canceled, further held that the cross-complainants were entitled to judgment on their cross-complaints. In the trial court, the two issues, i. e., whether the notes and trust deeds should be canceled, and whether the hotel company, independently of the notes, was indebted to the cross-complainants, were inseparably connected. On this appeal, as limited by appellant, the sole question presented is whether or not the finding that appellant hotel company is indebted to respondent Davidson's, Inc., is supported by the evidence.

The factual background of the action is as follows: In 1925, I. T. Davidson and M. E. Meyer owned and operated the St. James Hotel. In August, 1925, they gave W. A. Drennan an option until November, 1925, to purchase the hotel for $300,000. The option specifically provided that the cost of all replacements made after August, 1925, should be added to the purchase price, and that taxes and insurance should be prorated. Within several weeks from the time this option agreement was entered into, Drennan organized the appellant company, the Hotel St. James Company, for the purpose of purchasing the hotel. Subsequently, the hotel company agreed to purchase the hotel from Drennan for $235,000, plus certain stock of the hotel company. Drennan likewise organized another corporation known as the Hotel St. James Operating Company. On November 23, 1925, the option was exercised and the hotel purchased. The transfer from Meyer and Davidson was from them directly to the hotel company. At the time of the transfer, Meyer and Davidson turned over to the hotel company, in addition to the building and furniture, certain insurance policies, tax receipts for taxes paid in advance, actual cash in the till, accounts from guests then living in the hotel (which accounts were subsequently collected by the hotel company), stationery, office supplies, and additional bedding and furniture purchased after the date of the option. Of the judgment appealed from, $2,647.85, plus interest, involves these items. The hotel company received these items and admittedly has not paid for them. This obligation is now held by Davidson's, Inc. The trial court found that this item of the judgment was for insurance, taxes, and goods, the benefit of which was received by the hotel company, and that the hotel company owed for the same. This finding is amply supported by the evidence and cannot now be disturbed.

[1] The second portion of the judgment in favor of Davidson's, Inc., involves an item of $28,709.80, plus interest. The trial court found that this was a valid obligation owing from the hotel company, and that Davidson's, Inc., was the legal holder thereof. This obligation was incurred as follows: Drennan, as the president of the hotel company, went into possession of the hotel in November, 1925. From then until May, 1927, Drennan assumed absolute control of the hotel and of both corporations, the hotel company and the operating company. All during this period all moneys collected from the operation of the hotel were deposited in the name of the hotel company. The board of directors of neither company held any meetings during this time. In 1926, Drennan conceived the idea of reconstructing certain portions of the hotel, so as to add to its revenue producing capacity. The hotel company was so heavily involved that Drennan discovered that the banks would not lend the company any more money. He testified that he discussed the problem with the holders of all claims against the hotel and operating companies. An officer in one of the banks suggested that perhaps Drennan personally could contract for the improvements and give the contractor certain insurance policies and stock owned by Drennan, as security. The contractor could then be paid in installments from the increased revenue produced by the improvements. Pursuant to this plan, Drennan approached M. Trepte & Son, a contracting firm, suggested by the bank. Drennan then, personally, and evidently with the full knowledge of the creditors of both corporations, entered into a contract with M. Trepte & Son to construct the improvements. These improvements were constructed between September and December, 1926. The improvements produced an increased income for the hotel and Drennan testified that every cent of the increase, as well as the other income of the hotel, was deposited in the bank account of the hotel company. Drennan gave the contractor his personal note for the amount due, secured by certain life insurance policies and by his stock in the operating company. To protect himself, he caused to be entered in the books of the hotel company a credit in his name equal to the amount of the notes he had executed in favor of the contractor. In October of 1927, the contractor insisted that he be paid. Neither Drennan nor the hotel company had a sufficient amount of money available to pay the debt.

In order to raise the money, Drennan approached his friends Wolf and Davidson, the owners of all the stock of Davidson's, Inc., respondent herein. Drennan pointed out to them and to their attorney that, in addition to the security held by the contractor, he (Drennan) had a claim against the hotel company for $26,000 plus. Drennan showed the attorney a copy of the original entry in the books of the hotel company, showing such a credit in Drennan's favor. Wolf and Davidson agreed to pay the contractor in full, provided Drennan assigned to them as additional security his claim against the hotel company. This was done and the contractor paid. There is no dispute but that the hotel company received the benefit of the improvements, and that neither it nor the operating company nor Drennan has paid for them. There is no dispute but that Wolf and Davidson, whose claim has been assigned to respondent, did pay for them. Under such circumstances, the finding that this sum was a valid obligation of the hotel company is obviously supported by the evidence.

Almost the entire portion of appellants' argument is devoted to issues not properly before us on this appeal. Under a heading "conspiracy" appellant seeks to show that in July, 1928, Wolf, Davidson, and Drennan seized control of the hotel company and fraudulently caused to be executed by that company certain promissory notes in favor of Davidson's, Inc., evidencing the above-mentioned items of indebtedness, and likewise caused to be executed a trust deed on the hotel property as security for the notes. The actions of these men in this regard were held to be fraudulent, in that in this fashion the due date of the indebtedness was accelerated. It was for this reason that the trial court canceled the notes and deeds of trust, the relief prayed for by appellant. Those matters are not involved on this appeal. On this appeal all that is involved is whether or not in October of 1927 the hotel company owed Drennan or the contractor the amount in question, and, if so, whether the debt was assigned to respondent. What happened to the corporation in July of 1928 is not at all pertinent to that issue. Many of the charges of fraud made by appellant would perhaps be pertinent, were the creditors of the hotel company or operating company now before us, but they are not. The sole appellant is the hotel company. The judgment merely declares that legally and equitably the sums therein mentioned are owing to respondent from appellant. If any grounds for an estoppel in favor of the creditors of the two corporations exists, that matter is not pertinent on this appeal.

The appellant also contends that the obligation for the improvements was not a debt of the hotel company, but was a debt of the operating company, a company with no assets. This contention is based on the fact that in April of 1927 a lease was entered into between the hotel company and the operating company whereby the former company leased the hotel to the latter company. For reasons not very clear, the lease was dated back to May, 1926. The improvements were contracted for in September of 1926. Obviously a lease between the two corporations entered into in April of 1927 could not affect Drennan's rights in an obligation of the hotel company incurred in 1926.

Appellant refers to certain agreements between the operating company and its creditors, the purchasers of its gold notes. None of these people is a party to this appeal and their rights are not involved herein. Moreover, it should be mentioned that the operating company did not even function as a corporation until April or May of 1927, long after the obligations here involved were incurred.

[2] The evidence, as above reviewed, clearly indicates that the sole appellant, the Hotel St. James Company, has no just grounds for complaint. If other parties not parties to this appeal have just cause for complaint, their rights can undoubtedly be protected by a proper action. Their rights cannot be considered or protected on this appeal, to which they are not parties.

The portions of the judgment appealed from are affirmed.

We concur: PRESTON, J.; LANGDON, J.; SEAWELL, J.; IRA F. THOMPSON, J.; SHENK, J.

218 Cal. 27

LUBARSKY v. RICHARDSON.

S. F. 14725.

Supreme Court of California.

April 24, 1933.

1. Appeal and error ⇐1099(6).

Vendor could not contend that purchaser's complaint for rescission was insufficient as not based on failure of consideration of purchase contract, where reviewing court on former appeal established sufficiency of complaint for rescission.

2. Appeal and error ⇐907(3).

Evidence is conclusively presumed to support findings, where appeal is on judgment roll.

3. Vendor and purchaser ⇐119.

Where dwelling house burned in December, purchaser giving notice of rescission of

purchase contract following April *held* not guilty of laches, where vendor did not until April repudiate agreement to credit insurance proceeds on purchase price.

4. Contracts ⇐270(2, 3).

Facts peculiar to each case are determinative of period within which right to rescind for misrepresentations must be exercised, and whether defrauded party acted promptly is for trial court on facts of particular case.

5. Vendor and purchaser ⇐120.

Notice of rescission containing demand for money paid out by purchaser under purchase contract and offer to restore all things of value received by him thereunder *held* sufficient.

6. Vendor and purchaser ⇐123.

Vendor could not complain of purchaser's inability to restore specified items of personal property on rescission of purchase contract, where vendor's rights were protected by judgment.

7. Appeal and error ⇐681.

Whether cross-complaint was amended in form only so as not to open up plaintiff's previous default could not be determined by reviewing court not having original cross-complaint before it.

8. Judgment ⇐150.

Where, after defendant's default, complaint is amended in matter of substance as distinguished from matter of form, amendment opens default.

In Bank.

Appeal from Superior Court, Alameda County; Frank M. Ogden, Judge.

Action by Moses Lubarsky against Evelyn Richardson, administratrix of the estate of C. Pauline Chavis, deceased. From a judgment for plaintiff, defendant appeals.

Affirmed.

William J. Hayes, of San Francisco, and Charles H. Patterson, of Oakland, for appellant.

W. F. Cowan and J. O. Kroyer, both of Santa Rosa, for respondent.

CURTIS, Justice.

This action was originally instituted against C. Pauline Chavis as defendant. After its commencement, said defendant died, and defendant Richardson, as administratrix of her estate, was substituted as defendant. We will continue to refer to C. Pauline Chavis as the defendant.

On May 3, 1926, plaintiff and defendant entered into an agreement in writing whereby the defendant agreed to sell, and plaintiff agreed to buy, a certain chicken ranch in Sonoma county, Cal., together with certain personal property located on said ranch, including chickens, feed, automobile, and other equipment for the sum of $11,000; $2,000 of the purchase price was to be paid in cash, and the balance thereof was to be paid five years from date, with interest at 5 per cent., payable semiannually, the buyer to have immediate possession of the premises and to pay all taxes thereon and to maintain fire insurance upon the dwelling house on said premises to the extent of $3,000. The plaintiff paid the $2,000 called for by said contract, and entered into possession of said premises. He also paid the first six months' interest and the first half of the county taxes for the fiscal year, 1926–1927. On December 28, 1926, the dwelling house on said premises, of the value of $3,000, was destroyed by fire, and the insurance money, $3,000, was collected by the defendant. Upon the collection of said insurance money by the defendant, she agreed to give the plaintiff credit for the amount thereof on the amount of the purchase price remaining unpaid. The court found that defendant continued "to make said representations and statements that she would credit the insurance moneys collected by her upon the purchase price of said contract from the time of the destruction of said dwelling in December, 1926, to the month of April, 1927, at which time said defendant stated, that she would not reconstruct a dwelling of like or similar value or credit plaintiff with the value thereof." On April 15, 1927, plaintiff served upon defendant a notice of rescission of said contract of purchase, and thereafter commenced this action to have said contract rescinded. The trial court rendered judgment in favor of the plaintiff rescinding the contract and also for the recovery of $965.53 and costs. Defendant has appealed upon the judgment roll.

[1] As we understand the position of the defendant, she concedes that, by reason of the loss of the dwelling house on said premises, without any fault of the plaintiff, the consideration for said contract of purchase had so materially failed that the plaintiff was entitled to rescind said contract for that reason. Defendant contends, however, that the plaintiff did not base his right to rescind upon that ground, but upon the ground that defendant failed to give plaintiff credit for the amount of said insurance money on the unpaid purchase price of said property. Conceding that plaintiff's complaint is possibly susceptible of the construction placed upon it by the defendant, we think the defendant is precluded from making such a contention at this time. This action was before the District Court of Appeal upon a prior appeal from a judgment upon the pleadings in favor of the defendant. The judgment was re-

versed. There the defendant made practically the same contention that she now attempts to make on her present appeal. After analyzing the complaint in this action, the District Court of Appeal on said former appeal held as follows: "We conclude, therefore, that the plaintiff's complaint tendered a good issue * * * of failure of consideration, which, if supported by evidence would entitle plaintiff to rescind the agreement and recover back the money paid." Lubarsky v. Chavis, 99 Cal. App. 610, 616, 279 P. 205, 207.

[2] The findings in the present action follow the allegations of the complaint, and as the appeal is on the judgment roll, it is conclusively presumed that the evidence supports the findings. The law of the case, therefore, as pronounced by the previous decision in this action, establishes the sufficiency of the complaint and the findings support the judgment.

[3, 4] It is next contended that the plaintiff was guilty of laches in giving notice of rescission. The dwelling house was burned on December 28, 1926, and notice of rescission was not given until the following April. Defendant concedes, however, that immediately after the burning of said building the defendant agreed to give credit for the amount of said insurance on the purchase price remaining unpaid, and that the defendant continued to make said statements and representations up to April, 1927, when she repudiated them and for the first time informed the plaintiff that she would not so apply the insurance money. Plaintiff immediately upon being informed by the defendant that she would not make application of the insurance money to the balance due on the purchase price of the premises gave notice of rescission. Under these conditions the plaintiff was excused from giving notice of rescission at an earlier date. Recently we held that: "It is impossible to designate a definite period within which a party must exercise the right to rescind a contract on account of misrepresentations, for the facts peculiar to each case are determinative thereof, and whether the defrauded party has acted promptly is a question to be decided by the trial court upon the facts of the particular case." Hunt v. L. M. Field, Inc., 202 Cal. 701, 262 P. 730.

[5, 6] Equally untenable is the contention of the defendant that plaintiff's notice of rescission was defective, in that his tender of restoration was insufficient. The notice of rescission contained a demand for the money paid out by the plaintiff under the contract of purchase and an offer to restore all things of value received by plaintiff pursuant to the terms of the contract. The notice was sufficient. The trial court, in adjusting the differences between the parties, gave defendant credit for a number of articles of personal property which were on the property at the execution of the contract of purchase, and which plaintiff was unable to restore to defendant—such as a lot of chickens which had died between the date of the contract of purchase and the giving of the notice of rescission. Another lot of chickens had been sold during the said interval by the plaintiff. Defendant's rights were carefully protected by the court in its judgment, and she has no cause of complaint in that respect.

[7, 8] Defendant filed a cross-complaint, and, plaintiff failing to answer it, his default was entered for such failure. This was the state of the pleadings when the first appeal referred to above was taken. After the action was returned to the trial court, the defendant filed an amended cross-complaint, which the plaintiff did answer. Thereupon defendant moved to strike out his answer to said amended cross-complaint on the ground that plaintiff was in default in failing to answer the original cross-complaint. The court denied the motion. Defendant now complains of the action of the trial court in denying said motion. Defendant claims that her cross-complaint was amended in a matter of form only, and therefore the filing of the amended cross-complaint did not open up the previous default. The original cross-complaint is not before us, and we have no means of knowing the nature of the amendment embodied in the amended cross-complaint, or of determining whether it was one of substance or was only formal. "It is settled that where, after the default of the defendant has been entered, a complaint is amended in matter of substance as distinguished from a mere matter of form, the amendment opens the default." 14 Cal. Jur. 889. The same rule would, of course, apply when an amended cross-complaint is filed. Under these circumstances, we can only sustain the action of the trial court in refusing to strike out plaintiff's answer to the amended cross-complaint.

We think the judgment should be affirmed, and it is so ordered.

We concur: WASTE, C. J.; SEAWELL, J.; IRA F. THOMPSON, J.; SHENK, J.; PRESTON, J.; LANGDON, J

218 Cal. 62

HOPKINS v. ANDERSON et al.

L. A. 11885.

Supreme Court of California.

April 26, 1933.

1. Statutes ⇐196.
Qualifying phrase in statute is to be applied to word or phrase immediately preceding.

2. Courts ⇐120.
Superior court, prior to 1928 amendment to constitutional provision defining jurisdiction, *held* to have jurisdiction of action to foreclose chattel mortgage, involving less than $1,000 (Const. art. 6, § 5, amended in 1924 and 1928).

3. Courts ⇐163.
Municipal court *held* to have jurisdiction of action to foreclose chattel mortgage where amount involved is less than $1,000 (Civ. Code, § 2872 et seq.; Const. art. 6, § 11, amended in 1924).

4. Courts ⇐472(1).
Grant of original jurisdiction to particular court, of class of cases, without words excluding other courts from exercising similar jurisdiction, does not necessarily preclude concurrent jurisdiction.

5. Constitutional law ⇐24.
Repeal of constitutional provision by implication is not favored.

6. Courts ⇐52.
Jurisdiction of superior court remains, unless it appears with unequivocal certainty that people intended to take it away (Const. art. 6, § 5, amended in 1924).

7. Courts ⇐472(6).
Superior court and municipal court, prior to amendment in 1928 to constitutional provision defining jurisdiction of superior court, *held* to have concurrent jurisdiction of action to foreclose chattel mortgage involving less than $1,000 (Const. art. 6, § 5, amended in 1924 and 1928, and art. 6, § 11, amended in 1924).

8. Constitutional law ⇐23.
Constitutional provision is to be considered prospective and not retrospective in operation, unless contrary intention clearly appears.

9. Courts ⇐52.
Where action to foreclose chattel mortgage involving less than $1,000, was commenced in superior court prior to amendment in 1928 to constitutional provision defining jurisdiction, superior court *held* to have jurisdiction to thereafter render judgment (Const. art. 6, § 5, amended in 1924 and 1928).

10. Chattel mortgages ⇐169.
Foreclosure of subsequent chattel mortgage, where holder of prior mortgage was dismissed as defendant before judgment, *held* conversion of mortgaged property.

11. Chattel mortgages ⇐178(1).
Measure of damages as against subsequent mortgagee who converted mortgaged property, is full amount due under first mortgage, including interest and attorney fees.

12. Chattel mortgages ⇐178(1).
Measure of damages to first mortgagee from second mortgagee's conversion of mortgaged personalty, being amount due under first mortgage, including interest and attorney's fees *held* applicable where sale price of mortgaged personalty, fixed value in excess of amount due under first mortgage.

13. Courts ⇐42(5).
Statutory provisions giving municipal court exclusive jurisdiction to enforce liens on personalty of value of $1,000 or less *held* invalid as being in conflict with constitutional provisions vesting concurrent jurisdiction in superior and municipal courts (St. 1925, p. 658, § 29; Const. art. 6, §§ 5, 11, amended in 1924).

In Bank.

Appeal from Superior Court, Los Angeles County; Charles L. Bogue, Judge.

Action by Lucie B. Hopkins against Nellie G. Anderson and others, wherein the defendants J. W. Hahn and E. M. Hahn filed a cross-complaint. From the judgment rendered, the cross-complainants appeal.

Affirmed.

Prior opinion, 12 P.(2d) 1043.

Sherman & Sherman, of Los Angeles, for appellants.

Ray Howard, of Los Angeles, for respondent.

PRESTON, Justice.

The District Court of Appeal, First Appellate District, Division 1 (opinion by GRAY, Justice pro tem.), disposed of this cause as follows:

On April 5, 1928, respondent commenced in the superior court of Los Angeles county this action to foreclose a chattel mortgage, securing a note in the principal sum of $750, of which a balance of $550 was then due, owing, and unpaid. The action was tried on January 30, 1929. Findings of fact and judgment were signed and filed on June 8, 1929. Appellants urge for reversal the alleged lack of jurisdiction in such superior court to foreclose the chattel mortgage, because the amount involved was less than $1,000.

[1, 2] At the commencement of this action, the jurisdiction of the superior court was defined by article 6, § 5, of the state Constitution, as follows: "The superior courts shall have original jurisdiction in all cases in equity and in all cases at law, which involve the title or possession of real property, or the legality of any tax, impost, assessment, toll, or municipal fine, and in all other cases, *except as hereinafter provided*, in which the demand, exclusive of interest, or the value of the property in controversy, amounts to three hundred dollars, and in all criminal cases amounting to a felony, and in all cases of misdemeanor *not otherwise provided for;* of actions for forcible or unlawful entry or detainer, *except as otherwise provided* in this article; of proceedings in insolvency; of actions to prevent or abate a nuisance; of all matters of probate; of divorce and for annulment of marriage; and of all such special cases and proceedings as are *not otherwise provided for;* and said courts shall have the power of naturalization, and to issue papers therefor." (Italics ours.) There are four exceptions, each one of which can only limit the class next immediately preceding, for, if each limitation is extended to all preceding classes, a needless repetition occurs, and an exception to an exception arises. It is a rule of statutory construction that a qualifying phrase is to be applied to the words or phrase immediately preceding. 36 Cyc. 1123. Obviously, by reason of its context, position, and punctuation, the first exception, that is, "except as hereinafter provided," can only apply to the phrase "in all other cases," and not to the first class described as "all cases in equity." An action to foreclose a chattel mortgage is a case in equity. Simon Newman Co. v. Woods, 85 Cal. App. 360, 259 P. 460. Hence the superior court, when the complaint was filed, had jurisdiction of its subject-matter.

[3-7] At the same time, section 11 of the same article provided: "Municipal courts shall have original jurisdiction, except as hereinafter provided, * * * in cases to enforce and foreclose liens on personal property where the amount of such liens or the value of the property is one thousand dollars or less. * * *" From the inclusion of provisions as to chattel mortgages under the title of "Liens" in the Civil Code (title 14, § 2872 et seq.), it is apparent, as the Code commissioners stated, that "mortgages are liens, and, under the provisions of this code, nothing more." Hence it is clear that the municipal court had jurisdiction to foreclose a chattel mortgage of the amount here involved. Are these two grants of jurisdiction concurrent or exclusive? The grant of original jurisdiction in the Constitution, to a particular court, of a class of cases, without any words excluding other courts from exercising jurisdiction in the same cases, does not necessarily deprive other courts of concurrent jurisdiction in such cases. Courtwright v. Bear R. & A. W. & M. Co., 30 Cal. 573; Rosenberg v. Frank, 58 Cal. 387. There is nothing in section 11 which excludes the superior court of jurisdiction. Both sections were amended at the same time, and therefore neither can be held to have repealed the other. Furthermore, since repeals by implication are not favored, it cannot be said that the latter section pro tanto repealed the former. Ex parte Dolan, 128 Cal. 460, 60 P. 1094. The jurisdiction of the superior court remains, unless it appears with unequivocal certainty that the people intended to take it away. McGregor v. Board of Trustees, 159 Cal. 441, 114 P. 566. We are satisfied, therefore, that both courts had concurrent jurisdiction at the time the action was commenced.

[8, 9] Thereafter, and before trial, to wit, on November 6, 1928, said section 5 was amended to read as follows: "The superior courts shall have original jurisdiction in all civil cases and proceedings [except as in this article otherwise provided, and except, also cases and proceedings in which jurisdiction is or shall be given by law to municipal * * * courts]. * * *" The language within the brackets clearly and certainly excluded the superior court from concurrently exercising jurisdiction as to matters confided to the municipal court by the terms of said section 11. Did this exclusion, however, prohibit the superior court from trying the present action of which it had jurisdiction when it was commenced? "Constitutions, like statutes, are to be considered prospective and not retrospective in their operation, unless a contrary intention clearly appears." 5 Cal. Jur. 561. "While it is the general rule that a cause of action or remedy dependent on statute falls with a repeal of the statute, even after the action thereon is pending, in the absence of a saving clause in the repealing statute (Callet v. Alioto, 210 Cal. 65, 290 P. 438; Moss v. Smith, 171 Cal. 777, 155 P. 90; People v. Bank of San Luis Obispo, 159 Cal. 65, Ann. Cas. 1912B, 1148, 37 L. R. A. (N. S.) 934, 112 P. 866), it is equally well settled and is a fundamental rule of statutory construction that every statute will be construed to operate prospectively, and will not be given a retrospective effect, unless the intention that it should have that effect is clearly expressed. (Callet v. Alioto, supra; Pignaz v. Burnett, 119 Cal. 157, 51 P. 48; Montecito County Water Dist. v. Doulton, 193 Cal. 398, 224 P. 747). There is nothing in the 1929 amendment of section 29 of the Municipal Court Act, supra, indicating that it was intended to have a retroactive operation. The better reasoned cases, we believe, are those that support the view that the change in the appellate jurisdiction of the District Courts of Appeal, in so far as appeals from judgments of municipal courts are concerned, was not in-

tended to apply retroactively, and hence does not take from the appellate courts jurisdiction of appeals perfected at the time the amendment became effective. In this connection, see the cases of Jones v. Summers, 105 Cal. App. 51, 286 P. 1093, and Harris v. Moore, 102 Cal. App. 413, 283 P. 76." Berg v. Traeger, 210 Cal. 323, 325, 292 P. 495, 496. The same reasoning, applied to the instant case, requires a holding that the superior court has jurisdiction to render judgment in the present action.

[10-12] Appellants claim that the trial court erred in rendering a personal judgment against them for the amount due on the note, secured by the chattel mortgage, plus interest and attorney's fees, because their only interest in the litigation was that of subsequent incumbrancers. As the record consists solely of the judgment roll, consideration of this claim is limited to ascertaining whether the facts found support the judgment. 2 Cal. Jur. 690. The liability of appellants is founded, if at all, upon the facts that J. W. Hahn, as mortgagee, with notice under a subsequent chattel mortgage given by the same mortgagor upon the same property, judicially foreclosed his mortgage; that E. M. Hahn, with knowledge, purchased the property for $1,000; and that both appellants subsequently sold the property to an unknown person. Respondent, although originally named as a defendant in this last-mentioned foreclosure, was dismissed hence before judgment. These facts, so found, sufficiently established appellants' conversion of the property and rendered them liable in damages therefor. 11 Cor. Jur., p. 591. The measure of damages, as correctly applied by the trial court, was the full amount due under the first mortgage, including interest and attorney's fees, provided for therein. De Costa v. Comfort, 80 Cal. 507, 22 P. 218; Mitchell v. Wood, 37 Cal. App. 329, 174 P. 677. Since the sale price of $1,000 fixed the value of the property in excess of the amount due under the first mortgage, this measure was applicable. Sherman v. Finch, 71 Cal. 68, 11 P. 847.

We hereby adopt the above opinion as a basis for our decision herein.

[13] Appellants, not satisfied, assert that the above holding ignores the express provisions of section 29, chapter 358, p. 658, Statutes of 1925, which declare that as to liens on personal property of the value of $1,000 or less, jurisdiction to enforce same rests exclusively in the municipal court. However, we have found that under the sections of the Constitution above considered, such jurisdiction was concurrent between the superior and municipal courts. Manifestly, therefore, no mere statutory enactment could alter that relationship. However, it was in fact altered in 1928 by said amendment to section 5 of article 6, Constitution, making the jurisdiction in such cases exclusive in the municipal court, and hence it is clear that the provisions of the statute, relied upon by appellants, are void. Nothing in the case of In re Luna, 201 Cal. 405, 257 P. 76, sheds any light upon this question.

The judgment is affirmed.

We concur: WASTE, C. J.; LANGDON, J.; CURTIS, J.; SHENK, J.; SEAWELL, J.; IRA F. THOMPSON, J.

218 Cal. 147

CHIARODIT v. CHIARODIT.

L. A. 13099.

Supreme Court of California.

May 1, 1933

1. Reference ⇐99(2).

Where entire case is referred to referee, referee's findings take place of court's decision and become part of judgment roll (Code Civ. Proc. §§ 638, 639).

2. Reference ⇐99(2).

Where collateral matter is referred to referee for report, referee's findings are not indispensable and not binding unless adopted (Code Civ. Proc. §§ 638, 639).

3. Court commissioners ⇐5.

Procedure to be followed by commissioner is essentially same as that followed by referee, and, therefore, rules of law applicable to findings should be same (Code Civ. Proc. § 259, subd. 2, and § 259a, subds. 2, 5).

4. Divorce ⇐184(1).

Where motion to vacate interlocutory default divorce decree was referred to commissioner, appellate court could look to facts averred for support of order granting motion (Code Civ. Proc. § 259, subd. 2, and § 259a, subds. 2, 5).

5. Divorce ⇐165(5½).

Evidence showing resumption of marital relations and conception of child between commencement of divorce action and interlocutory decree *held* to establish fraud upon court and adverse party, entitling adverse party to have decree vacated.

6. Judgment ⇐386(7).

Court has inherent power to set aside decree obtained by extrinsic fraud, irrespective of six months' limitation for making application (Code Civ. Proc. § 473).

7. Divorce ⇐165(4).

Fact that motion to set aside interlocutory decree of divorce obtained by extrinsic

fraud was not actually made until after expiration of six months subsequent to entry *held* immaterial (Code Civ. Proc. § 473).

8. Divorce ⇐165(1).

Order staying entry of final decree of divorce *held* not inconsistent with part of order vacating interlocutory decree.

9. Divorce ⇐297.

Property settlement between husband and wife does not deprive court of jurisdiction to make provision for children.

10. Divorce ⇐165(1).

Property settlement between husband and wife *held* not to deprive court of jurisdiction, on motion to vacate interlocutory decree in divorce action, to order husband to pay physician's and hospital bills attending birth of child.

11. Divorce ⇐165(1).

Finding, on motion to vacate interlocutory divorce decree, that husband was father of unborn child, *held* not final so as to conclude any possible rights in husband, and was proper as basis for determination whether physician's and hospital bills should be paid by husband.

In Bank.

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Action by George Chiarodit, Sr., against Susie Chiarodit. From an order setting aside the defendant's default and vacating an interlocutory decree of divorce, and directing plaintiff to pay to defendant money for medical and hospital bills, the plaintiff appeals.

Order affirmed.

Roland Rich Woolley, of Los Angeles, for appellant.

Willard G. Cram and S. M. Bernard, both of Los Angeles, for respondent.

THOMPSON, Justice.

This is an appeal from an order setting aside the default of defendant in a divorce action and vacating an interlocutory decree, and ordering plaintiff to pay to the defendant $400 for medical and hospital bills. On April 8, 1930, the appellant commenced an action against the defendant alleging that she had been guilty of extreme cruelty and seeking a severance of the matrimonial ties. He also alleged a prenuptial agreement by which defendant released all claims to any property then owned by him or which he might thereafter acquire. Respondent appeared by a demurrer to the complaint which was sustained by the court on April 29, 1930. Not until June 4, 1930, did the appellant file an amended complaint. On June 16, the default of respondent was entered, and on June 20, 1930, the court granted appellant an interlocutory decree, which was entered June 23, 1930. On May 22, 1930, the parties by an executed agreement canceled the prenuptial agreement and settled their property rights. However, on December 19, 1930, respondent served and filed a notice of motion to set aside the default, vacate the interlocutory decree, and for an order for the support of respondent and an unborn child. The notice was accompanied by affidavits and a proposed answer, and fixed the time for making the motion for the 30th day of December. The motion was referred to a court commissioner for a hearing and report, and after such hearing the court practically adopted the report of the commissioner and made the order from which this appeal is taken.

Several reasons are urged by appellant why we should reverse the order. They are in effect as follows: (1) There was no finding or any evidence sufficient to support a finding of fraud; (2) there was no evidence to support and, in truth, no finding of a condonation between the parties; (3) the findings of the commissioner are not sufficient to warrant the order; (4) the notice was not given within the time required by law; and (5) the commissioner should not have found that appellant was the father of the unborn child because that fact was not in issue.

[1, 2] A preliminary discussion with respect to the procedure will obviate the necessity of considering the arguments of appellant seriatim. Had the motion of respondent been heard by the judge instead of having been referred to the commissioner, the contentions of appellant regarding the certainty and definiteness of the findings would not be advanced. The question would be: Were the averments of fact sufficient to support the order? So here, we are concerned not so much with form, as with substance, which conclusion is demonstrated by the following observations. It has been held with regard to the report or findings of a referee appointed pursuant to the provisions of sections 638 or 639 of the Code of Civil Procedure that where the whole case is tried by the referee his findings take the place of the decision by the court and become a part of the judgment roll, but where a collateral matter, for the information of the court, is referred to him for a report, such findings are not indispensable, and a finding with respect to a fact does not become binding on the court until and unless adopted by it. Harris v. San Francisco Sugar Refining Co., 41 Cal. 393, 404; Faulkner v. Hendy, 103 Cal. 15, 36 P. 1021; Clark v. Millsap, 197 Cal. 765, 784, 242 P. 918; Lewis v. Grunberg, 205 Cal. 158, 270 P. 181; Barker Bros., Inc., v. Coates, 211 Cal. 756, 297 P. 8; National Brass Works v. Weeks, 92 Cal. App. 318, 268 P. 412; Schefski v. Anker (Cal. Sup.) 15 P.(2d) 744. Section 259 of the Code

of Civil Procedure provides in subdivision 2 thereof that court commissioners shall have power "to take proof and report his conclusions thereon as to any matter of fact other than an issue of fact raised by the pleadings, upon which information is required by the court; but any party to the proceedings may except to such report within five days after written notice that the same has been filed, and may argue his exceptions before the court on giving notice of motion for that purpose." Section 259a of the Code of Civil Procedure, defining powers, in addition to those conferred by the section from which we have just quoted, for commissioners in counties having a population of nine hundred thousand or more, contains subdivisions 2 and 5 thereof, which read as follows:

"2. *To take proof and make and report his findings* thereon as to any matter of fact upon which information is required by the court; but any party to any contested proceeding may except to such report within five days after written notice that the same has been filed, and may argue his exceptions before the court on giving notice of motion for that purpose."

"5. [Divorce proceedings.] When ordered by the court appointing him so to do, to hear, and report his findings and conclusions to the court for approval, rejection or change, all preliminary matters including motions or petitions for the custody and support of children, the allowance of temporary alimony, costs and attorneys' fees, and issues of fact in contempt proceedings in divorce, maintenance and annulment of marriage cases."

[3, 4] It will be noticed that the procedure which the commissioner is to follow is in all of its essential features the same as that to be followed by the referee, for which reason the rules of law ought to be the same. And this is particularly manifest when we consider that there is no occasion in such instances as the one now before us for the court to make findings. Hence, it may be inquired why there is necessity for formal findings by the commissioner. We conclude that we may look to the facts averred as well as those testified to, for support for the order, the same as though the court had not asked for the assistance of the commissioner.

We may, therefore, reframe the propositions to be answered as follows: (1) Were the facts sufficient to warrant a conclusion that there was fraud practiced upon the court? Was the notice to set aside the interlocutory decree given in time to vest the court with jurisdiction to vacate the decree? (3) Did the facts justify the order? And (4) was it improper for the court to conclude that appellant was the father of the unborn child?

[5] In substance, it is established by the averments of the affidavit of the respondent and her testimony, corroborated by others, that on or about May 8, 1930, the appellant proposed to respondent that he be permitted to go ahead with the divorce but that they live together as though they were married, which suggestion was rejected by defendant; that thereafter and about the 25th of May the respondent agreed to live and cohabit with appellant, and as man and wife, upon his express promise that everything in the past should be condoned, and that he would provide her a home; that between May 25, 1930, and July 20, 1930, appellant and respondent lived together as man and wife and had numerous acts of sexual intercourse; and that on or about May 30, 1930, the respondent conceived a child as a result of the foregoing relations with appellant, which fact appellant knew before the interlocutory decree was obtained. The foregoing recitals are ample to show fraud, when we consider that notwithstanding them appellant appeared before the court on June 20, 1930, and without disclosing any of the recited facts, testified and induced the court to grant him an interlocutory decree. In McGuinness v. Superior Court, 196 Cal. 222, 237 P. 42, 40 A. L. R. 1110, it was held that the concealment of the resumption of marital relations constituted a fraud upon the court. It could not be otherwise. The books are full of statements to the effect that the state is interested in the marital status. It certainly is concerned with the welfare of children which may be born as the result of the re-established union, and to conceal such facts from the court constitutes a fraud upon the court and the adverse party.

[6, 7] We now turn to consider whether the notice to set aside and vacate the decree was timely given. The notice was served before the expiration of six months but the time set for making the motion fell beyond the limit of section 473 of the Code of Civil Procedure. Those authorities which hold that the motion must actually be made within the period are beside the point in the present case for the reason that here the fraud established by the showing of the respondent was extrinsic [McGuinness v. Superior Court, supra; Tomb v. Tomb, 120 Cal. App. 438, 7 P.(2d) 1104], and it has been determined that where it is of that character, the court has the inherent power to set aside the decree regardless of the limitations prescribed by section 473. McGuinness v. Superior Court, supra; Aldrich v. Aldrich, 203 Cal. 433, 264 P. 754; McKeever v. Superior Court, 85 Cal. App. 381, 259 P. 373; Tomb v. Tomb, supra.

[8] We have found that one part of the order was supported. We shall consider the other parts. Appellant says that the order staying the entry of the final decree is inconsistent with that part vacating the interlocutory decree. We grant that the former is unnecessary and superfluous but it is not inconsistent. There is nothing with respect thereto of which to complain.

[9, 10] He also says that provision should not have been made for physician's and hospital bills attending the birth of the child. The affidavit of the defendant and of her physician both establish the necessity of such expenditures. It is well settled that a property settlement between husband and wife does not deprive the court of jurisdiction to make provision for the support of the children. Equally so it should not deprive the court of the power to provide for the well-being of the unborn child even though the ministration must be through the medium of the mother.

[11] Appellant's concluding argument that the court should not have determined the paternity of the child is to all intents and purposes answered by our preliminary discussion herein. It is only necessary to point out, in addition to what has been said, that such conclusion was only preliminary for the purpose of enabling the court to decide whether provision should be made for physician's and hospital bills during the pendency of the action. It is not final and does not conclude any rights the appellant may possibly have.

Order affirmed.

We concur: SEAWELL, J.; SHENK, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.

218 Cal. 39

TONINI v. ERICCSEN et al.

Sac. 4590.

Supreme Court of California.

April 25, 1933.

1. Costs ⇐32(1).

Action to restrain escape of waters onto plaintiff's lands and for damages "involved title to real estate," within statute, and entitled plaintiff to full costs, where he recovered $500, though action also involved plaintiff's right to damages (Code Civ. Proc. § 1022).

[Ed. Note.—For other definitions of "Involve," see Words and Phrases.]

2. Costs ⇐13.

Although granting of costs is usually discretionary in equitable actions, form of action is immaterial where case comes within statute (Code Civ. Proc. § 1022).

In Bank.

Appeal from Superior Court, Humboldt County; T. H. Selvage, Judge.

Action by James S. Tonini against Leven O. Ericcsen, in which defendant filed a cross-complaint against plaintiff and Z. Russ Company. From a part of the judgment, plaintiff appeals.

Reversed, with directions.

See, also, (Cal. Sup.) 21 P.(2d) 566.

Denver Sevier and Kenneth D. Sevier, both of Eureka, for appellant.

Marc F. Morrison and H. C. Nelson, both of Eureka, for respondent.

CURTIS, Justice.

[1, 2] This action was brought to restrain the defendant Ericcsen from permitting waters from Russ creek, which defendant Ericcsen had diverted onto his own lands, to escape to and onto lands occupied by the plaintiff, and for damages already sustained by the plaintiff by reason of water escaping from defendant's said lands onto the lands in the possession of the plaintiff. Defendant answered and claimed a right, or easement, to have the waters of Russ creek flow over and across the said lands, of which the plaintiff was in possession. The question of damages was submitted to a jury and resulted in a verdict of $500 in favor of the plaintiff. The equitable issues involved in the action were then tried by the court, and at the conclusion thereof the court made findings, and upon said verdict and findings, gave judgment in favor of the plaintiff in the sum of $500, and enjoined said defendant from interfering with the natural flow of Russ creek in such manner as to cause the waters thereof to escape upon the lands of the plaintiff. In the judgment, plaintiff was awarded his jury fees as costs, but the court denied him any further costs. From that part of said judgment denying him his full costs, the plaintiff has appealed. We think the court erred in limiting plaintiff's recovery of costs to jury fees only. Section 1022 of the Code of Civil Procedure provides that: "Costs are allowed of course to the plaintiff, upon a judgment in his favor, in the following cases: * * * 3. In an action for the recovery of money or damages; * * * 5. In an action which involves the title or possession of real estate. * * *" While the present action involved the right of the plaintiff to an injunction, it was also one for the recovery of damages. Furthermore, one of the main issues involved was whether or not the defendant was the owner of an easement to have certain waters from Russ creek flow over the lands occupied by the plaintiff. Such an action involves the title or possession of real estate. Hoyt v. Hart, 149 Cal. 722, 730, 87 P. 569.

"In determining whether a party is entitled to costs as of course in such cases the question does not depend upon the nature of the action, whether legal or equitable, but depends rather upon the question whether the case comes within the terms of the statute

relating to costs, namely, section 1022 of the Code of Civil Procedure. And although, as pointed out elsewhere in this article, 'the granting of costs is usually discretionary in equitable actions, nevertheless, the form of the action is immaterial where the case comes within the provisions of section 1022." 7 Cal. Jur. p. 258. The cases cited in the footnotes in support of the text containing the above statement of law amply support the text and declare the law as set forth therein. Under these decisions we think it was the plain duty of the trial court to allow the plaintiff all costs legally incurred by him in the prosecution of said action. There is nothing to be found in the authorities cited by respondent inconsistent with this conclusion. Hoyt v. Hart, supra, was a case involving the title or possession of real estate. The plaintiff prevailed, but the trial court apportioned the costs. This was done, as clearly appears from the decision, for the reason that the defendant filed a cross-complaint which involved in like manner the title or possession of real property. Under his cross-complaint, the defendant succeeded in establishing in part the right claimed, and was granted relief to that extent. Under these circumstances it was held that the trial court was justified in apportioning the costs between the parties. In Smalley v. Peckham, 175 Cal. 146, 165 P. 438, and Gallatin v. Corning Irr. Co., 163 Cal. 405, 126 P. 864, Ann. Cas. 1914A, 74, the court simply held that in equity actions the award of costs was in the discretion of the trial court. In McCarthy v. Gaston Ridge Mill & Mining Co., 144 Cal. 542, 78 P. 7, plaintiff sought to enjoin a nuisance and to recover judgment for damages sustained by reason of its maintenance. The court gave damages in favor of plaintiff in the sum of $50, but denied the injunction on the ground that since the commencement of the action, the nuisance had been abated. It also gave judgment in plaintiff's favor for his costs. This judgment was sustained on appeal, the court holding that the action was an equitable one and that it was, therefore, within the power of the court to award costs in favor of the plaintiff. Had the plaintiff in that action recovered damages in the sum of $300 or more, he would have been entitled as of course to his costs under section 1022, Code of Civil Procedure. As the amount of damages recovered was less than $300, the court was without authority to award any costs to plaintiff under said section 1022, but that fact did not prevent the court from acting under section 1025 and in its discretion allowing costs to either party to said action.

We appreciate the fact that there were other complications in this case besides those mentioned above. The Z. Russ Company was a party defendant in said action and defendant Ericcsen established a right to an easement to have the waters of Russ creek conveyed over and across certain lands belonging to said last-named defendant, known as the Occidental ranch. These last-named lands were no part of the lands of which the plaintiff was in possession and for the overflow of which he recovered damages against the defendant Ericcsen. The action was tried as a whole, and, on account of the several interests represented therein, the awarding of costs was a matter of considerable difficulty. The trial really involved two actions, one between the plaintiff and Ericcsen on the one hand, and the other between Ericcsen and the Z. Russ Company on the other hand. In the former of these, the plaintiff is entitled to his costs. It will be the task of the trial court to determine what costs were incurred by him in establishing his case and, upon this amount being determined, to award judgment in plaintiff's favor for said amount. The case, in so far as it involves the controversy between defendant Ericcsen and the Z. Russ Company, is also on appeal before this court. The decision of said appeal has this day been filed (21 P.(2d) 566).

That part of the judgment appealed from by the plaintiff Tonini is hereby reversed, and the trial court is hereby directed to modify the same, so that the judgment as modified will provide for the recovery by the plaintiff of his costs incurred at the trial of this action.

We concur: WASTE, C. J.; LANGDON, J.; PRESTON, J.; THOMPSON, J.; SEAWELL, J.; SHENK, J.

218 Cal. 43

TONINI v. ERICCSEN et al.

Sac. 4620.

Supreme Court of California.

April 25, 1933.

1. Parties ⇐54.

In action to restrain escape of water onto lands occupied by plaintiff and for damages, defendant claiming easement to overflow certain lands belonging to third party, including those in plaintiff's possession, had right to file cross-complaint making such third party defendant.

2. Estoppel ⇐92(1).

Cross-defendant *held* estopped from denying binding effect of agreement permitting water to flow over its land, though it did not sign agreement, where agreement was acted on by other party and cross-defendant received benefit (Code Civ. Proc. § 1962, subd. 3; Civ. Code, § 1589).

3. Specific performance ⇐94.

Decreeing specific performance of agreement permitting waters of creek to flow over cross-defendant's land *held* proper under statute, as against contention that cross-complainant had not complied with terms of agreement (Civ. Code, § 3392).

Evidence showed that cross-complainant's failure to perform came after cross-defendant had refused to permit waters of creek to flow across its land. Under Civ. Code, § 3392, where failure of one party to perform is only partial and either entirely immaterial, or capable of being fully compensated, specific performance may be compelled upon full compensation being made for default.

4. Specific performance ⇐49(2), 51.

To enforce agreement permitting waters to flow over certain lands, it must be just and reasonable and consideration must be adequate.

5. Specific performance ⇐121(3).

Facts *held* to justify specific performance of agreement permitting waters to flow over certain lands.

6. Specific performance ⇐126(1).

Specific performance decree compelling cross-defendant to take creek as soon as it reached cross-defendant's land and confine it in channel and empty it into tidewater *held* not unjust or unreasonable under facts.

All that the decree provided was that cross-defendant should use waters of creek so that they would not damage cross-complainant. There was nothing in the agreement or in decree that prevented cross-defendant from using waters of creek so as to save valuable sediment for purpose of enriching its land so long as in so doing it did not cause waters to back up and overflow lands and premises of cross-complainant.

7. Appeal and error ⇐1078(1).

Claim not supported by argument is deemed waived on appeal.

In Bank.

Appeal from Superior Court, Humboldt County; T. H. Selvage, Judge.

Action by James S. Tonini against Leven C. Ericcsen, in which defendant filed a cross-complaint against plaintiff and Z. Russ Company. From an adverse judgment, Z. Russ Company appeals.

Affirmed.

Denver Sevier and Kenneth D. Sevier, both of Eureka, for appellant.

Marc F. Morrison and H. C. Nelson, both of Eureka, for respondent.

CURTIS, Justice.

This appeal grows out of the same case in which the appeal, Sacramento No. 4590 [21 P.(2d) 565], this day decided, was taken. The two appeals bear the same title but different numbers. The case in which they arose was begun by the plaintiff Tonini against the defendant Ericcsen to restrain the latter from permitting waters from Russ creek in Humboldt county, which defendant Ericcsen had diverted onto lands in the possession of the plaintiff and for damages already sustained by the plaintiff by reason of waters escaping from defendant Ericcsen's lands onto the lands in the possession of the plaintiff. The lands of which plaintiff was in possession and for the overflow of which he sought damages against the defendant Ericcsen belonged to a corporation by the name of Z. Russ Company, which company had leased them to plaintiff. The defendant Ericcsen answered denying the allegations of plaintiff's complaint and setting up as a special defense that he was the owner of a right or easement to have the waters of Russ creek flow and pass over and across his own lands and thence onto and upon certain lands of the said Z. Russ Company, including those in possession of the plaintiff. Ericcsen also alleged in his said answer that a complete determination of the controversy in said action could not be had without the presence of said Z. Russ Company as a party to said action. Thereafter, but at just what stage of the proceedings we are unable to determine, the court made an order requiring that Z. Russ Company be made a party to said action. Afterwards, presumably, the defendant Ericcsen filed a cross-complaint and later a first and second amended cross-complaint against the defendant Z. Russ Company. We assume that these pleadings were filed, although they are not contained in the record before us, but there is on file a third amended cross-complaint filed by defendant Ericcsen in which he asserts the same rights as are set forth in his special defense, and which are stated in his third amended cross-complaint as follows: "That ever since on or about the 7th day of September 1897, the cross-complainant and his predecessors in interest have been, and now are, the owners of and in possession of a right or easement to have the waters of Russ creek flow, pass and spread continuously and uninterruptedly over and across the said lands of cross-complainant aforesaid, and to drain and flow continuously and uninterruptedly to tide water across, upon and over the lands and premises of said Z. Russ Company, a corporation, hereinbefore referred to, including the lands and premises occupied, controlled and possessed by cross-defendant, James S. Tonini, as aforesaid, all of which was known to cross-defendant, Z. Russ Com-

pany, and that said rights and easements are based on instruments in writing."

By stipulation of the parties this third amended cross-complaint was filed "as of the 30th day of November, 1929," and that "all of the allegations" thereof "be considered as denied by the cross-defendants named therein [James S. Tonini and Z. Russ Company]." The action was tried upon plaintiff's complaint and the answers thereto of defendant Ericcsen, and on the cross-complaint of defendant Ericcsen and the answer thereto of plaintiff and defendant Z. Russ Company. As stated in the decision of the appeal, Sacramento 4590, this day filed, plaintiff recovered judgment against defendant Ericcsen for the sum of $500 damages and was given judgment against said defendant Ericcsen, enjoining said defendant from interfering with the natural flow of the waters of Russ creek in such a manner as to cause the waters of said creek to escape and flow upon the lands of the plaintiff. Upon the cross-complaint of defendant Ericcsen against the plaintiff and the defendant Z. Russ Company, the court made findings and rendered judgment in favor of said defendant Ericcsen and against said defendant Z. Russ Company. Said judgment in so far as it is material to any question raised in the instant appeal is as follows: "It is further ordered, adjudged and decreed that said Leven C. Ericcsen is the owner of an easement and right to have waters of said Russ Creek conveyed across the said Occidental Ranch to tide water in any direction said cross-defendant may see fit to do so in a channel that will reasonably carry said waters without causing said waters to back up and overflow the lands and premises of said Leven C. Ericcsen along and adjacent to said creek from its original point of diversion as specified in said agreement to the north boundary thereof; and that said easement and right are appurtenant to, and run with and are necessary for and incident to the use and enjoyment of said lands and premises of said Leven C. Ericcsen hereinbefore described, and every part thereof."

The defendant Z. Russ Company has appealed from the judgment upon typewritten transcripts.

[1] Appellant's first contention is that the trial court committed error in ordering said defendant Z. Russ Company to be made a party to this action and in permitting defendant Ericcsen to file a cross-complaint in this action against the defendant Z. Russ Company. A complete answer to this contention would seem to be that the record does not show that Z. Russ Company ever objected to said order of court or raised the point that the order was erroneous until the case was appealed to this court. Furthermore, upon its merits, the contention cannot be sustained. Plaintiff sought to enjoin the overflowing of land in his possession, but held under lease from Z. Russ Company. Defendant Ericcsen claimed that he had an easement to overflow certain lands belonging to Z. Russ Company, including those in plaintiff's possession. A complete determination of the controversy could only be had by bringing in the defendant Z. Russ Company and making it a party to the action. In such a case a cross-complaint was proper and the order to that effect was not erroneous. 21 Cal. Jur. p. 80; Stockton Sav. & Loan Soc. v. Harrold, 127 Cal. 612, 60 P. 165.

In order to understand the controversy between Ericcsen as cross-complainant and Z. Russ Company as cross-defendant (although we will continue to refer to them either by name or as defendants following their names) a more extended statement of facts will be necessary. In September, 1897, Eli C. Ericcsen, the father of the present defendant Ericcsen, owned the east half and P. J. Petersen owned the west half of a certain forty-acre tract of land situated in Humboldt county, each operating a dairy on the land owned by him. At the same time Z. Russ & Sons, a corporation, the predecessor in interest of the present defendant Z. Russ Company, owned a seventy-acre tract of land contiguous to and directly north of the forty-acre tract owned by Ericcsen and Petersen. Said company also owned another tract of land contiguous to and directly north of said seventy-acre tract, which last-named tract was known as the Occidental ranch. In addition to these two tracts of land said company owned the land lying to the west of Petersen's land, which tract was known as the Russ Creek Dairy, and the land to the east of the Ericcsen land, which said last-named tract was in the possession of the plaintiff Tonini under lease and is the same land which the defendant Ericcsen damaged by permitting waters of Russ creek to escape and overflow the same. At this time Russ creek ran in a generally westerly direction across the Russ Creek Dairy, and thence to tidewater. In times of flood it carried a large amount of water heavily laden with silt, which in time had been deposited upon Russ Creek Dairy to the extent that in 1897 the Russ Company desired its course changed if possible. The seventy-acre tract just mentioned was then low and swampy land unfit for dairy uses, but which could be built up and made usable for such purposes if the sediment deposits from Russ creek could be made available. In the month of September, 1897, Ericcsen began negotiations to purchase from the Russ Company the seventy-acre tract of land which lay immediately north of the forty-acre tract owned by him and Petersen. The purchase was made. A deed effecting such transfer was executed and delivered by the Russ Company to Ericcsen on or about September 7, 1897, and the purchase price paid. A few days later a form of contract prepared by W. N. Russ, president of the

Russ Company, was submitted to Ericcsen and Petersen providing for a change in the course of Russ creek so that said creek instead of running in a westerly course across the Russ Creek Dairy, would be diverted northerly and as so diverted it would run between the two tracts of land owned by Ericcsen and Petersen onto and over the seventy-acre tract and from there over the Occidental ranch and thence on to tidewater. This agreement was signed by them and returned to W. N. Russ. There is substantial oral evidence that it was the intention of all parties that said agreement was to be signed by the Russ Company and that Ericcsen and Petersen thought it had been executed by the company. The signature of the company was never affixed to the agreement, but on its delivery to its president said agreement was kept in the company's safe until produced at the trial of this action. Following the purchase of said seventy-acre tract and the execution of said agreement, and in the following month, Ericcsen and Petersen proceeded to change the course of Russ creek, and, following the terms of said agreement constructed a ditch on the line between their two properties and thence north onto the seventy-acre tract. During the period of years from 1897, when the creek bed was changed, until the commencement of this action (1928), the water from Russ creek was discharged through this new channel onto the seventy-acre tract, and from said tract onto the Occidental ranch where it was conducted in ditches and channels extending in various directions constructed by the Russ Company, across the Occidental ranch, and thence to tidewater. The continuous flow of the waters of Russ creek over the seventy-acre tract and the Occidental ranch resulted in the filling in and building up of these lands. The surface of the seventy-acre tract was raised some five feet. That of the Occidental ranch was raised even higher, so that the course of the waters of said creek over the Occidental ranch was greatly impeded. This resulted in the waters of the creek being thrown back upon the seventy-acre tract and in times of high water large areas of Ericcsen's land were submerged. Ericcsen made repeated requests of the Russ Company to open up the channel of Russ creek across the Occidental ranch so as to prevent the water from overflowing the seventy-acre tract. The company refused these requests and refused to allow Ericcsen to open up said channel. Ericcsen then attempted to so overflow his lands as to raise the surface thereof above the Occidental ranch, and in so doing he permitted water to escape onto the property leased to Tonini, with the result that the latter commenced this action to enjoin Ericcsen from permitting the waters to escape onto the Tonini property. The land leased to Tonini, as we have seen, was no part of the Occidental ranch, and the court held, therefore, that Ericcsen had no right to overflow it and enjoined him from so doing. As to the controversy between Ericcsen and the Russ Company, the court held that the company was estopped from denying "the validity, effect and legality of said written agreement * * * and the obligations imposed upon it [the Russ Company] by said written agreement." Judgment was, therefore, rendered in favor of Ericcsen and against the Russ Company establishing his right to an easement over the lands of the Russ Company as hereinbefore set forth in full.

[2] While it may not be conceded by the Russ Company, it is clear that if the Russ Company is estopped from denying the binding effect upon it of said written instrument, the judgment establishing an easement in favor of Ericcsen to have Russ creek after it leaves the seventy-acre tract flow over and across the Occidental ranch must be affirmed. It will not be necessary to set forth said agreement in full. The names of the parties who were to execute said agreement are not recited in the body of the instrument. After certain recitals in the first part of the agreement it continues in the following language: "We, the undersigned, mutually agree that Russ Creek is to be put and kept into a permanent channel." Then follows a description of the channel. It was to commence at a certain point and then "to flow north on the subdivisional line between" the two twenty-acre tracts of land belonging to Ericcsen and Petersen "until it comes to the south boundary line" of the seventy-acre tract; "thence onto and through" the seventy-acre tract "in any direction that will cross the south boundary line of the" [Occidental ranch]; "thence to tide water in any direction that the owners of the Occidental Ranch may see fit to convey it."

It is clear from a casual reading of this instrument that its purpose was to provide for a new channel for the Russ creek across the several tracts of land described therein. One of said tracts, the Occidental ranch, was owned by the Russ Company. No person could, of course, give a right of way across this particular piece of land except the owner, the Russ Company. It is also clear that Ericcsen and Petersen would not have the right to divert Russ creek as it originally flowed in a westerly course over the Russ Creek Dairy, which was the property of the Russ Company, away from said lands and northerly onto the seventy-acre tract without the consent of the Russ Company. The agreement itself, therefore, bears internal evidence that it was the intention of the parties who were concerned in its preparation that it was to be signed by the Russ Company, for without the consent of the Russ Company no change in the course of said stream could be made by either Ericcsen or Petersen. As it was prepared by the Russ Company and given by its president to

Ericcsen and Petersen for their signature and was then returned to the company, the conclusion is inescapable that both Ericcsen and Petersen were led to believe by the president of the company that the company would sign said agreement along with them. Had they been men of more extended business experience, they would have undoubtedly demanded a copy of said agreement signed by the Russ Company for their future protection. That they did not do so, but trusted the president of the company that the latter would comply with their mutual understanding, furnishes no legitimate excuse for not holding the company to the terms of the agreement. In addition to the foregoing, as we have already seen, after the agreement was executed, the parties thereto immediately undertook to carry out its terms and provisions. In so doing the company joined with Ericcsen and Petersen in all that the latter did to divert said creek in accordance with the previous understanding of the parties. Ericcsen and Petersen at considerable expense constructed a new channel for the stream between their two twenty-acre tracts. By means of this channel they diverted the waters of the creek from the lands of the Russ Company, known as the Russ Creek Dairy, and caused them to flow northerly onto the seventy-acre tract and from said tract over, onto, and through the Occidental ranch, the property of the Russ Company. After the waters of the creek had reached the Occidental ranch it was received by the company and used by it on said last-named tract as we have already stated. Under this state of facts there can be no question but that the defendant company was estopped from denying the due execution and validity of the written agreement. Section 1962, subdivision 3, of the Code of Civil Procedure, would seem to be directly applicable to these facts: "Whenever a party has, by his own declaration, act, or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act, or omission, be permitted to falsify it."

Then again it appears without contradiction that it was a distinct benefit to the Russ Company to have the waters of Russ creek diverted from the Russ Creek Dairy, where they were no longer needed, and where in fact they were a detriment, and to have them flow over the Occidental ranch and thus build up and make usable the lands thereof. It is well settled, so much so that it has been embodied in a section of our Codes, that, "A voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it, so far as the facts are known * * * to the person accepting." Section 1589, Civ. Code.

[3] The contention is further made that the court erred in decreeing specific performance of said agreement as against the Russ Company for the reason that the defendant Ericcsen had not complied with the terms thereof. In support of this contention the appellant, the Russ Company, calls our attention to the finding of the trial court that Ericcsen failed to confine said creek within a definite channel, but "cut holes in the banks of the said channel and placed obstructions in the stream thereof to deflect the waters from said creek over onto his own lands and the lands of the plaintiff Tonini." While the court found the facts as set forth in this finding, the evidence shows that Ericcsen cut holes in said channel and diverted the waters of the creek over his lands and thence onto the Tonini property, only after the Russ Company had refused to permit the waters of said creek to flow in a channel across and over the Occidental ranch. It further appears that the court enjoined Ericcsen from the further diversion of waters onto the Tonini property and gave damages to Tonini for the injury thus sustained. It also directed the defendant to permit the waters of the creek to flow in a defined channel across the Occidental ranch. Or, in other words, it specifically enforced the agreement against the Russ Company. This disposition of the controversy was in accordance with well-established equitable principles. Where the failure of one party "to perform is only partial and either entirely immaterial, or capable of being fully compensated," in such case "specific performance may be compelled upon full compensation being made for the default." Civ. Code, § 3392. See, also, 23 Cal. Jur. 454; Furtinata v. Butterfield, 14 Cal. App. 25, 110 P. 962; Sheplar v. Green, 96 Cal. 218, 31 P. 42.

[4-7] Finally the appellant contends that in order to enforce the agreement it must be just and reasonable and the consideration must be adequate. There is no question but that the authorities cited by appellant fully support this statement of the law. The principle of law announced therein, however, is so well established and generally admitted that no citation of authorities is necessary to support it. But we think sufficient facts were alleged and proven to entitle Ericcsen to a decree of specific performance. Appellant complains that under the decree it is compelled "to take Russ Creek as soon as it reaches the Occidental Ranch and confine it in a channel and empty it into tide water instead of spreading it over said ranch, thus saving the valuable sediment that it carries," and that the decree in that respect is not just and reasonable. The evidence shows that Russ creek has been used by the Russ Company to overflow the Occidental ranch for years with the result that the surface of said ranch has been raised above the level of the seventy-acre tract, and to longer permit the company to so use the waters of said creek would cause irreparable injury to Ericcsen.

All that the decree provides is that the Russ Company shall use the waters of the creek so that they will not damage Ericcsen. There is nothing in the agreement or in the decree that prevents the Russ Company from using the waters of the creek so as to save the valuable sediment which it carries for the purpose of enriching the Occidental ranch so long as in so doing it does not cause said waters, in the language of the decree, "to back up and overflow the lands and premises of said Leven C. Ericcsen." The evidence further shows when Ericcsen attempted to further raise the seventy-acre tract by overflowing it with waters from the creek, that the waters escaped therefrom onto the lands of the Russ Company under lease to the plaintiff Tonini. There is an intimation that Tonini initiated this litigation upon the instigation of the Russ Company. The evidence is not clear that this is so. But they both appear by the same counsel and they have made common cause against defendant Ericcsen. If they both succeed, then Ericcsen is helpless and his lands are subject to overflow and perpetual damage by the acts of the Russ Company, notwithstanding he has a contract with the Russ Company that it will convey, in a channel across the Occidental ranch to tidewater, the waters of Russ creek after it leaves the seventy-acre tract. Under these conditions we cannot say that the action of the trial court in compelling the Russ Company "to take Russ Creek as soon as it reaches Occidental Ranch and confine it in a channel and empty it into tidewater" is either unjust or unreasonable. The claim of inadequacy of consideration is not supported by any argument, and for that reason we deem it to be waived by appellant.

No further questions in the case merit discussion.

The judgment is affirmed.

We concur: WASTE, C. J.; LANGDON, J.; PRESTON, J.; THOMPSON, J.; SEAWELL, J.; SHENK, J.

GERDES v. PACIFIC GAS & ELECTRIC CO. et al., and three other cases.*

S. F. 14763.

Supreme Court of California.

April 20, 1933.

Rehearing Granted May 19, 1933.

1. Gas ⇐19.

Where gas pipe broke and gas leaked in house, consumers, injured by explosion, had duty to use ordinary care for their protection.

2. Negligence ⇐65.

Test whether one is "contributorily negligent" is whether ordinarily reasonable man, in like situation as plaintiffs were, would have exercised more caution for his own safety.

[Ed. Note.—For other definitions of "Contributory Negligence," see Words and Phrases.]

3. Negligence ⇐136(9).

Negligence, to become law question, requires that plaintiffs' conduct be such that ordinarily reasonable minds cannot draw different conclusions therefrom.

4. Gas ⇐20(2).

Evidence showed consumers, injured by explosion of escaping gas on premises, were contributorily negligent in failing to leave property when warned by fireman.

Evidence disclosed that gas was leaking in house with a roar and could be felt by firemen who examined leak at 5:24 p. m., and at 7 p. m.; that female occupant was warned at 5:24, and at 7 p. m. those in street were warned against use of lanterns and smoking; that some time after 7 p. m., female, though windows were open, became stupefied from gas fumes and was moved to porch; that over two and one-half hours elapsed after first warning when firemen asked female to leave before explosion; and that, after her husband came home, they ate cold supper shortly after 6 o'clock, indicating that they appreciated their peril.

5. Gas ⇐19.

Failure of consumers to notify gas company of escaping gas for almost two hours did not of itself constitute contributory negligence barring recovery of value of house destroyed by explosion.

6. Gas ⇐20(2).

In action for injuries caused by gas explosion, wherein evidence showed breaking away of gas pipe was caused by fall of pavement, res ipsa loquitur doctrine *held* inapplicable as to gas company.

7. Gas ⇐20(2).

Where break in water mains caused pavement to fall, which broke away gas pipe, resulting in gas explosion injuring plaintiffs, res ipsa loquitur doctrine did not apply to cause against water company unless its main broke before main of city and county.

8. Appeal and error ⇐882(12).

Defendant's resistance to application of res ipsa loquitur doctrine and attempt to have jury instructed regarding burden of proof in cases where doctrine is applied did not invite instructions on res ipsa loquitur doctrine so as to preclude complaint on ground error was invited.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 27 P.2d 365.

9. Gas ⇐20(5).

Where consumers knew, for two hours before explosion, of escaping gas, instruction on imminent peril *held* error.

In Bank.

Appeals from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Actions by H. A. Gerdes, by Barbara Gerdes, and by H. A. Gerdes and others, against the Pacific Gas & Electric Company and others, which were tried together. From the judgments, defendants Olympic Salt Water Company and the Pacific Gas & Electric Company appeal.

Reversed.

For prior opinion, see 13 P.(2d) 393.

Thos. J. Straub, Clinton F. Stanley, Cullinan & Hickey, Hadsell, Sweet & Ingalls, and Eustace Cullinan, all of San Francisco, for appellants.

Fletcher A. Cutler and Ford & Johnson, all of San Francisco, for respondents.

IRA F. THOMPSON, Justice.

The plaintiff H. A. Gerdes commenced two actions against the defendants, the one for personal injuries to himself in which he sought to recover the sum of $10,000, and the other for loss of services of his wife, Barbara Gerdes, in the sum of $10,000, plus $1,000 for the liability incurred by him for physicians' services and nursing. The plaintiff Barbara Gerdes in another action sought $50,000 as compensation for personal injuries, and all the plaintiffs by a fourth complaint claimed the sum of $12,000 for the destruction of the home of Mr. and Mrs. Gerdes, and $5,519.10 for the loss of their furniture and household belongings; the two insurance companies being insurers of the house and the furniture. The four cases were consolidated for the purposes of the trial, and the verdicts which were returned against the Olympic Salt Water Company and the Pacific Gas & Electric Company as follows: (1) for personal injuries to Barbara Gerdes, $15,000; (2) for personal injuries to H. A. Gerdes, $7,500; (3) for loss of services and for hospital and medical services, $5,000; (4) for loss of home and personal property, $12,500—were modified by the court by reducing the total from $40,000 to $25,000. The jury returned verdicts in favor of the city and county of San Francisco. The defendants Olympic Salt Water Company and the Pacific Gas & Electric Company prosecute appeals from the judgments against them. However, by stipulation of all the parties the appeals are presented to us upon a single transcript, and, in fact, the causes are argued as though there were no material difference in the law applicable thereto, although it may be necessary for us, before concluding, to demonstrate that a difference does exist between the actions for personal injuries on the one side and property damage on the other.

The following statement of facts is adopted from the opinion of the District Court of Appeal, speaking through Mr. Presiding Justice Nourse:

"At the time of the accident the defendant Olympic Salt Water Company owned and operated a 16-inch salt water main along the easterly side of Forty-seventh avenue; the defendant City and County of San Francisco owned and operated an 8-inch fresh water main along the same avenue at a distance of about a foot and one-half west of the salt water main; the defendant Pacific Gas & Electric Company owned and operated an 8-inch steel welded high pressure gas main located to the west and close to the westerly curb; Pacific Gas & Electric Company also owned and operated a 6-inch low pressure main from which a service pipe extended across and above the two water mains and into the home of the plaintiffs where it was connected with the meter and service pipes installed in the home at a point in the westerly front wall below the garage and directly under the front door and porch of the home.

"On March 18, 1930, at about 4:45 or 4:50 p. m., the two water mains broke at a point in front of the Gerdes home and the water coming from these mains undermined the pavement in the street so that this pavement broke and the sand underneath was washed out and a portion of the pavement fell upon the service pipe of the Pacific Gas & Electric Company extending into the Gerdes home and caused it to sag and separate at the point of connection within the front wall of the home and outside of the place where the meter was installed. This caused gas to escape into the garage and basement of the Gerdes home which rose throughout the upper rooms.

"The odor of gas was detected by Mrs. Gerdes as early as 5:15 p. m., and at 5:24 p. m. a member of the fire department went into the Gerdes home in the line of his duty. He detected the odor of gas and in going into the basement heard a distinct roar as the gas escaped from the broken pipe. He opened all the doors and windows in the basement and upper rooms and told Mrs. Gerdes that he and his associate had been sent to take her out of the house, but Mrs. Gerdes refused to leave, stating that she had telephoned to her husband and that he was on his way home. The fireman then warned her to stay in the rear of the house because of the escape of gas in the forepart, to refrain from lighting any fire, and suggested that inasmuch as her husband was coming immediately it would be proper to wait and let him take her out of the house. Another fireman, who was in the house at the time, and Mrs. Gerdes both corroborated this

testimony in every particular. Mr. Gerdes arrived home at about 5:40 p. m., detected the odor of gas and learned from his wife the warning that had been given by the firemen. They ate a cold supper, refraining from lighting a fire of any kind because of the warning of danger given by the firemen. At about 6:30 p. m. Mrs. Gerdes put on her hat and coat, preparing to leave the place, and Mr. Gerdes at the same time left the house through the rear of the lot and called upon a neighbor, who was a member of the fire department and who accompanied Mr. Gerdes back to the Gerdes home. They went into the basement and turned off the meter, but discovered that the leak came from a point beyond the meter and could not be controlled within the house. At this time they found the odor of gas very strong, and one of them stepped to the garage in front of the house and warned the men on the outside of the house to refrain from smoking because of the danger on account of the leak. This fireman telephoned to the gas company at some time between 7:10 and 7:30 p. m., notifying the company that the pipe was broken and in need of repair.

"As Mr. Gerdes and the fireman returned to the upper floor of the house they found Mrs. Gerdes in a stupefied condition as the result of the escaping gas. They moved her to a place near the front door and afterward she was moved out on the front porch. At about this time a friend came to the house and urged Mrs. Gerdes to leave, and the fireman again warned those gathered on the street in front of the house to refrain from smoking because of the danger caused by gas escaping in the house. At approximately 8 p. m. gas was ignited in a manner not shown in the evidence, and the explosion which resulted injured both plaintiffs and caused serious damage to their property. The repair man of the gas company, in answer to the call for service, appeared at the home just as the explosion occurred. (No satisfactory proof was made of the cause of the explosion. Evidence was offered that men working in the street were using lighted lanterns and that some men were smoking; also that the electric lights were turned on and off within the premises. But, whether the gas was ignited from the street or from sparks from the electric switches was not known.)"

The appellants press the claim that the facts establish that respondents were guilty of contributory negligence as a matter of law. The District Court of Appeal sustained their contention in this regard, and it is because we were in doubt upon this phase of the matter that the cause was transferred to this court. Respondents have cited a number of authorities dealing with the subject of gas leaks followed by explosions in which it has been held that plaintiffs were not guilty of contributory negligence as a matter of law, and a brief review thereof may be of some benefit in aiding us to arrive at a conclusion. In the earliest case referred to, that of Holly v. Boston Gas Light Company, 74 Mass. (8 Gray) 123, 69 Am. Dec. 233, the gas leaked from a main in the street. The jury was instructed upon the subject of contributory negligence, and, in upholding the instruction, the court took occasion to remark as follows:

[1] "It was also incumbent on her to prove that she herself used ordinary care for her own protection against the noxious influence of the gas. She had no right to expose herself carelessly or wilfully to its injurious effects, and thereby make the defendants responsible for the mischievous consequences resulting from such exposure. It was said by Lord Ellenborough that 'a party is not to cast himself upon an obstruction which has been made by the fault of another, and avail himself of it, if he do not himself use common and ordinary caution to be in the right.' Butterfield v. Forrester, 11 East, 60. The case in which the rule of law was thus stated has often been referred to by this court with approbation, and the rights of parties determined according to the doctrine considered there to be established. Smith v. Smith, 2 Pick. 621 [13 Am. Dec. 464]. Adams v. Carlisle [21 Pick. 146] and White v. Winnisimmet Co. [7 Cush. 155] above cited.

"Nor does it make any difference that the plaintiff is a minor. She was under the care of her father, who had the custody of her person and was responsible for her safety. It was his duty to watch over her, guard her from danger, and provide for her welfare, and it was hers to submit to his government and control. She was entitled to the benefit of his superintendence and protection, and was consequently subject to any disadvantages resulting from the exercise of that paternal authority which it was both his right and duty to exert. Any want of ordinary care therefore, on his part, is attributable to her, in the same degree as if she were wholly acting for herself. And for this reason the defendants were properly allowed to show any conduct on his part, indicating a want of ordinary care in adopting suitable precautions against the hurtful effect of the gas after it was discovered to be penetrating and pervading the house where they resided. It was for the jury to consider whether there was not a manifest want of prudence in remaining in the house after it became known to its inmates that it was being filled with the gas which was escaping from the leak in the pipes. And it was their province also to decide whether the immediate communication to the officers or agents of the gas company that such a leak had occurred was not a necessary, or at least a reasonable measure of precaution, of which those who were liable to suffer from inhaling a noxious substance ought to have availed themselves. In

this view, it was competent for the defendants to offer proof of the conduct of the plaintiff and her father, that the jury might have the means of determining whether she had not herself neglected to use ordinary care in seeking relief, or resorting to expedients which might readily have been availed of for her own protection and security."

In the second case in point of time, that of Kibele v. City of Philadelphia, 105 Pa. 41, it was testified by the plaintiff that he had never noticed the smell of gas in the house before the explosion, and that he had never smelled city gas theretofore. The court held that whether he was guilty of contributory negligence was a question for the jury, but said: "If the plaintiff knew that illuminating gas was escaping from the main, and also knew that from it an explosion might reasonably be expected, it was his duty to have withdrawn from the premises, or to have taken other precautions for his safety, until the leak could be discovered and stopped. He could not knowingly take upon himself such a risk as this, the risk of an explosion, and for its consequences charge the city. In such case both parties would be chargeable with negligence; both contribute to the accident, hence one could not charge the other with the resulting damages."

In Lawrence v. City of Scranton, 284 Pa. 215, 130 A. 428, 431, 41 A. L. R. 454, gas from the city main had been leaking into a manhole in the street for a "month or so," which fact was known to defendant. The odor was noticeable. The plaintiff, a boy of 15, while waiting for another at the manhole, struck a match to light a cigarette, and was injured by the explosion which followed. The court said:

"Was the boy, when he struck the match at the manhole, guilty of negligence, as argued by appellee? He could smell the gas, and, while his knowledge of its dangerous character was for the jury, his lighting the match under the circumstances, says defendant, made the act a case for the court. We may concede a part of this statement as indicated in Plonk v. Jessop, supra [178 Pa. 71, 35 A. 851]. Escaping gas is dangerous, but the point at which it becomes dangerous is not a well-known fact. One may approach to within a certain distance from a leak with a light in safety, but, in approaching, that point is reached where the mixture of gas and air becomes dangerous. The location of this point is difficult to determine. Gas should be confined; the leak large enough to create some pressure; and the mixture about perfect. We have held that one may go into a cellar or attic with a lighted match, lamp, or lighted taper, hunting along a gas line for a leak, and not be guilty of contributory negligence. Plonk v. Jessop, supra. The common practice of discovering gas leaks is by the use of a match or candle. In Plonk v. Jessop, supra [178 Pa.], 77 (35 A. 851), plaintiff, who knew gas would explode if brought in contact with a light, used a match or burning taper to discover a gas leak, going into the cellar for that purpose. The court said:

" 'The knowledge of the explosive character of gas certainly may be presumed to be general among persons who have it in their houses, and plaintiff admitted such knowledge. But how far a smell of gas indicates a leak that may safely be searched for with a match or candle, and at what point it means danger of explosion in so doing, is a question requiring judgment and some experience,'—and that was for the jury. So it may be said as to this boy, assuming he knew gas was present, his knowledge of the danger point around the manhole where he struck his match, or his contributory negligence, is a question of fact for the jury.

"It is not contributory negligence per se to use a match or lighted candle in trying to discover a gas leak, or to enter with a light a cellar or other closed place into which gas is escaping. City Gas Co. v. Webb, 117 Va. 269, 84 S. E. 645; Schmeer v. Gas Light Co., 147 N. Y. 529, 42 N. E. 202, 30 L. R. A. 653; Plonk v. Jessop, supra; Stoner v. Pennsylvania Fuel Supply Co., supra [40 Pa. Super. Ct. 599]. We may say without further comment that the use of matches on the street to light a cigar or cigarette should be anticipated by the city as a reasonable use of highways."

Helpful language is also found in Fort Worth Gas Co. v. Cooper (Tex. Civ. App.) 241 S. W. 282, 285, as follows:

"It is believed that, in view of all the circumstances, it was a question of fact for the jury to decide whether or not the appellee was guilty of negligence proximately causing or proximately contributing to cause her injury. It does not conclusively appear, reasonably construing the evidence, that appellee, situated as she was, had notice or knew on the occasion in question that the gas in the closet had collected in a dangerous quantity, so that she, acting in reasonable care, could realize and appreciate the extent of her danger if she lighted the stove. And it does not conclusively appear that the appellee was cognizant of the extent of the leakage and the danger at the time when she lighted the stove. She does say that 'the house was full' of gas, but, in view of her explanation, she evidently did not mean to say more than that she noticed a strong smell of gas in the kitchen. If the kitchen had been 'full' of gas an immediate combustion would have resulted, as a physical fact, from igniting the gas on the stove. As a fact, it appears, the explosion was not coincident or simultaneous with the striking of the match, but occurred some minutes later. The explosion was from the closet in which the meter was located.

Wherefore, under the evidence, the court cannot, as a matter of law, we believe, impute to appellee knowledge that an explosion would naturally and probably follow her act of lighting the stove."

So, too, in Pine Bluff Water & Light Co. v. Schneider, 62 Ark. 109, 34 S. W. 547, 548, 33 L. R. A. 366, similar language is found:

"We should not hold, under the facts of this case so far as they appear, that it was negligence per se for Hammert to use a match in trying to discover the place from which the gas escaped, for that would depend upon whether he had notice that the gas was escaping in large quantities or not. If he had notice that it was present in large quantities, it was gross carelessness for him to apply a lighted match to it. But if the quantity was small, or if there was nothing to cause a man of ordinary prudence placed in the same situation to believe that there was danger of an explosion, it would not be negligent to light the match. Such a question is one for the jury to determine."

In discussing the same question in Louisville Gas Co. v. Fry, 147 Ky. 754, 145 S. W. 748, 749, the same test of knowledge was applied. The court there said:

"Gas is highly inflammable, and when exposed in quantity to flame or fire is liable to explode. This is true, not only when it is in its pure state, but when mixed with air. But it does not appear that these qualities of it were known to appellee. She had been raised in the country, and had not been accustomed to its use. It had been escaping in her house for several months. For some time she did not know what it was, and after she did learn that it was the gas that was escaping she continued to use the house, not realizing that she was endangering her life by so doing. But it is not in every instance where one exposes himself to a known danger and injury results that he is denied a right to recover, but only in that class of cases where the danger is so obvious and imminent that a person of ordinary prudence under like circumstances would not subject himself to it. Applying that test to the facts in the case before us we would not be willing to hold, as a matter of law, that appellee could not recover, even though appellant was guilty of negligence in permitting its service pipe to remain out of condition for the length of time here shown."

Finally, in Richmond Gas Co. v. Baker, 146 Ind. 600, 45 N. E. 1049, 1051, 36 L. R. A. 683, the court refused to determine that plaintiff was guilty of contributory negligence as a matter of law because defendant's agent had assured plaintiff there was no danger; it being there stated:

"But counsel for appellant does earnestly contend that the facts found by the jury, and shown in the evidence, disclose contributory negligence on the part of the appellee, or at least that she has not established her freedom from such contributory negligence. In this, also, we are unable to agree with counsel. Because the gas had penetrated the various parts of the house in dangerous quantities, it does not follow that the occupants were aware of the full extent of their danger. They had good reason to rely upon the superior knowledge of the gas company, and of its agents who had made the connections of its mains with the house, and who had afterwards assumed charge of making repair of the connecting pipes, and then assured the family that all was now safe, and that they need not be alarmed about the odor, which they were assured came from the gas post on the street corner. The company could not thus lull the members of the family into a belief in their security, and then, when injury came, turn on the family, and charge them with negligence in relying on the assurance of safety so given by the company itself. The company had assumed the responsibility of making the repairs or changes in the piping necessary for the safe delivery of gas to the house, and thereafter continued to deliver the gas with full knowledge of all the conditions, including a knowledge of the family's reliance upon its assurance of safety."

[2-4] One salient feature stands out in all the cases which discuss similar explosions from which we have quoted so extensively, and that is the knowledge or lack of knowledge on the part of the injured person of the danger which was reasonably to be apprehended. This is necessarily true, because the test of whether one is guilty of contributory negligence is whether the ordinarily reasonable man, in like situation as plaintiffs were, would have exercised more caution for his own safety, and, in order for it to constitute negligence by plaintiff, as a matter of law, the conduct must be such that ordinarily reasonable minds cannot draw different conclusions therefrom. In our effort to apply the law, what do we find? The present case is not one of an ordinary gas leak, but it was coming in with "a roar"; it could be felt and was felt by the firemen, both those who examined it at 5:24 p. m. and the one who examined it at 7 p. m. Mrs. Gerdes was warned at 5:24, and at 7 p. m. or thereabouts, those in the street were twice warned against the use of lanterns and smoking. Some little time after 7 p. m. Mrs. Gerdes, with all the windows open, became stupefied from the gas fumes and yet they lingered on. Over two and one-half hours elapsed after the first warning, when the firemen asked Mrs. Gerdes to leave, before the explosion. Somewhere between two and two and one-half hours elapsed before plaintiffs notified the gas company of the escaping gas. It is idle to assert that plaintiffs were unaware of the danger of an explosion. They ate a cold supper shortly after 6 o'clock, indicating

that they did appreciate their peril. It is true they feared their house was being undermined, and were, for that reason, excited, but they had ample time to consider all factors, and were not required to act hastily or to choose without deliberation. It is difficult to believe that reasonable minds could draw different conclusions from their conduct concerning their negligence.

With respect to the negligence of plaintiffs, it is argued that they were confined in their home because of the weakened pavement of the street in front. But this argument is not supported by the evidence presented in the record. It is also said that the warning which was given to Mrs. Gerdes by the fireman at about 5:24 p. m. was not sufficient to impress upon her the hazard of her position because the fireman asserted that she might wait for her husband, to whom she had telephoned and who was expected at any minute. Even though he said there was no immediate danger, the statement was coupled with the warning, the opening of all the windows, his request to her to leave, and his acquiescence in her right to wait for her husband, whose arrival might be at any time. To state the situation is to refute its argument. Our conclusion is that plaintiffs were guilty of negligence.

[5] We are not, however, ready to yield assent to the proposition that their failure to notify the gas company of the escaping gas for a period of almost two hours of itself constituted contributory negligence, so as to bar recovery of the value of the property. In other words, it was apparent they were in danger and could save themselves by withdrawing from the zone of peril—but they did not have at their own command the means of shutting off the escaping gas. They were warned by those, who knew the hazards of fire, to leave the premises, but it is not shown that they knew or should have known that the gas company would make immediate repairs, if it were advised of the leak. Considered by itself, we doubt that it may be said that their failure to notify the company for the elapsed time may be considered negligence as a matter of law.

[6, 7] We therefore turn to the next contention of appellants to the effect that the court erred in instructing the jury with respect to the doctrine of res ipsa loquitur. Those instructions read as follows:

"In the present case if you find from the evidence that the injuries sustained by plaintiffs, if any, were due to an explosion of gas on the premises of plaintiffs and if you further find from the evidence that said gas was communicated to said premises through a pipe under the control and management of the defendant, Pacific Gas and Electric Company, and if you find that said pipe broke without fault of plaintiffs, permitting gas to escape therefrom into the premises of plaintiffs, and that said gas proximately caused the explosion, then I instruct you that the bursting or breaking of said pipe affords reasonable evidence, in the absence of explanation, that it arose from a want of reasonable care. * * *

"I instruct you that when a thing which causes injury is under the control and management of a defendant and the accident is such as in the ordinary course of things does not happen if those who have the control and management use proper care, it affords reasonable evidence in the absence of explanation by the defendant, that the accident arose from want of proper care. Therefore in the present case if you find from the evidence that the defendant Olympic Salt Water Company, owned and controlled a water main on Forty-seventh Avenue on the 18th day of March, 1930, and said water main broke on said day, permitting water to escape therefrom and thereby proximately contributing to the explosion causing the injuries complained of by plaintiffs, then I instruct you that the bursting or breaking of said water main affords reasonable evidence in the absence of explanation that it arose from a want of reasonable care."

It is so obvious that the doctrine was not unqualifiedly applicable to the present situation that the contention requires little discussion. It has been said: "The foundation or reason for the doctrine is based upon probabilities and convenience. When it is shown that the occurrence is such as does not ordinarily happen without negligence on the part of those in charge of the instrumentality, and that the thing which occasioned the injury was in charge of the party sought to be charged, the law operating upon the probabilities and the theory that if there were no negligence the defendant can the most conveniently prove it raises a presumption of negligence which the defendant must overcome by proof that there was in fact no negligence." Smith v. O'Donnell, 215 Cal. 714, 12 P.(2d) 933, 936; see, also, Olson v. Whitthorne & Swan, 203 Cal. 206, 263 P. 518, 58 A. L. R. 129; O'Connor v. Mennie, 169 Cal. 217, 146 P. 674; Judson v. Giant Powder Co., 107 Cal. 549, 40 P. 1020, 29 L. R. A. 718, 48 Am. St. Rep. 146; Kahn v. Triest-Rosenberg Cap Co., 139 Cal. 340, 73 P. 164. With this thought in mind it is only necessary, so far as the appellant gas company is concerned, to observe that the breaking away of the gas pipe from the riser pipe was occasioned by the fall of the pavement with its tremendous weight, which in turn was caused by the break in the water mains. It is nowise different from a supposititious case where some malefactor might have maliciously torn the pipe away. In so far as the claim is advanced that the company was negligent in failing to respond promptly to the call for repairs is concerned, that was a separate, distinct claim of negligence not arising from

the original occurrence, and not directly connected with the instrumentality itself.

With reference to the complaint against the water company, it is obvious if the water main of the defendant city and county broke first and the main of the appellant company was broken solely by reason of the great pressure of the earth and water thus thrown upon it, that the doctrine was not applicable, for like reasons as those disclosing that the doctrine was inapplicable to the cause against the gas company. In other words, the instructions could only have been applicable to the water company upon proof that its mains broke prior to the break in the main of the city and county.

Respondents attempt to apply the rule of Burke v. Dillingham, 84 Cal. App. 736, 258 P. 627, and St. Clair v. McAlister (Cal. Sup.) 13 P.(2d) 924, which declare that in those collision cases, where the accident may be the result of the concurring negligence of a common carrier and another vehicle, the plaintiff is not foreclosed of his right to rely upon the doctrine, so far as it applies to the carrier, by his effort to establish the acts of negligence on the part of the driver of the other vehicle. What we have said discloses the reason why the authorities are not in point.

[8] The respondents contend that, in so far as the appellant Olympic Salt Water Company is concerned, it cannot complain of the application of the doctrine because it proposed an instruction relating thereto, for which reason, if the instruction were erroneously given, it was but invited error. The record fails to substantiate this position. It discloses, first, a resistance to the application of the doctrine and, in the event of not being upheld in this contention, of properly seeking to have the jury instructed with respect to the burden of proof in those cases where the doctrine is applied. This is far from inviting the instructions of which complaint is made.

[9] The court also instructed the jury with regard to imminent peril. As we have already observed, the danger in the present case was not such as to leave respondents without ample time for deliberation and reflection. Where such is the case, there is no occasion for the instruction. Rhodes v. Firestone Tire Co., 51 Cal. App. 569, 197 P. 392; 19 Cal. Jur. 601.

While other points are raised, we deem a further discussion of them unnecessary, for the reason that they will probably not arise on a retrial of the cause.

The judgments are reversed.

We concur: WASTE, C. J.; CURTIS, J.; SHENK, J.; LANGDON, J.; SEAWELL, J.

218 Cal. 143

BURKE v. STATE BAR OF CALIFORNIA.

L. A. 13901.

Supreme Court of California.

May 1, 1933.

Attorney and client ⇐53(2).

Recommendation of three months' suspension *held* unsupported by findings disclosing absence of direct evidence that suspended attorney knew that cases were solicited.

In Bank.

Petition by W. Maxwell Burke to review a recommendation of the Board of Governors of the State Bar of California that he be suspended for three months.

Proceeding against petitioner dismissed.

D. G. Wettlin, Clyde C. Downing, and Franklin G. West, all of Santa Ana, for petitioner.

Philbrick McCoy, of Los Angeles, and S. F. Gallagher, of Anaheim, for respondent.

PER CURIAM.

This is a petition to review a recommendation of the board of governors of the State Bar of California, that petitioner be suspended from the practice of the law for a period of three months. The charges upon which this recommendation was based were solicitation of employment, and acceptance of employment on behalf of a claimant in personal injury cases as a result of the activities of an unlicensed person. The facts show that the Mexican consul at Los Angeles had organized an honorary commission with headquarters at Santa Ana, of which one Lucas Lucio was president. Lucio was instructed to investigate the difficulties of Mexican nationals in Santa Ana and see that their rights were properly protected. He reported all cases to the consulate, and was subsequently told to direct them to petitioner. Petitioner performed a great deal of gratuitous work, and also collected fees from many of the clients. He employed Lucio as an interpreter, investigator, and process server, paying him between $15 and $20 per week. It appears that Lucio solicited employment of petitioner among the Mexican residents, chiefly in personal injury cases, and in one or two cases, among native-born residents. He had some of petitioner's cards, supplied to him in order that he might direct clients to petitioner's office. In one case he signed the contract with the client, on behalf of petitioner.

Upon this evidence the administrative committee found that while there was no direct evidence of knowledge on the part of petitioner that Lucio was soliciting employment in his behalf, the circumstances were such that

petitioner was chargeable with that knowledge. From this finding the conclusion was drawn that there had been a violation of rule 3 of the Rules of Professional Conduct of the State Bar.

In our opinion the order of suspension finds no substantial support in the record, and it is not necessary for us to go to the evidence at all, for the findings disclose the weakness and uncertainty of the case against petitioner. These findings disclose, preliminarily, a splendid history of legal training and practice on the part of petitioner, together with academic positions in sociology, political science, and economics in such institutions as Columbia University, University of Pennsylvania, University of California, Albion, Occidental, and Oberlin colleges. During 1918 and 1919 he was for a time assistant director of the law school in Baume University in Burgundy, France, and from about 1921 to 1924 was a deputy district attorney in Los Angeles county.

What do the findings state as to the activities which form the basis of the complaint? "*Mr. Pasqueira, the Mexican consul, instructed Mr. Lucio* to direct all cases to the accused, W. Maxwell Burke. For this service, neither Mr. Lucio nor Mr. Burke received any compensation whatever from the Mexican consulate, or the Mexican government, with the result that both Mr. Burke and Mr. Lucio performed for the Mexican people at Santa Ana and vicinity a large amount of gratuitous and meritorious service." "The accused, W. Maxwell Burke, did not have many Mexican clients until he made the consular connection above mentioned, since which time he has handled a large portion of the Mexican business at Santa Ana." "In the above cases *I do not find any direct evidence* that the accused knew at the time the cases were brought to him that they had been solicited for him by Lucas Lucio, but * * * it is *hardly conceivable* in view of the fact that Lucio was in the employ of Mr. Burke *that the accused did not know*, or at least have *strong reason to believe*, that Lucio had solicited the cases for him. * * * I therefore find that he *must have known* of the solicitations of such cases by Lucio." (Italics ours.)

The findings are also at some pains to declare that while a foreign consul should be given a "great deal of latitude" in "trying to protect his nationals," he should not, and did not in this case, authorize the solicitation of business in violation of the law and ethics of the legal profession. The consul is thus absolved, and the findings with great candor state: "The fault is not with the Mexican consul in the discharge of his duties, but *rather in the manner of carrying out his instructions by Lucio.*" Inasmuch as the acts complained of herein have, according to these findings, resulted from the violation of instructions or authority by a representative of the Mexican consul, and there is no direct evidence that the accused even knew of these acts, and of course no evidence at all that he himself authorized them, we are unable to understand how the guilt of petitioner can be considered as established. It should not be forgotten, in the language of the findings, that "there is *no evidence whatsoever* that W. Maxwell Burke, the accused, was guilty of any act involving moral turpitude or affecting his honesty or integrity, or anything other than affecting his ethical standard of professional conduct." (Italics ours.)

There is other material in the findings which clarifies the case. They state: "This case is an off-shoot of one that preceded it, in which charges were preferred against one Charles Carillo, the Spanish interpreter at the court house, who was accused of some alleged dereliction of duty and malfeasance." The matter, it is further stated, was agitated by the Santa Ana Register, of which petitioner's brother is the publisher. Petitioner appeared as attorney for his brother, both in this proceeding and in a subsequent libel suit instituted by Carillo against the newspaper. Mr. N. D. Meyer appeared as attorney for Carillo. Out of these cases, the findings continue, "has grown bad feeling, assuming the color of a feud between the Mexican people who were partisans of one side and those who were partisans of the other." Still further: "The Santa Ana Register acted as a sponsor for the Mexican people and employed Mr. Lucas Lucio to procure affidavits for it, and to interview Mexicans, and it was largely through this situation that Mr. Pasqueira, the Mexican consul at that time, felt grateful to Mr. Burke, the accused, for his services, and *which resulted later in his recommending Mr. Burke in practically all Mexican cases.* At that time *N. D. Meyer controlled a large portion of the Mexican business of Santa Ana, much of which he lost after Mr. Pasqueira recommended that the Mexican cases should be sent to Mr. Burke.*" (Italics ours.) N. D. Meyer was the complainant in this proceeding against petitioner.

The proceeding against petitioner is hereby dismissed.

217 Cal. 763

In re FLOOD'S ESTATE.

Petition of GAVIN.

S. F. 14581.

Supreme Court of California.

April 18, 1933.

Rehearing Denied May 18, 1933.

1. Bastards ⇐13.

To establish claim of legitimation, claimant must establish illegitimacy, paternity, that father publicly acknowledged claimant as his child during her minority, reception into father's family with his wife's consent given with knowledge of illegitimacy, and treatment of claimant as legitimate (Civ. Code, § 230).

2. Trial ⇐165, 178.

Nonsuit or directed verdict may be granted only when, disregarding conflicting evidence and giving plaintiff's evidence proper value, and indulging in every legitimate inference deducible therefrom, evidence is insufficient to support verdict for plaintiff.

3. Trial ⇐178.

Although trial court may weigh evidence and determine credibility of witness on motion for new trial, it may not do so on motion for directed verdict.

4. Bastards ⇐5.

Acts and declarations of testator and his wife *held* competent to prove paternity of alleged illegitimate daughter of testator claiming share of estate as pretermitted heir (Code Civ. Proc. § 1852, and § 1870, subds. 4, 11; Probate Code, § 90).

5. Bastards ⇐8.

Whether testator was father of petitioner, who alleged she was testator's illegitimate daughter and claimed share of estate as pretermitted heir, *held* for jury (Probate Code, § 90; Civ. Code, § 230).

6. Bastards ⇐8.

Whether testator's wife had knowledge that petitioner, claiming share of testator's estate as pretermitted heir, was illegitimate child of testator, *held* for jury (Probate Code, § 90; Civ. Code, § 230).

7. Trial ⇐140(1).

Credibility of witness is for jury.

8. Bastards ⇐8.

Whether testator publicly acknowledged that he was father of petitioner, who alleged that she was testator's illegitimate daughter and claimed share of his estate as pretermitted heir, *held* for jury (Probate Code, § 90; Civ. Code, § 230).

9. Bastards ⇐5.

Declarations of testator's wife's relatives *held* competent on issue whether claimant was illegitimate child of testator (Code Civ. Proc. § 1852, and § 1870, subd. 4).

Pedigree declarations of the relatives of testator's wife were admissible on theory that the relatives of testator's wife were related to and were members of the family of the testator connected by marriage instead of by blood, and the declarations were also admissible on the theory that petitioner who lived for a time in the household of one of the relatives was a member of her family in the broad sense of that term, and the declarations of other members of that family as to petitioner's family history were admissible as evidence of common reputation in the family.

10. Statutes ⇐243.

Statutes regarding admissibility of pedigree declarations should be given liberal interpretation (Code Civ. Proc. § 1852, and § 1870, subd. 4).

11. Witnesses ⇐330(1).

Where witness testified that she knew petitioner, claiming to be pretermitted heir, only under name not testator's, and that all expenses of maintaining petitioner after she left convent were met by witness and her brother-in-law, refusing to permit petitioner to cross-examine witness to show that testator paid for petitioner's maintenance, and that witness knew petitioner by testator's surname, *held* error.

12. Witnesses ⇐268(1).

Wide latitude is permitted in cross-examination of witness.

In Bank.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Proceedings in the matter of the estate of James L. Flood, deceased, wherein Constance May Gavin filed petition for partial distribution which was opposed by the Protestant Episcopal Bishop of California, a corporation sole, and others. From an adverse judgment, and from an order denying her motion for a new trial, Constance May Gavin appeals.

Reversed.

Maxwell McNutt and John J. Taaffe, both of San Francisco, and Albert Mansfield, of Redwood City, for petitioner and appellant.

Albert J. Dibblee, of San Francisco, for respondent Protestant Episcopal Bishop of California.

Garret W. McEnerney, of San Francisco, for respondents Maria Kip Orphanage and Alfred Nuttall Nelson Memorial Home.

Garret W. McEnerney and John J. Barrett, both of San Francisco, for respondent James Flood.

Charles W. Slack and Edgar T. Zook, both of San Francisco, for respondent San Francisco Protestant Orphanage Soc.

H. U. Brandenstein, of San Francisco, for respondent Pacific Hebrew Orphan Asylum and Home Soc.

Franklin Swart, Ross & Ross, and Hall C. Ross, all of Redwood City, and Andrew F. Burke, of San Francisco, for respondent Mary Emma Stebbins (formerly Mary Emma Flood).

D. C. Murphy, of San Francisco, for respondent Roman Catholic Orphan Asylum of San Francisco.

John U. Calkins, Jr., of San Francisco, for respondent Regents of University of California.

Theodore J. Roche and Garret W. McEnerney, both of San Francisco, for respondent Roman Catholic Archbishop of San Francisco, St. Vincent's Roman Catholic Orphan Asylum for Boys, Maud Lee Flood, and James E. Walsh.

LANGDON, Justice.

This is an appeal by petitioner, Constance May Gavin, from a decree of the probate court denying her application for partial distribution. The sole question presented to this court is whether the case should have been submitted to the jury, the court having directed a verdict against petitioner and in favor of respondents. In our opinion, the court erred in so doing, and the judgment must be reversed.

The decedent, James L. Flood, died testate, leaving a surviving widow, Maud Lee Flood and two children, Mary Emma Stebbins and James Flood. The estate, appraised at $8,565,507.85, was by the terms of his will distributed among said widow and children, Cora Jane Flood, a sister of the decedent, since deceased, and various charitable institutions, respondents herein. Petitioner alleged that she was the illegitimate daughter of the testator, and claimed a share (⅔) of the estate as a pretermitted heir, under Probate Code, § 90 (formerly section 1307 of the Civil Code). Respondents answered, and a trial was had before a jury. At the close of all the evidence, upon motion by respondents, the trial court directed the jury to bring in a verdict against petitioner and in favor of respondents. Judgment was accordingly entered thereon, denying the application for partial distribution. A motion for a new trial was made and denied. Thereupon, petitioner brought this appeal from the judgment and order denying the motion for new trial.

[1] Probate Code, § 255, is not involved in this proceeding, petitioner's claim being based upon legitimation under section 230 of the Civil Code, which reads as follows: "The father of an illegitimate child, by publicly acknowledging it as his own, receiving it as such, with the consent of his wife, if he is married, into his family, and otherwise treating it as if it were a legitimate child, thereby adopts it as such; and such child is thereupon deemed for all purposes legitimate from the time of its birth. * * *" To establish her claim of legitimation under this section as construed by a number of decisions of this court, petitioner must sustain the burden of proof of the following elements: (1) Illegitimacy. That she is an illegitimate child. (2) Paternity. That James L. Flood was her father. (3) Public acknowledgment. That he publicly acknowledged her as his own child during her minority. (4) Reception into family with wife's consent. That she was received into his family with his wife's consent, given with knowledge of the illegitimacy. (5) Treatment as legitimate. That he otherwise treated petitioner as if she were his legitimate child. See, generally, Estate of Baird, 193 Cal. 225, 223 P. 974; Estate of Gird, 157 Cal. 534, 108 P. 499, 137 Am. St. Rep. 131; Estate of Jones, 166 Cal. 108, 135 P. 288. It is admitted by the pleadings that petitioner is an illegitimate child, the daughter of Eudora Helen Forde Willette, born out of wedlock May 11, 1893, at San Francisco. The evidence is also undisputed that petitioner was received into the family of James L. Flood with the consent of his wife, and lived there for some time during her youth, where she was treated as if she were his legitimate child. The controversy, therefore, centers about the three remaining elements, paternity, public acknowledgment, and knowledge by Mrs. Flood of petitioner's illegitimacy.

[2, 3] Before proceeding to discuss the evidence, it is necessary to set forth the rule governing the power of the trial court to direct a verdict. This matter has been before the courts of this state on numerous occasions, and the principles were recently reviewed in Estate of Lances, 14 P.(2d) 768, wherein this court said: "It has become the established law of this state that the power of the court to direct a verdict is absolutely the same as the power of the court to grant a nonsuit. A nonsuit or a directed verdict may be granted 'only when, *disregarding conflicting evidence and giving to plaintiff's evidence all the value to which it is legally entitled, herein indulging in every legitimate inference which may be drawn from that evidence*, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of plaintiff if such a verdict were given.' Newson v. Hawley, 205 Cal. 188, 270 P. 364; Perera v. Panama Pacific Int. Exp. Co., 179 Cal. 63, 175 P. 454; Estate of Sharon, 179 Cal. 447, 177 P. 283; Estate of Gallo, 61 Cal. App. 163, 175, 214 P. 496; 24 Cal. Jur. pp. 912–918. Unless it can be said as a matter of law that, when so considered, no other reasonable conclusion is legally deducible from the evidence, and

that any other holding would be so lacking in evidentiary support that a reviewing court would be impelled to reverse it upon appeal, or the trial court to set it aside as a matter of law, the trial court is not justified in taking the case from the jury. Umsted v. Scofield Eng. Const. Co., 203 Cal. 224, 228, 263 P. 799. A motion for a directed verdict 'is in the nature of a demurrer to the evidence, and is governed by practically the same rules, and concedes as true the evidence on behalf of the adverse party, with all fair and reasonable inferences to be deduced therefrom. * * * Even though a court might be justified in granting a new trial it would not be justified in directing a verdict on the same evidence. * * * The power of a court in passing upon such motions is strictly limited. It has no power to weigh the evidence, but is bound to view it in the most favorable light in support of the verdict. * * * If, in the opinion of the court, the evidence is unreliable, it is its duty to grant a new trial, and it may grant such a trial even where there is substantial evidence to sustain the verdict, if it believes that the evidence preponderates against the verdict.' Hunt v. United Bank & Trust Company of California, 210 Cal. 108, 117, 118, 291 P. 184, 188. In other words, the function of the trial court on a motion for a directed verdict is analogous to and practically the same as that of a reviewing court in determining, on appeal, whether there is evidence in the record of sufficient substance to support a verdict. *Although the trial court may weigh the evidence and judge of the credibility of the witnesses on a motion for a new trial, it may not do so on a motion for a directed verdict.*" (Italics ours.)

Two important propositions should be noted in the above quotation. First, the trial court, on a motion by a defendant for a directed verdict, cannot weigh all the evidence introduced by both sides; all evidence in conflict with the plaintiff's evidence must be disregarded. Second, the trial court, in determining such motion, cannot judge the credibility of witnesses, but must give to the plaintiff's evidence all of the value to which it would be legally entitled if the witnesses were believed. If extraordinary situations may be conceived in which these rules would yield to exceptions, the instant case is not one of them, and it must be governed by the rules, which must now be considered as settled in this state by a long line of authorities. See, also, Topley v. Zeeman (Cal. Sup.) 13 P.(2d) 666; Smellie v. Southern Pacific Co., 212 Cal. 540, 552, 299 P. 529; Bannister v. Los Angeles Ry. Corp., 203 Cal. 427, 264 P. 756; Estate of Caspar, 172 Cal. 147, 155 P. 631. Such cases as Diamond v. Weyerhaeuser, 178 Cal. 540, 174 P. 38, where the court found the case for the plaintiff wholly lacking in the elements to justify recovery, and therefore held it proper to direct a verdict, are not inconsistent with these rules. We proceed, then, upon the basis that petitioner was required merely to offer competent evidence of such a substantial nature that it might reasonably be inferred therefrom that she was the illegitimate daughter of James Flood, legitimated in conformity with Civil Code, § 230.

Certain facts constituting the background of this case must be briefly stated. Mrs. Alfredeta Forde, a widow, came to California from Boston with her daughter Eudora Helen Forde (now Eudora Forde Willette), and her son Ferdinand David Forde, in 1891. They lived in Los Angeles until June, 1892. They were in constant financial distress. The mother, a former actress, attempted to support her daughter by giving dramatic readings, and the son, a violinist, occasionally was engaged to play at dances and banquets. Later, the daughter commenced her theatrical career with a stock company. According to her testimony, they met a "Dr. Victor Sturm" in Los Angeles, who represented himself to be a retired physician from the east. In June, 1892, Mrs. Forde and Eudora came to San Francisco, Ferdinand following shortly afterward. They stayed at the Russ House, a hotel, for about a month. Eudora testified that Dr. Sturm then arrived, that they became engaged, that she ordered a trousseau for which he was to pay, and that he then disappeared, leaving them with numerous unpaid debts. They moved to the Grosvenor, and then to the Langham hotel, at Ellis and Mason streets. For a short time, Mrs. Forde was engaged as an actress at the Grove Street Theater, on Grove between Polk street and Van Ness Avenue. The mother and daughter moved from the Langham to a boarding house, and changed lodgings again several times thereafter.

While living at one of these houses Eudora discovered that she was pregnant. She testified that she consulted a priest concerning her plight, asking whether she might not take the name of a married woman; that he permitted her to do so, telling her that she could treat the matter as a spiritual marriage; that she thereupon took the name of "Mrs. Stearn," which, she says, was familiar to her as the name of a department store in Boston. In April, 1893, Mrs. Forde and Eudora rented a room at 628 Eddy street, and early in May moved next door to a boarding house at 626 Eddy street. On May 11, 1893, Eudora gave birth to a daughter. On May 19, 1893, the child was baptized, and a baptismal record made, in which the child's name was entered by the priest as "Constans Marguerite Stern," and the parents' as "Eudora Ford" and "Victor Stern." The name actually given to the child, petitioner herein, was Constance Marguerite Stearn.

In August, 1893, when the child was about three months old, she was taken into the family home of James L. Flood at 1890 Page

street. He was then thirty-six years of age, had been married to Marie Rose Flood for six years, and had no children. Upon the reception of the child into the Flood family, the financial condition of Mrs. Forde and Eudora improved considerably, many of their bills being paid and large additional sums being given them from time to time. The Floods changed the child's name from "Constance Marguerite" to "Constance May", and she was known as "Constance May Flood." Some time prior to May, 1894, Mrs. Flood acquired a summer home at Alma, Santa Clara county, where she lived with her husband and petitioner during the summer. In August, 1896, she secured a residence at 1816 Pacific avenue, San Francisco. On January 15, 1898, Mrs. Flood died. Shortly thereafter, on February 23, 1898, James Flood made a trip to the Orient, taking with him his sister-in-law, Maud Lee Fritz, and brother-in-law, Walter Fritz, Constance, and a valet and maid. He returned June 7, 1898. At the conclusion of the trip, Maud and Walter Fritz remained with him at Alma, and their parents, Mr. and Mrs. John Fritz, and their brothers, John and Beaumont Fritz, came out from their home in Kansas City at Mr. Flood's invitation. Mr. Fritz, John, and Beaumont spent the summer and part of the fall there, and Mrs. Fritz, Maud, and Walter stayed until January 1, 1899, when they went to Kansas City accompanied by Mr. Flood and Constance. It was arranged that Mrs. Fritz was to rear Constance in her home, and Flood thereupon left her and returned to San Francisco. He went back to Kansas City soon afterwards, and on February 9, 1899, was married to Maud Lee Fritz, sister of his deceased wife. They went to Europe, returned, and established their home at Menlo Park, San Mateo county. A child, Mary Emma, was born to them on July 7, 1900. Constance remained in Kansas City with the Fritz family until July, 1901, attending St. Theresa's academy there for a time.

Some time in July, 1898, Colonel Henry I. Kowalsky, an attorney representing Mrs. Forde and Eudora, sought to obtain money for them from Mr. Flood. On August 1, 1899, Flood paid to Colonel Kowalsky, for Eudora, the sum of $5,000, receiving from him a document entitled "Declaration of Abandonment," which was an affidavit of Eudora Forde, stating that Constance was the child of herself and her husband "Edward Stearn"; that her husband had died in New York in 1894; and that she had abandoned the child and relinquished all claims to its custody and control. Of the $5,000 thereby received for Eudora, Colonel Kowalsky retained $1,200 as his fee. The statements in this affidavit respecting parentage were admittedly false, and Eudora testified that she did not know what she was signing. She further testified that Flood knew her under the name of "Miss Dora Forde."

Shortly before July, 1901, Mrs. Forde wrote to Flood on behalf of herself and Eudora, asking that Constance be returned to them. After consultation with his attorney, Mr. Flood had Constance brought to San Francisco. On July 13, 1901, a meeting was held at Mr. Flood's office, at which Flood, according to evidence presented by respondents, offered either to return the child, or to educate her during her minority. The latter arrangement was decided upon, and on July 22, 1901, Constance was taken by her nurse to "Ramona Convent" at Shorb (now Alhambra), Los Angeles county. Flood paid the sum of $7,000 into a trust fund for her expenses for a period of ten years. She remained a boarder in the convent until June, 1911, and was there known as "Constance May Stearn." While there, she became intimate with the two daughters of Senator Robert N. Bulla, frequently spending her weekends with them. At the conclusion of the ten-year period, she left the convent and went to live at the home of Senator Bulla. He lived in Alhambra with his two children and his sister-in-law, Mrs. Bertha Welfare. Constance made her home there for over nine years, receiving her board and lodging, and a monthly allowance from him of $30 for clothing and incidentals, which was the amount given by him to each of his daughters.

Some time in 1917 petitioner became engaged to be married to John P. Gavin, her present husband, and on April 16, 1917, she wrote to Mr. Flood asking information as to her parentage. Receiving no reply, she wrote again on May 17, 1917. Thereafter, in June, 1917, James E. Walsh, Mr. Flood's secretary, called at Senator Bulla's home, and told her that according to Mr. Flood's information she was the daughter of Edward Stearn and Eudora Forde Stearn. Upon his return, Walsh sent her, in care of Senator Bulla, an extract from the affidavit of Eudora, to the same effect. After leaving Senator Bulla's home, petitioner was employed for some time as a domestic servant in Los Angeles. On May 11, 1921, when she was twenty-eight years of age, she was married to John P. Gavin at Los Angeles, and has lived there with her husband ever since. On November 30, 1922, being ill and in financial distress, she wrote Mr. Flood, telling of her condition and appealing for aid, but received no reply. In 1918 and in 1923, when visiting San Francisco, she attempted to see Mr. Flood, but in each instance was informed that he was out.

James Flood died February 15, 1926. About two months later, petitioner visited San Francisco, and consulted a firm of attorneys as to her possible right to a share in the estate. Thereafter various investigations and conferences took place, resulting in the commencement of this proceeding.

It is the theory of petitioner that James L. Flood met Eudora Forde soon after she came

to San Francisco, had sexual relations with her, that petitioner was the result of the union, and that Flood and Mrs. Flood took her into their home with knowledge of these facts. Respondents advance the theory that Eudora Forde, while accompanying her mother to the Grove Street Theater at this time, met James S. Cannon, the property man (who died subsequently in 1911), became intimate with him, and that he was the father of petitioner. According to this theory petitioner was taken into the Flood household as an act of charity by Mrs. Flood, who secured her husband's consent thereto. Both theories find their origin, to some extent, in the statements of Eudora Forde Willette, who from 1926 to 1931 persistently maintained to representatives of petitioner and of respondents, to newspaper men, and to others, that Flood was the father, and subsequently testified at the trial that Cannon was the father. As will hereinafter appear, the testimony of this witness is unimportant on this appeal, for at most it creates a conflict with petitioner's case which must be disregarded in determining the propriety of the court's direction of the verdict. Moreover, it is impeached by prior inconsistent statements and by her conduct to such an extent that the jury might have disbelieved it, and her credibility should have been determined by the proper course of submission of the case to the jury. It was the admitted practice of this witness to maintain herself at the expense of the parties to the litigation. One witness, for example, testified that she told him on one occasion that Aureguy (petitioner's investigator) was behind in his payments, and that she might jump to the other side of the case. She denies making this statement, although the fact is that she did "jump" (because she became conscience stricken, according to her testimony), and thereafter she received regular remittances from representatives of respondents.

We come now to the case for petitioner, the question being whether the testimony presented by her, and all reasonable inferences therefrom, sufficiently establish the elements of legitimation set forth above. Her evidence falls into three classes: (1) Declarations and acts of Mr. Flood; (2) declarations and acts of Mrs. Rose Flood; (3) declarations of others, which the trial court excluded.

Numerous witnesses, including servants, friends, neighbors, and casual acquaintances, testified to the conduct and statements of Flood with respect to petitioner. He was greatly attached to the child, played with her constantly, embraced and kissed her frequently and affectionately. Photographs were introduced in evidence, showing the child at the table, or seated with Flood. He provided her with beautiful clothes, toys, and trinkets. She was known in the household and among friends as "Baby Flood." She had visiting cards with the name "Constance May Flood" engraved thereon. A flower bed on the Alma estate contained the same name, and various trinkets carried her initials as "C. M. F." Packages and telegrams were received and sent in the name of Constance May Flood. Flood called her "baby," "my daughter," "my little daughter," "my little girl," "my darling daughter"; she called him "papa." He would take the child in his arms and say: "Who does sweetheart look like?" She would answer: "Papa." Their coachman testified that on one occasion, when Flood was in the carriage with the child, he said to her, "Baby, what is papa going to have when we get up to the ranch?" She replied, "Whiskey and soda," and Mr. Flood said "Baby knows what is good for papa." On his trip to the Orient, petitioner was constantly in his company. To the officers and passengers he made the same sort of declarations as he had made at his home, continually referring to petitioner as his "daughter" or his "little daughter." The passenger lists of the Steamship Belgic and the Steamship Gaelic, on which they traveled, read: "Miss Constance M. Flood." And the captain's manifest of the Steamship Belgic read: "Miss C. M. Flood, 5, female, with father, J. L. F." On board the Gaelic he met an old friend, who asked him "Whose child is that?" Flood replied: "It is my own. Doesn't she resemble me?" In Kobe, Japan, he placed the child on the hotel counter saying: "This is my baby, my Constance, my baby Constance May Flood; she can sing in French." Upon the return trip, Flood had printed and published at his expense a newspaper called "Sayonara," recording the events of the trip, and sent copies to all of the officers and passengers. In it was a picture of petitioner as "Miss Constance M. Flood," and a poem, "The Belgic Alphabet," containing the line: "F—is for Flood and his sweet little daughter."

The conduct of Mrs. Rose Flood was equally affectionate. As did the rest of the household, she called the child "Baby Flood" or "Sunshine," and was present on many occasions when Flood referred to the child as his "daughter." One of the declarations of Mrs. Flood, which is chiefly relied upon by petitioner, appears in the testimony of Mrs. Adele Gahan, formerly Adele Cerles, nurse in charge of the child at Alma, during the ocean trip, and then at the Pacific street home. She testified that in July or August, 1897, Mrs. Flood gave her an envelope containing money, and told her to take it to a "Miss Ford" on Mason street; that she took the child with her to the place, inquired for the woman, and was told by an elderly lady that she was not in, but that she (the elderly lady) was the mother of the woman; that she gave this person the money, and that the lady then tried to coax the child to her, and after some effort said: "Isn't it too bad she doesn't know her grandmother?" Upon her return,

the witness testified, she told Mrs. Flood of the incident, and Mrs. Flood said to her: "Adele, I am going to tell you something, but on your word of honor you must promise that you will never reveal it to anybody. Baby Constance is the daughter of my husband, Mr. Flood, and Miss Ford, and Miss Ford is the mother."

[4] The above evidence constituted the main case for petitioner. No attack is made upon the *admissibility* of this evidence, and the competency of such acts or declarations concerning family history (pedigree) is clearly established by statute and case law in this state. Section 1870, subdivision 4, of the Code of Civil Procedure makes admissible "the *act or declaration*, verbal or written, of a deceased person in respect to the *relationship*, birth, marriage, or death of any person *related by blood or marriage* to such deceased person. * * *" Section 1852 of the same code provides: "The *declaration, act*, or omission of a *member of a family* who is a decedent, or out of the jurisdiction, is also admissible as evidence of *common reputation*, in cases where, on questions of pedigree, such reputation is admissible." Section 1870, subdivision 11, provides that "*common reputation* existing previous to the controversy" is admissible in cases of pedigree. Under these sections, the acts and declarations of both Mr. Flood and Mrs. Rose Flood are competent to prove the *paternity* of petitioner. In Estate of Heaton, 135 Cal. 385, 67 P. 321, a situation similar to that involved herein was presented, and the court said: "One of the facts absolutely necessary to support the claim of legitimation is that Warren D. Heaton was the father of Jennie. Jennie came to the family of Mrs. Ruth May when but an infant. A few years later Heaton and Mrs. May were married. Thereafter Jennie became a member of the family of Warren D. Heaton and his wife. Being *a member of their family*, the declarations of *either* were competent and relevant evidence upon the question of Jennie's paternity." (Italics ours.) See, also, Estate of Hartman, 157 Cal. 206, 107 P. 105, 36 L. R. A. (N. S.) 530, 21 Ann. Cas. 1302; In re Clark, 13 Cal. App. 786, 110 P. 828; Estate of McNamara, 181 Cal. 82, 100, 183 P. 552, 7 A. L. R. 313; 3 Wigmore, Evidence, § 1489, p. 226.

[5] The admissibility of this type of evidence being demonstrated and conceded, respondents' position is simply that the acts and declarations admitted in this case are not sufficient to establish the elements of legitimation, and particularly the element of paternity. Their principal contention is this: The declarations of a married man living with his wife, to the effect that a child in their home is his or their child, import that the child is the *legitimate* child of himself and his wife, and do not afford evidence that the child is the husband's *illegitimate* child. Starting with this proposition, they describe the statements of Mr. Flood as declarations that petitioner was his legitimate child, born in lawful wedlock, and not competent to show that she was his illegitimate daughter. In support of this theory, respondents offer sociological data on the common practice of married persons taking strange children into their homes, and also cite authorities, of which the following is typical: "The rule cannot be stated too broadly, that the description, 'child, son, issue,' every word of that species, must be taken prima facie to mean legitimate child, son, or issue." Wilkinson v. Adam, 1 V. & B. 422, 462; 35 Eng. Rep. 163, 179. The effect of these authorities would no doubt be that, if petitioner were here claiming to be the legitimate child of James Flood, his declarations to the effect that she was *his child* would afford an inference of both *parentage and legitimacy*. But there is no authority which holds that these declarations mean *legitimacy or nothing*, and common sense would rebel against a notion so unreasonable. The rational view must necessarily be this: Flood's declarations were evidence of paternity, i. e., evidence that he was the father of the person whom he addressed and described as his "child" and his "daughter." In the absence of any other evidence, the inference would normally be that she was his *legitimate child*. But here the undisputed evidence shows, and the pleadings of all parties admit, that Eudora Forde and not Rose Flood was the mother of the child, and it follows that the inference of paternity, if drawn by the jury, would be an inference of illegitimacy and not legitimacy.

Looking at respondents' argument from another point of view, it would wholly prevent the proof of legitimation under Civil Code, § 230 by declarations and acts of a father who was married, for, if he referred to the person merely as his *child*, this would not afford proof of illegitimacy, and if he referred to the person as his *illegitimate child*, this would constitute a failure to *treat the child as legitimate*, a positive requirement of the section. Thus, in Estate of De Laveaga, 142 Cal. 158, 168, 75 P. 790, 794, the court says: "But Jose Maria never received him into his family, or into or among his kindred, and did not treat the respondent as if he were a legitimate child, but, on the contrary, *treated him and referred to him as an illegitimate child.*" (Italics ours.) To require reference to the child as illegitimate would, therefore, prevent legitimation and defeat the very object of the statute. Analogous cases reject such a requirement. In Blythe v. Ayres, 96 Cal. 532, 31 P. 915, 19 L. R. A. 40, speaking of acknowledgment of an illegitimate child for purposes of inheritance, the court says (96 Cal. 589, 31 P. 915, 926): "Blythe, in writing, acknowledged himself to be the father of Florence Blythe; Florence Blythe is an illegitimate child; therefore, Blythe acknowledged

himself to be the father of an illegitimate child. This logic is unassailable, and *no sound reason can be adduced why the acknowledgment should contain a declaration of bastardy.*" See, also, Estate of Loyd, 170 Cal. 85, 148 P. 522. We conclude that on the question of paternity the jury should have been permitted to determine the effect of the acts and declarations set forth above.

[6, 7] The second disputed issue relates to the element of knowledge by Mrs. Flood that petitioner was the illegitimate child of her husband. The evidence upon which petitioner relies is of two kinds. First are the declarations of James Flood, made *in the presence* of his wife, which, respondents concede, amount to the joint declaration of both spouses, that is, the express declaration of the declarant and the implied declaration of the other spouse who acquiesced therein. See Cal. Code Civ. Proc. § 1870, subd. 3; In re Clark, 13 Cal. App. 786, 110 P. 828; Griswold v. Frame, 48 Cal. App. 178, 183, 191 P. 962. In this connection, section 1963, subdivision 27, of the Code of Civil Procedure, is pertinent. It states, as a disputable presumption, that "acquiescence followed from a belief that the thing acquiesced in was conformable to the right or fact." In re Clark, supra, 13 Cal. App. 789, 110 P. 828, 829, deals with this precise question: "As to the third point, the acquiescence of Eliza Clark when introduced on two separate occasions as the sister of Jackson Freeman is equivalent to an acknowledgment on her part of said relationship." Respondents attack this evidence on the ground already discussed, namely, that Flood's declarations import *legitimacy*, and hence could not establish knowledge of *illegitimacy* on the part of Mrs. Flood. In other words, their view would seem to be that Mrs. Flood must have understood by her husband's declarations that she was the mother of the child. We have already pointed out the weakness of their premise, and with that eliminated, the evidence is clearly of probative value. Second is the declaration of Mrs. Flood to Adele Cerles (Mrs. Gahan) that Flood was the father and Eudora Forde the mother of petitioner. Respondents launch a determined attack upon this testimony, pointing to alleged inconsistencies, falsehoods, and prior statements and conduct of the witness, in an effort to discredit it completely and remove it from consideration as having no value at all. It would be a useless task to set forth the attempted impeachment and rehabilitation of this witness, for it is settled that the question of credibility is one for the jury, and the trial court, as already shown, cannot determine that question on a motion for directed verdict. Estate of Lances, supra. The point is clearly stated in Estate of Gird, 157 Cal. 534, 540, 108 P. 499, 502, 137 Am. St. Rep. 131: "But, says counsel, there are eight separate reasons why Alice Bennett was not 'entitled to full credit,' such as swearing to her own adultery, admissions, and inconsistent acts. In reply, we can only point to section 1847, Code Civ. Proc., which, after declaring the manner in which a witness may be impeached, declares 'and the jury are the exclusive judges of his credibility.'" And in Brandt v. Krogh, 14 Cal. App. 39, 48, 111 P. 275, 279, it is said: "But no one will attempt to challenge the right of a jury or a judge trying the facts to believe and credit certain parts of the testimony of a witness who has been shown to have sworn falsely as to certain other material parts thereof." See, also, Archibald Estate v. Matteson, 5 Cal. App. 441, 90 P. 723. On this issue, likewise, the matter should have gone to the jury.

[8] The third element of legitimation which respondents claim is lacking is the *public acknowledgment* of the relationship by Flood. This contention is made in spite of the numerous instances in which Flood made declarations of paternity to members of his household, friends, neighbors, and complete strangers, in San Francisco, at Alma, on shipboard, in the hotel at Kobe, Japan, and to the world generally in the paper Sayonara. It may be observed that this was not one of the grounds for the motion for directed verdict, and, from a study of the court's opinion, appears not to have been a factor in its ruling. On its merits, however, the point deserves scant consideration. Basing their argument on Estate of Baird, 193 Cal. 225, 274–278, 223 P. 974, respondents assert that there was no public acknowledgment because Flood did not acknowledge the relationship to his mother and his sister. In the cited case, Baird, an unmarried man, made admissions of paternity only in places where he carried on meretricious relations with the mother of the child, and not to the members of his own family (his mother, sister, brother, and half-brothers), with whom he was in constant contact. The court said (page 278 of 193 Cal., 223 P. 974, 996): "Under the terms of section 230 and such cases as Estate of Jessup, supra [81 Cal. 408, 21 P. 976, 22 P. 742, 1028, 6 L. R. A. 594], and Blythe v. Ayres, supra, it must be held that willful concealment of the fact of paternity by the father from relatives with whom he is in frequent intercourse and is on terms of affection is opposed to public acknowledgment of paternity." The Baird Case certainly has no application to the facts disclosed by the record herein. Flood, a married man, maintained a family, consisting of his wife and petitioner, and, to this family and to persons who visited and associated with it, he declared the relationship. On the other hand, there is no evidence in the record that Flood's mother or sister visited his home during that period, or that he maintained any close contact with them. The evidence of public acknowledgment falls well within the rules laid down in Estate of Baird, supra, and other cases decided by this court. See Estate of Gird, 157 Cal. 542, 108 P. 499,

137 Am. St. Rep. 131; Estate of Jones, 166 Cal. 112, 135 P. 288; Estate of Jessup, 81 Cal. 408, 21 P. 976, 22 P. 742, 1028, 6 L. R. A. 594.

From the foregoing brief review, we have concluded that there was competent evidence of sufficient substantiality, in support of the elements of legitimation, to necessitate the submission of the case to the jury. We have, in the course of this review, dealt with those contentions of respondents which bear directly upon the admissibility and probative value of petitioner's evidence. The remaining points of respondents represent an attempt to destroy petitioner's case by argument based on conflicting evidence, and on the absence of direct evidence on certain matters. Parenthetically, it may be said that the principal witnesses for respondents (Eudora Forde Willette, Alfredeta Forde, Walter Fritz, and Mrs. Maud Flood) were contradicted in the essential portions of their testimony by evidence of prior inconsistent statements and other contrary evidence, which fact disposes of respondents' contention that the material parts of their case should be considered on this appeal because they are undisputed and not in conflict with petitioner's case. It would greatly and unnecessarily prolong this opinion to give any extended consideration to the lengthy arguments of respondents on these points, but some may be mentioned by way of illustration. Thus, it is said that petitioner offered no direct evidence that Flood ever knew her mother at any time during his life; that she offered no evidence to show that Flood was at any place which would make it possible for him to be her father; that she offered no evidence to show the circumstances under which she was brought to Flood's home, etc. The mere statement of these propositions discloses their weakness, for it is obvious that there is no requirement that petitioner produce *direct* evidence upon any of these points. From the declarations and conduct discussed above, all of the elements of paternity and legitimation can be inferred, and whether the inference should be made is a question for the jury. With respect to the impossibility of Flood being the father of petitioner, counsel lean heavily upon the testimony of Mrs. Maud Flood and Walter Fritz, to the effect that Flood had been in the East and did not return to California in time to be present at the date of probable conception. An examination of the record shows that the discrepancy, based upon the normal period of gestation (280 days), was not more than 10 or 15 days, and that these witnesses were uncertain in their recollection of the dates, basing their statements partly upon memory and partly upon Flood's habits of travel. The result of their testimony in any event was merely another conflict.

[9, 10] We now come to a consideration of the other evidence offered by petitioner and excluded by the court. In view of our conclusion already expressed that sufficient evidence was produced and admitted to require submission of the case to the jury, the admissibility of this remaining evidence is only important in the event that this case is tried anew. This evidence consisted of declarations of relatives of Mrs. Flood, namely, Mrs. Nancy Fritz, her mother, Beaumont Fritz, her brother, and Wilhemina Fritz, her sister, all of whom were either dead or outside the state at the time of this trial. A written offer of proof was made by petitioner, and it was stipulated that a number of witnesses would testify that these parties had all declared upon various occasions that Constance was the daughter of James Flood, but not of Rose Flood, and that the mother of petitioner was a woman named Stearn; and that petitioner's parentage was a frequent subject of discussion in the Fritz family. A similar offer was made as to the declarations of Walter Fritz made in the presence of other members of the family. To these offers of proof respondents objected, and the court ruled that the testimony was inadmissible. This ruling, in our opinion, was erroneous. The theory of respondents is that pedigree declarations of Flood were admissible as to the relationship of petitioner to him; and that declarations of *his blood relations*, or of *his wife* were likewise admissible; but that declarations of *his wife's relatives* were incompetent. Blackburn v. Crawford, 70 U. S. (3 Wall.) 175, 18 L. Ed. 186, is cited to the point, and it does apparently support this narrow rule; and there is language also in Shrewsbury Peerage Case, 7 H. L. D. 1, 11 Eng. Rep. 1, to the same effect. There is no unanimity in the authorities, however, and the view of those cases is not a necessary conclusion from our statute. Section 1870, subdivision 4, makes the pedigree declaration admissible where the deceased declarant was related "by blood or marriage" to the person with whom the declaration deals; and section 1852 makes admissible the declaration of a "member of a family" as evidence of "common reputation" in pedigree cases. There are two theories to justify the admission of these declarations under such statutory provisions. One is that the blood relatives of Mrs. Flood were related to and were members of the family of Mr. Flood, *connected by marriage* instead of by blood; and that the declarations of such relatives as to *his family history* were admissible. The other is that *petitioner*, who lived for a time in the household of Mrs. Fritz, was a member of *her family* in the broad sense of that term, and the declarations of other members of that family as to *petitioner's family history* were admissible, as evidence of *common reputation* in that family. See Estate of Heaton, 135 Cal. 388, 67 P. 321; Alston v. Alston, 114 Iowa, 29, 86 N. W. 55. We are disposed to give a liberal interpretation to our statutes, and there is authority to support the view which we take. In People v.

Fulton Fire Insurance Company, 25 Wend. (N. Y.) 205, the court states that "it is the constant practice to receive evidence of the declarations of persons connected with the family by marriage as well as of those who were connected with it by * * * consanguinity." In Alston v. Alston, supra, 114 Iowa, 29, 86 N. W. 55, 57, the court admitted declarations of parties not actually related to the alleged father, saying: "With reference to the declarations of Mr. and Mrs. De France, they do not come strictly within the rule requiring such declarations to be by a relative by blood or marriage, but it was *their family in which plaintiff was brought up*, and we hold that their declarations are admissible by reason of such relationship." In Estate of Williams, 128 Cal. 552, 555, 61 P. 670, 672, 79 Am. St. Rep. 67, this court said: "* * * The declarations of William Frederick Williams, deceased, as to the *family understanding and belief*, to the effect that he [George Williams] enlisted in the army, when a boy, * * * and was believed to have been killed, and that he never married, was competent evidence, and sufficient to sustain the finding of the court." Professor Wigmore, whose authoritative treatise on evidence is frequently cited by the courts of this state, condemns the doctrine of Blackburn v. Crawford, and in criticising the distinction drawn by such cases, between relationship by blood and relationship by marriage, states: "All that can be said for such a distinction is that relations by marriage are likely to be less intimate in the family circle and to have little or no interest depending upon a chance of inheritance. But the general likelihood of their being correctly informed is perhaps quite as great as for distant consanguineous relations, and is sufficient in the ordinary instances * * * Furthermore, in general, the declaration of any person connected on one side of a marriage concerning relationship in the family on the other side would probably be received, unless the actual absence of adequate information should be made to appear in a given instance." 3 Wigmore, Evidence (2d Ed.) p. 226. In 1 Greenleaf on Evidence (16th Ed.) § 114c, page 198, it is said that "the declarations of any person connected by marriage only would probably be received, if he appeared to have had opportunities of information." And in 3 Jones, Commentaries on Evidence (2d Ed.) § 1132, p. 2081, a similar statement is made: "The declarations of persons connected by marriage are received, since they are more likely to be informed of the family of which they have become members than a relative who is only distantly connected by blood." It may be added that the facts of the instant case are extraordinarily appropriate for the application of this rule, since it appears without contradiction that the members of the Flood and Fritz families were very intimately associated, that Mrs. Fritz and her children made lengthy visits at the Flood home, and that Flood made similar visits to the Fritz home at Kansas City.

[11, 12] The possibility of a new trial makes it necessary also to pass upon a ruling of the court which petitioner assigns as error, limiting cross-examination of one of respondents' witnesses. The witness, Mrs. Bertha Welfare, sister-in-law of Senator Bulla, testified on direct examination that she knew petitioner prior to her marriage only under the name of "Constance May Stearn," and that all the expenses of maintaining petitioner after she left the convent were met by Senator Bulla and the witness. Petitioner sought to cross-examine the witness to show, first, that Flood had paid for the maintenance of petitioner; and, second, that the witness knew petitioner as "Constance May Flood." She was asked, among other questions, the following: "Did you ever know Constance by any other name, or did you ever hear any other name mentioned?" "Isn't it a fact, Mrs. Welfare, that in 1920, before Constance was married to Mr. Gavin, that Mr. Gavin in asking you about Constance's parentage in your home, there being no other person present, said to you, 'Do you know anything about Constance's parentage?' to which you replied, 'Flood—James L. Flood, is her father; I don't know who her mother was. * * *'" The court sustained objections to all of this line of questioning, stating that the questions would be permitted only if counsel for petitioner would call Mrs. Welfare as their witness. We are at a loss to understand how this obviously proper impeachment could be restricted in this manner, and in view of the wide latitude habitually permitted by our courts in cross-examination (see Jackson v. Feather River Water Co., 14 Cal. 18, 23), and the willingness of the court below to admit the evidence if the witness were called by petitioner, the ruling must be deemed erroneous.

The judgment is reversed.

We concur: WASTE, C. J.; CURTIS, J.; IRA F. THOMPSON, J.; SEAWELL, J.; SHENK, J.; PRESTON, J.

218 Cal. 86

OCEAN SHORE R. CO. v. SPRING VALLEY WATER CO. et al.

S. F. 14190.

Supreme Court of California.

April 27, 1933.

Vendor and purchaser ⊂=229(9).

Evidence showing that, at time golf club was negotiating with water company for purchase of property, club had knowledge of physical condition of property which indicated existence of railroad right of way thereon, club was chargeable with constructive notice of easement, and therefore was not bona fide purchaser without notice of easement, deed for which was not recorded (Civ. Code, §§ 19, 1217).

In Bank.

Appeal from Superior Court, San Mateo County; Geo. H. Buck, Judge.

Action by the Ocean Shore Railroad Company against the Spring Valley Water Company, the Lake Merced Golf and Country Club, a corporation, and others. From a judgment in favor of plaintiff, the second named defendant appeals.

Affirmed.

Brownstone & Goodman and Louis E. Goodman, all of San Francisco, for appellant.

Henry E. Monroe, of San Francisco (Julia M. Easley of San Francisco, of counsel), for respondent.

H. S. Young, of San Francisco, for defendants Spring Valley Water Co.

Harry A. Encell, of San Francisco, for California Highway Commission.

U. S. Webb, Atty. Gen., for the State.

WASTE, Chief Justice.

Plaintiff brought this action to quiet its title to a certain right of way. At the conclusion of the trial it was found that plaintiff had abandoned the same. Judgment was accordingly entered denying relief. Upon appeal it was held that the evidence did not warrant a finding of abandonment. The judgment was therefore reversed. Ocean Shore Railway Co. v. Spring Valley Water Co., 87 Cal. App. 188, 262 P. 53.

Prior to the second trial of the action the defendant golf club, pursuant to stipulation, amended its answer so as to specially plead that it was a bona fide purchaser for value without notice of plaintiff's right. It was further stipulated that all of the evidence given at the first trial was to be considered as given at the second trial. None of the defendants, except the golf club, introduced any further evidence. The golf club offered evidence touching the special defense above mentioned. Findings were made adverse to the defendant water company on the issue of abandonment and against the golf club on its special defense. The golf club alone appealed. The sole question presented for determination has to do with the sufficiency of the evidence to support the finding that the defendant golf club was not a bona fide purchaser for value without notice of plaintiff's right of way.

It appears that in 1909 the defendant water company conveyed to the plaintiff's predecessor in interest a surface right of way for railroad purposes. In the latter part of the year 1920, or early in 1921, the plaintiff discontinued the operation of its railroad over said right of way and removed all of its tracks and equipment therefrom. In October, 1921, the defendant golf club commenced negotiations with the defendant water company for the purchase of a tract of land over which ran plaintiff's right of way. The contract for the purchase of this land was executed by the defendant golf club in March, 1922, and $10,000 was paid on account of the purchase price. The golf club thereupon entered into possession and improved the property. The contract of purchase contained no reference to plaintiff's right of way and the deed conveying the right of way was not recorded until approximately one month after the defendant golf club had executed such contract and paid a portion of the purchase price.

There is testimony to the effect that at the time the defendant golf club was negotiating for the purchase of the property, portions of plaintiff's right of way were being plowed and planted by farmers. Counsel for the defendant golf club testified that while such negotiations were pending, there remained over a gulch in one part of the property a portion of a trestle over which the railroad had formerly passed. The rails and the ends had been removed from this trestle. It is conceded that the trestle was plainly visible to the eye. That the golf club was without actual notice or knowledge of plaintiff's rights in the property and had expended approximately $30,000 before learning thereof, may be admitted. This is not determinative of the case, however.

An unrecorded instrument is valid as between the parties thereto and those who have notice thereof. Civ. Code, § 1217. Every person having actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, is charged with constructive notice of the fact itself in all cases in which by prosecuting such inquiry he might have learned such fact. Civ. Code, § 19. Examination of the evidence satisfies us that the defendant golf club, while lacking actual knowledge of plaintiff's easement when negotiating for the purchase of the property,

had actual notice of circumstances sufficient to put it upon inquiry which, if prosecuted, would have disclosed plaintiff's interest and right in the property. This being so, the defendant golf club is chargeable with constructive knowledge of the existence of plaintiff's right of way. Its title to the property is, therefore, subject to plaintiff's easement.

The physical condition of the property, as disclosed by the evidence adduced by the golf club, was such as to indicate the existence of a right of way thereon. The trestle above mentioned, together with certain gradings and cuts on the property, of which the defendant golf club through its representative admittedly had knowledge, so indicated. The assumption that the railroad had been abandoned does not help the defendant's cause. It has been held there was no abandonment. Ocean Shore Railway Co. v. Spring Valley Water Co., supra. Inquiry by the defendant golf club would have led to the ascertainment of this fact. In Chicago & E. I. R. R. v. Wright, 153 Ill. 307, 38 N. E. 1062, a case somewhat similar to the present one, the following appears: "It appears from the evidence that in 1872, and soon after the execution of the deed for the right of way, the Danville, Tuscola & Western Railroad Company constructed a grade across section 20 on the strip of land 60 feet wide, and extended such grade across the adjoining lands both east and west of said section. No further work was done on this grade or on the railroad, from and after the year 1872, until subsequent to the time that appellee made his purchase. When he bought, his grantor was in possession of the whole section, the strip in question being fenced in with the other parts of the section, and the whole used as a pasture for cattle. However, the railroad grade was clearly defined, and remained intact. It is admitted that appellee knew of the grade. He states in his own testimony that at the time that he bought he saw the grade there, and saw the grade on the adjoining property on both sides of the section; and that there was a grade all the way through there. He also states that he made inquiries of a Mr. Eckhart, who had lived on the land, but did not ask anything about what title the railroad company had; and that Mr. Eckhart said that the old company was dead, and the road would never be built. * * * It is difficult to lay down a general rule as to what facts are sufficient to charge a party with notice, or put him upon inquiry. It is safe to say, however, that if the information received is of such a character that it would arouse the suspicions of an ordinarily prudent person, and suggest to him a source of information which, by the exercise of ordinary and reasonable diligence, would, upon inquiry and investigation, lead him to the fact that a prior conveyance had been made, then he will be deemed chargeable with knowledge of such conveyance. In Crawford v. Railroad Co., 112 Ill. 314, it was said that the rule is that if anything apprises a purchaser or incumbrancer that a particular person claims the property, or an interest in it, the former must pursue that notice to its source, and that, failing to do so, he will be charged with all he would have learned had he pursued and investigated the matter to the full extent to which it led. In Railway Co. v. McBroom, 114 Ind. 198, 15 N. E. 831, the appellee knew at the time he bought the land that the grade for a railroad track was constructed thereon, and this was held to be sufficient to put him upon inquiry. And it was there said: 'A person who is about to purchase land upon which a grade for a railroad is constructed is warned that there is some claim of right, and if he fails to make proper inquiry as to the nature of the claim he buys at his peril.' In the case at bar the grade was a plain, unmistakable monument, which notified the whole world that a railroad company had entered upon the land and erected its roadbed thereon, and the legal presumption arose that it had done so under some claim of right. * * * It must therefore be held that the title that he procured to the strip of ground in question is in subordination to the title that is vested in appellant to its right of way."

Indiana, etc., R. R. v. McBroom, 114 Ind. 198, 15 N. E. 831, 832, declares: "The appellee, in his testimony, says: 'At the time that Wood conveyed to me there was a strip cut through the timber, and there were ditches. I had no doubt but this work was grade for a railroad.' * * * At the time he bought the land he knew that the grade for a railroad track was constructed, and this was sufficient to put him upon inquiry. Paul v. Railroad Co., 51 Ind. 527; Railroad Co. v. Oyler, 60 Ind. 383. A person who is about to purchase land upon which a grade for a railroad is constructed, is warned that there is some claim of right, and if he fails to make proper inquiry as to the nature of the claim, he buys at his peril. A man cannot buy property where there are facts known to him sufficient to put him upon inquiry, and hold it free from prior claims or equities of which due inquiry would have given him information. Wilson v. Hunter, 30 Ind. 472; Singer v. Scheible, 109 Ind. 575, 10 N. E. 616. This familiar and long-settled rule is thus well stated in a recent case: 'A party in the possession of certain information will be charged with a knowledge of the facts which an inquiry suggested by such information, prosecuted with due diligence, would have disclosed to him.' "

Smith v. Worn, 93 Cal. 206, 28 P. 944, cited by the appellant, is distinguishable on its facts from the instant case. It therein appears that "there was nothing on * * * the land indicating in any way the existence of any road over it." In the present case,

as already indicated, there remained in existence physical characteristics of a right of way sufficient to suggest to a prudent person an inquiry in regard thereto. The cited case concludes, even in the face of nonuser extending over a period of years, that the owner of the servient estate had not been misled by any *acts* of the owner of the dominant estate unequivocally indicating a clear intent to abandon. Examination of the record in the case now before us satisfies us that the defendant golf club was not misled to its prejudice by any *acts* of the plaintiff clearly evidencing an intent to abandon.

In conclusion, we repeat that the defendant golf club is not a bona fide purchaser for value without notice of plaintiff's easement. Prior to executing the contract of purchase or advancing any money thereunder, it had knowledge of facts sufficient to indicate the existence, at one time or another, of a right of way across the land. Reasonable inquiry would have disclosed plaintiff's interest in the property and dissipated any theory of abandonment. Having failed to pursue the inquiry suggested by the facts of which it had knowledge, it necessarily follows that the defendant golf club acted at its peril and its title to the property is therefore subject to plaintiff's easement therein.

For the foregoing reasons, the judgment of the court below quieting plaintiff's title to such easement must be, and it is hereby, affirmed.

We concur: CURTIS, J.; LANGDON, J.; SHENK, J.; THOMPSON, J.; SEAWELL, J.

218 Cal. 136

MERNER LUMBER CO. v. BROWN et al.
MINTON CO. v. SAME.

S. F. 14639.

Supreme Court of California.

May 1, 1933.

1. Appeal and error ⇐931(1).

Reviewing court must so construe trial court's findings that they will, if possible, support judgment.

2. Principal and surety ⇐190(7).

Evidence sustained finding that contractor's surety paid materialmen's claims, thereby extinguishing debts and restricting surety to remedy against principal on implied obligation of principal to reimburse surety (Code Civ. Proc. § 1183).

3. Principal and surety ⇐185.

Surety paying debt for which he is liable as surety thereby extinguishes debt, and his remedy is against principal on implied obligation of principal to reimburse him.

4. Subrogation ⇐41(5).

In actions to foreclose materialmen's liens where contractor's surety paid materialmen and continued actions in their names, surety was bound by original plaintiffs' complaints (Code Civ. Proc. § 1183).

5. Appeal and error ⇐1071(6).

In actions against owner, contractor and contractor's surety to foreclose materialmen's liens, where surety paid materialmen and continued actions in their names, court's failure to find on question whether owner violated contract by making premature payments *held* not reversible error, in view of absence of pleading on issue (Code Civ. Proc. § 1183).

6. Appeal and error ⇐877(2).

In actions against owner, contractor, and contractor's surety to foreclose materialmen's liens, where surety paid materialmen and continued actions in their names, surety could not complain that judgment against contractor was inconsistent with finding that surety paid materialmen's claims (Code Civ. Proc. § 1183).

Surety could not complain that judgment against contractor was inconsistent with finding that surety paid materialmen's claims, since there was no appeal from the judgment against the contractor, and judgment was in surety's favor. Moreover, there was no inconsistency, since when a surety pays the debt, while he thereby extinguishes it, he has a cause of action against his principal for reimbursement.

7. Subrogation ⇐41(8).

In actions against owner, contractor and contractor's surety to foreclose materialmen's liens, where surety paid materialmen and continued actions in their names, judgment denying foreclosure of liens against property and allowing recovery against contractor *held* not erroneous as ignoring equitable theory of subrogation, where owner complied with statutory requirements and paid full contract price (Code Civ. Proc. § 1183).

In Bank.

Appeals from Superior Court, Santa Clara County; Robert R. Syer, Judge.

Actions by the Merner Lumber Company and by the Minton Company against Elizabeth Brown and others, which were consolidated for trial. From a judgment in favor of named defendant, plaintiffs appeal.

Affirmed.

Richardson & Richardson, Owen D. Richardson, and Donald B. Richardson, all of San Jose, for appellants.

Rodgers, Smith & Costello and Rodgers & Smith, all of Palo Alto, for respondent.

Cooley, Crowley & Supple, of San Francisco, for defendant Commerce Casualty Co.

CURTIS, Justice.

These two actions were instituted by two separate materialmen, the Merner Lumber Company, a corporation, and the Minton Company, a corporation, to foreclose their liens against the property of the owner, Elizabeth Brown, to secure a money judgment against the contractor, Fred S. Wiseman, for materials used, and to enforce bond against the surety company, the Commerce Casualty Company. Subsequent to the commencement of said actions, the surety company, deeming itself liable to the materialmen under its bond, paid said claims, took from said materialmen a purported assignment of their rights as materialmen, and continued the actions in the names of said materialmen. The contractor defaulted, and the actions were not pressed against the surety company for the reason that it had, in fact, become the real party plaintiff. The actions were consolidated for trial. Judgment was rendered against the plaintiffs and in favor of the defendant owner denying foreclosure of the materialmen's lien against the property and in favor of the plaintiffs against the defaulting contractor for the agreed value of the materials furnished. The appeal is prosecuted by the surety company, in the name of the original plaintiffs, from the judgment denying it a lien against the property of the owner.

The facts briefly stated are these: On July 14, 1930, the owner, Elizabeth Brown, entered into a contract with Fred S. Wiseman for the construction of a house to cost $3,500. The contract was filed for record together with a surety bond in the sum of $1,750, being one-half of the contract price of the house, furnished by the contractor, and issued by the Commerce Casualty Company, which was conditioned, as provided in section 1183 of the Code of Civil Procedure, for the payment of all claims of all persons performing labor or furnishing materials to be used in the construction of said dwelling house, and which by its terms, as provided by said section 1183, Code of Civil Procedure, was to inure to the benefit of any and all persons who furnished materials, so as to give such persons a right of action to recover upon said bond in any suit brought to foreclose the liens or in a separate suit brought on said bond. Thereafter it appears that on or about November 15, 1930, Wiseman abandoned the contract before the work was fully completed. The owner, after taking the matter up with the surety company, proceeded to finish the building and paid out for labor and materials an amount which, together with the amounts already paid out to the contractor, totaled the contract price of the building. The plaintiffs herein, not having been paid, filed their claims of lien against the property and commenced these actions, which, as before indicated, were continued in their names by the surety company after the payment to them by the surety company of the amount claimed due by them from the contractor, less an agreed percentage. The amount claimed by the Merner Lumber Company to be due, and which was found due by the trial court, was the sum of $1,076.57, and the amount claimed to be due by the Minton Company, and which was found due by the trial court, was the sum of $666.37. The court further found that the Commerce Casualty Company had fully paid, satisfied, and discharged the indebtedness originally due the two plaintiff lumber companies.

[1] The first contention of the appellant, the surety company, is that there is a material conflict in the findings in respect to whether the claims of the two lumber companies had been paid. Under well-established rules of construction it is the duty of a reviewing court to so construe the findings of the trial court that they will, if possible, support the judgment. It is not necessary to cite authority in support of this well-known and firmly established rule. When we read the findings together as a whole we think there is no inconsistency or conflict therein. What the court evidently intended to find, and we think that in substance it did find, was that the contractor had not paid the two lumber companies the indebtedness respectively due to them from the contractor, but that, as the finding expressly states, the appellant, the Commerce Casualty Company, subsequently paid these claims in full. There is evidence in this case to show that there was due at the commencement of this action to the two lumber companies the amount of their claims as above set out and that the surety company paid these two claims in full after the commencement of the action. The findings fairly reflect these facts and are not so inconsistent as to justify a reversal of the judgment on that ground.

[2, 3] It is next contended that the finding that the surety company paid the indebtedness due the two lumber companies is not supported by the evidence. In this connection the appellant admits that it paid the amount due each of said companies on their said claims, less a deduction of some 5 per cent., which they each agreed to accept in a cash settlement, but that in connection with these payments it took from each of said companies an assignment of its claim sued on. These transactions, the appellant contends, did not amount to payment of these claims, but, on the other hand, were a pur-

chase of said claims. The surety either paid these claims or it purchased them from the two lumber companies. It could not do both. If it paid them, it could not have bought them, for upon their payment they were extinguished and there was then nothing to purchase. On the other hand, if it bought the claims it could not thereafter pay them without paying itself and this it does not claim to have done. There is some conflict in the evidence upon this phase of the case. Representatives of each of the two lumber companies testified that the surety company paid their claims. Mr. Desky, superintendent of the surety company, explained the transaction as follows: "Under the terms of our bond we decided that our obligation to third parties was not affected by a breach of the contract on the part of the obligee, and we would be bound regardless as to the outcome of any suit that we might institute against the obligee under the contract to pay the materialmen's claims under this contract. We didn't feel that we would be in any worse position by paying them than we would by trying to deny liability under the claims of the material, so we paid the claims." He also testified that the surety company took assignments of these claims. Assuming, therefore, that there was a conflict in the evidence as to whether the claims were paid or whether they were purchased by the surety company, the evidence of payment was sufficient to support the finding of the court that the surety company paid and discharged the claims in full. "Payment by a surety extinguishes the principal obligation." 6 Cal. Jur., p. 415. It is well-settled law in this state that when a surety pays a debt for which he is liable as such surety, he thereby extinguishes the debt and his remedy is against the principal upon the implied obligation of the principal to reimburse him. Johnson v. Mortgage Guarantee Co., 117 Cal. App. 416, 420, 4 P.(2d) 208; W. H. Marston Company v. Fisheries Co., 201 Cal. 715, 258 P. 933. Appellant's contention, therefore, that the finding of payment is not supported by the evidence cannot be sustained. By sustaining the finding that the claims were paid by the surety we have made it unnecessary to refute the further claim of the surety company that the findings are insufficient to support the judgment.

[4, 5] Another objection made by appellant to the judgment is that the court failed to find on a material issue in the case. This material issue was, the appellant asserts, that the respondent violated the contract by "making advances or premature payments to the contractor." It may be seriously questioned whether this issue of premature payments was really an issue in the case. The plaintiffs in whose name the appellant is prosecuting this appeal made no mention of premature payments. The appellant is bound by the complaints of the two original plaintiffs herein. In appellant's answer it made no claim that the respondent made any premature payments on the contract, and we find no mention of this subject in respondent's answer. The trial court was extremely liberal in the ruling regarding the introduction of evidence and accordingly the record does show that possibly premature payments were made by the respondent to laborers and materialmen, but as there was neither pleading nor finding as to this fact, it is evident that it was not regarded as a material issue in the case, and as neither the appellant nor either of said plaintiffs tendered it as an issue in any pleading filed by them, we are of the opinion that it would be highly improper for a reviewing court to reverse the judgment under such a state of facts for failure of the trial court to make such a finding.

[6] As noted above, the trial judge denied a lien against the building but gave judgment against the contractor for the amount of the two claims by the plaintiffs. Appellant contends that the judgment against the contractor is inconsistent with the finding that the claims were paid. There is no appeal from the judgment against the contractor. If the court erroneously gave judgment against the contractor, that was an error which does not concern appellant and regarding which it cannot complain especially as the judgment was in its favor. There was nothing, however, inconsistent in the provisions of the judgment. When a surety pays the debt, while he thereby extinguishes the debt, he has a cause of action against his principal for reimbursement. Johnson v. Mortgage Guarantee Company, supra.

[7] As a final attack on the judgment appellant makes the broad statement that "the decision is against the law and is contrary to the state Constitution." Under this general accusation, appellant makes two specific charges wherein it contends that the judgment is against the law. It is first stated that the decision ignores the assignment made by the parties and, secondly, that it ignores the equitable theory of subrogation. Neither of these charges is meritorious. The decision does ignore the assignment for the reason that the evidence supported the theory of respondent that appellant paid the claims of the two plaintiffs. The superintendent of appellant company, whose testimony is quoted above, testified that the surety company considered that it was bound by its bond, and that they did not feel "that we would be in any worse position by paying than we would by trying to deny the liability under the claims of the materialmen, so we paid the claims." Evidently the trial court was of the opinion that if the claims were paid there

was nothing to assign and, therefore, the attempted assignment was ineffective for any purpose. The charge that the decision ignores the equitable theory of subrogation is also without justification. We will assume that appellant, by paying the two lien claimants, was subrogated to all rights of these claimants to foreclose their respective liens. What rights had these lien claimants, before they sold their claims, against the property of the respondent, the owner of the building, for the construction of which the materials were furnished? The respondent had complied with all the requirements of section 1183 of the Code of Civil Procedure providing for the filing of a written contract between herself and the contractor for the construction of said building accompanied by a bond with a good and sufficient surety in an amount not less than fifty per cent. of the contract price and containing all the other provisions required by said section of the Code. This section then provides that when the owner has complied with all the requirements of this section and an action has been commenced to foreclose liens against said building, "then the court must, where it would be equitable so to do, restrict the recovery under such liens to an aggregate amount equal to the amount found to be due from the owner to the contractor and render judgment against the contractor and his sureties on said bond for any deficiency or difference there may remain between said amount so found to be due to the contractor and the whole amount found to be due to claimants for such labor or materials or both." The trial court in rendering its judgment followed the provisions of this section of the Code. It found that the owner had paid the full amount of the contract price of said building, in part to the contractor before he abandoned his contract, and thereafter the balance to complete said building. It accordingly restricted its judgment to the contractor. Had the original plaintiffs been prosecuting this action at the time of the rendition of said judgment, the trial court, in case it considered such a decree equitable, would have been authorized under this section to have made said judgment run against the surety as well as the contractor, but as the surety by paying the claims was the real plaintiff in fact, no judgment was rendered against the surety. The trial court did not, therefore, ignore the equitable doctrine of subrogation, but applied it in so far as the facts of this case would permit by rendering judgment in its favor against its principal, the contractor.

The judgment is affirmed.

We concur: LANGDON, J.; SEAWELL, J.; IRA F. THOMPSON, J.; PRESTON, J.; SHENK, J.

131 Cal.App. 562

RAINEY, Superintendent of Banks, v. CROWDER et al.

Civ. 9010.

District Court of Appeal, Second District, Division 1, California.

May 2, 1933.

1. Appeal and error ⊂⊃345(1).

That motion for new trial was denied less than 60 days after entry of judgment did not deprive appellant of 30 days allowed for filing notice of appeal after entry of order denying new trial (Code Civ. Proc. § 939).

2. Appeal and error ⊂⊃345(1).

One who promptly moves for new trial may, in all cases, have extension of time, not exceeding 30 days from entry of order denying motion, for taking appeal (Code Civ. Proc. § 939).

3. Appeal and error ⊂⊃799.

Burden was on respondents moving to dismiss appeal to establish that written notice of ruling denying new trial was given to appellants or that such notice was waived.

Appeal from Superior Court, Los Angeles County.

Action by Edward Rainey, as Superintendent of Banks, against Ellen B. Crowder and others. From the judgment, defendants H. B. Standley and F. W. Standley appeal. On motion of defendant Ellen B. Crowder and other defendants for dismissal of the appeal.

Motion to dismiss appeal denied.

Derthick, Cusack & Ganahl, of Los Angeles, for appellants.

W. W. Middlecoff, of Los Angeles, for moving parties.

CONREY, Presiding Justice.

In this action of interpleader the defendants Standley have appealed from that portion of the judgment which awarded the disputed fund to certain codefendants of the appealing defendants. The respondent defendants have duly presented their motion for dismissal of the appeal upon the ground that no transcript on appeal has been filed; and that no proceeding has been taken to obtain a bill of exceptions or any transcript, and that the time for such proceedings, and for filing of a transcript in this court has expired; and on the ground that the notice of appeal "was not filed in time."

The following dates of proceedings are noted: 1932, September 21, judgment entered; September 30, notice of entry of judgment served and filed; November 14, motion for new trial denied; December 14, notice of ap-

peal filed; 1933, March 7, notice of motion to dismiss appeal filed herein.

[1, 2] In opposing the motion to dismiss, appellants contend that their notice of appeal was within time, because it was filed within thirty days after the ruling on motion for new trial. Code Civ. Proc. § 939. Since it appears that the motion for new trial was pending within sixty days from the date of entry of judgment, it would appear that this contention of appellants should be sustained. We think that the fact that the motion for new trial had been denied less than sixty days after the date of entry of judgment does not deprive appellant of the thirty days allowed for filing of notice of appeal after entry of the order denying the motion for a new trial. It is argued by counsel for respondents that the notice of appeal came too late because the proceeding on motion for new trial was not pending at the end of the sixty-day period following the entry of judgment—the motion having been denied on November 14th. In support of this position he refers to Iske v. Stockwell-Kling Corp. (Cal. App.) 17 P.(2d) 203; Bates v. Ransome-Crummey Co., 42 Cal. App. 699, 184 P. 39, and Ransome-Crummey Co. v. Beggs, 185 Cal. 279, 196 P. 487. It must be admitted that in these decisions (other than the Iske Case) there are statements to be found which in their literal reading tend to support the contention made by respondents. But the cases themselves were cases wherein there had not been any attempted proceedings on motion for new trial until after expiration of the sixty-day period which primarily constitutes the time limited for appealing from a judgment. Presumably the Supreme Court had in mind this distinction when in making its order denying a petition for rehearing in Bates v. Ransome-Crummey Co., supra, it inserted in the order a reference to Pacific Light & Power Corp. v. Kauffman, 39 Cal. App. 499, 179 P. 452. In that case also the fact was that the appellant had not filed his notice of intention to move for a new trial until the sixty-day period from entry of judgment had expired. But in its opinion the court limited itself strictly to a statement of the rule applicable to those facts and said: "But it is our opinion that the Code of Civil Procedure does not authorize a party, whose right of appeal from a judgment has expired, to revive that right of appeal by subsequently giving notice of intention to move for a new trial. The phrase 'if proceedings on motion for a new trial are pending' (sections 939 and 941b) refers exclusively to such proceedings *pending within* the period of 60 days from the entry of the judgment. This appears so plainly to be the meaning of the language used that we are unable to give it any other construction. * * * To sustain the right of the plaintiff to maintain this appeal, we would be attempting to revive a right which has been lost, and which cannot be revived without construing the statute against the direct statement of its intention." We think that the statute as written reasonably allows a construction which will in all instances fully preserve the right of a party who promptly has made his motion for a new trial, to have the benefit of the extension of time, not exceeding thirty days, for taking his appeal.

[3] As above noted, the record fails to show that any written notice of the ruling on motion for new trial was ever given to appellants, or that such notice had been waived in writing, or by oral stipulation made in open court and entered upon the minutes. If there ever was any such written notice or waiver thereof, the burden was upon respondents, as the moving parties, to establish that fact. The conclusion necessarily follows that, so far as shown by the record, the time within which appellants were required to prepare bill of exceptions or make request for transcript has not expired. Griffin v. Kent, 206 Cal. 263, 274 P. 56.

For the foregoing reasons, the motion to dismiss appeal is denied.

We concur: HOUSER, J.; YORK, J.

131 Cal.App. 284

GARBUTT v. CHAPPE et al.
KING v. SAME.

Civ. 8621.

District Court of Appeal, First District, Division 1, California.

April 18, 1933.

Hearing Denied by Supreme Court June 15, 1933.

1. Patents ⇐216.

Contractor's two contracts with licensee of patented process required to be used should be construed together in fixing status, rights, and obligations of parties.

The facts showed that specifications required patented process, and, accordingly, first contract with licensee required it to furnish certain equipment, labor, material, and supervision. A later contract dealt with same subject, but contracting company, by provisions of later contract with licensee, were to furnish materials and labor, leaving licensee bound only to provide special equipment and inspector.

2. Patents ⇐216.

Second agreement between paving contractor and licensee of patented process required to be used *held* modification of former agreement.

3. Patents ⇐216.

Any secret oral agreement between paving contractor and licensee of patented process required to be used merited close scrutiny, and, where evidence was indefinite and uncertain, court was warranted in finding against existence of such side agreement.

The court had before it the offer to the city to furnish contractors patented process at stipulated price, and had likewise before it the agreement of the licensee of the process with the contractors for the same amount.

4. Evidence ⇐249(3).

Admissions of partner after dissolution of partnership *held* inadmissible to prove claim against partnership (Code Civ. Proc. § 1870, subd. 5).

5. Names ⇐10.

Plaintiff, in action to foreclose mechanic's lien, an individual doing business under fictitious designation, *held* to have capacity to sue.

6. Municipal corporations ⇐373(2).

Where paving contract required use of patented process, plaintiff furnishing permission to use process and furnishing appliances and inspector had right to lien (St. 1911, p. 738, § 19, as amended by St. 1929, p. 1655, § 3; St. 1911, p. 730, § 79e, as added by St. 1927, p. 636, § 7).

7. Municipal corporations ⇐373(2).

Under liberal construction of statute providing lien for person furnishing "material" for improvements, word "material" would be sufficiently broad to include supplies of all sorts or kinds (St. 1911, p. 738, § 19, as amended by St. 1929, p. 1655, § 3).

[Ed. Note.—For other definitions of "Material," see Words and Phrases.]

8. Patents ⇐216.

Where paving contract required use of patented process, licensee for county *held* to have valid claim under contract with contractor, as against contention real owner of patent was one who had claim.

9. Municipal corporations ⇐347(2).

Where paving contract required use of patented process, licensee authorizing contractor to use patent was "materialman" and not "subcontractor" as regards right under contractor's bond of one furnishing material to licensee.

[Ed. Note.—For other definitions of "Materialman" and "Subcontractor," see Words and Phrases.]

10. Municipal corporations ⇐347(2).

One supplying material to materialman cannot recover on paving contractor's bond.

Appeals from Superior Court, Alameda County; Leon E. Gray, Judge.

Actions to foreclose mechanics' liens by J. G. Garbutt against W. T. Chappe and others, and by J. B. King against W. T. Chappe and others. From portions of the judgment adverse to them, appeals are taken by J. G. Garbutt, J. B. King, William H. Ford, and the Associated Gravel Company.

Affirmed.

Byron Coleman, of San Francisco, for appellants and respondents Wm. H. Ford and Associated Gravel Co.

Kirkbride, Wilson & Brooks, of San Mateo, for appellant J. B. King.

J. W. Havens, of Oakland (John D. Willard, of San Mateo, of counsel), for appellant J. G. Garbutt.

Kirkbride, Wilson & Brooks, of San Mateo, and J. W. Havens, of Oakland (John D. Willard, of San Mateo, of counsel), for respondent.

PARKER, Justice pro tem.

The actions above entitled, arising out of the same transaction, and involving the same issues, practically between the same parties, were consolidated for trial in the court below, and the record on appeal is a single transcript and bill of exceptions jointly prepared and settled. The controversy centers about a sum of money withheld by the city of Oakland upon a stop-payment notice, which money would otherwise be payable pursuant to the terms of a public improvement contract.

Inasmuch as the caption indicates different appellants and respondents, it may serve to clarify the discussion if we detail the situation at least to the extent, preliminarily, of identifying the real parties in interest here. We may note, at the outset, that there is no issue presented as to the validity of the proceedings up to and including the letting of the contract; nor is there any point made as to full performance in so far as the city of Oakland is interested. The position of the city of Oakland is analogous to that of a stakeholder. It concedes that the money is due some one and has little, if any, interest in the outcome. Chappe and Curren were partners doing business under the name of Oakland Contracting Company. After proceedings regularly had, a contract was entered into between the city of Oakland and the Oakland Contracting Company. This contract called for the paving of certain streets in Oakland. Wm. H. Ford and Associated Gravel Company were and are the sureties on the contractors' bond. J. B. King, while in truth an assignee of Loui F. King, will be hereinafter referred to as though there were no assignment, and the name "King" will include both assignor and as-

signee, inasmuch as no point is made on the question of assignment and it being conceded that all rights of the assignor have passed and all liabilities of said assignor attach to the assignee. J. G. Garbutt, plaintiff in one of the consolidated actions, alleges that he did business under different designations, of which hereinafter. However, less confusion will result if we designate him by his own proper name throughout, referring to his business form when discussing that phase of the case wherein it may be an issue. As hereinbefore noted, the contract of paving was completed and accepted and the unpaid portions of the contract price due. Garbutt and King each filed lien claims with notices to withhold, and these actions followed.

Garbutt alleged that he had furnished certain labor and materials to the contractors for which he had not been paid. King, in his action, made the same allegation, claiming that he had furnished labor and material to Garbutt, who, alleged King, was a subcontractor under the original contract. In each case the defendants appeared and made specific denials. We omit reference to any counterclaims, inasmuch as the issues raised thereby are not here urged.

The actions were tried together and a judgment rendered in favor of Garbutt against defendants in the sum of $3,717.24 principal and $723.48 interest, plus $500 attorneys' fees. The court awarded King a judgment against Garbutt in the sum of $5,053.48 principal, with interest. Further, judgment was awarded defendants Ford and Associated Gravel Company against King for $500 as attorneys' fees, and the remaining defendants received judgment against King for costs. Garbutt and King appeal from the judgment. Ford and Associated Gravel Company appeal from that portion of the judgment in favor of Garbutt. The contractors have abandoned their appeal, though the sureties, upon whom the burden falls, carry on.

We will first consider the case of Garbutt, which will unfold the situation to the extent that it will be unnecessary to repeat the details when considering the appeal of King. In the case of Garbutt, there are two appeals. Garbutt appeals on the ground that he should have had judgment for a greater amount; and the defendants, sureties on the contractors' bond, argue that Garbutt should recover nothing. The facts, to a large extent, are in little conflict. It seems that there is a patented process of laying pavement, the use of which process has become highly desirable in modern construction. Ordinarily, under the patent rights extant, use of the process could be curtailed or harsh and unusual terms imposed. On the other hand, if the process were never used, the patents would have little value. Accordingly, the patentee, though a state licensee of the patent, in August of 1927 granted to the city of Oakland the right and privilege of specifying the patented process in calls for bids on pavement work, and agreed to furnish the material and supplies used in the performance of the contract, in so far as use of the patent process was employed, at a stipulated figure. The agreement of the licensee ran in favor of all contractors or bidders who might elect to use the process aforesaid. The offer was made by California Vibrated Concrete Company, the then owner of the exclusive license privilege in and for Alameda county.

[1, 2] The Oakland Contracting Company was awarded a paving contract out of which the present litigation arises. The patented process was specified in this contract, and the contracting company thereupon entered into a written agreement with California Vibrated Concrete Company whereby the latter agreed to furnish to the contracting company certain material, equipment, labor, and service under the following terms and conditions, viz.: (1) The necessary machinery and special tools incident to the patented process, together with required surface stone; (2) operators, stone spreaders, and other labor to complete spreading and vibration of stone to the point of curage; (3) a supervising inspector. As full compensation, the concrete company was to receive eight cents per square foot of the pavement constructed. Within a few days of the execution of this contract, another agreement was entered into between the same parties. This latter agreement recited the former, and then provided that the contracting company should furnish material and all labor required in the use of the patented process. The trial court found this latter agreement to be a modification of the former. Appellant Garbutt contends that such a finding is unsupported, and he characterizes the latter contract as one of purchase and sale and entirely independent of the original agreement. As a basis of computation, it would make little difference how we classified the latter agreement. However, the status of each party to the transaction may be altered or changed according to the character of the instrument. The two contracts were between the same parties, and both were executed within a few days of each other. The contracting company, under its original contract with the city, had agreed and was bound to pave certain streets to the point of completion. The specifications requiring a patented process, it was necessary to secure the right and license to use the process patented. Accordingly, the first contract with the licensee required the latter to furnish certain equipment, labor, material, and supervision. The latter contract dealt with the same subject. The contracting company, in furtherance of its own contract, by the provisions of the latter contract with the licensee, were to furnish the materials and labor, leaving the licensee bound only to provide the special equipment and the inspector. It seems obvious that the two en-

gagements, relating to the same subject-matter and between the same parties, and executed at or about the same time, should be construed together in fixing the status, the rights, and the obligations of the parties. Appellant Garbutt argues that, by considering these agreements as distinct, and construing the latter as a contract of purchase and sale, his status is that of one who has completed the earlier contract by the furnishing of labor and materials in addition to the right to use the patented process, while, construing the two contracts as a whole, one modifying the other, we change his status from a conceded materialman to one of doubtful standing. Be that as it may, we adopt the finding of the trial court, and conclude that the latter agreement was a modification of the former.

[3] Under the contract as modified, there was earned the sum of $9,729.21. Garbutt admits having received $6,011.97, leaving a balance of $3,717.24, for which amount the court awarded him judgment. Upon this appeal Garbutt contends that the court should have awarded him an additional sum alleged as becoming due under an oral contract. The claim of lien filed by Garbutt set forth the amount originally due him as $14,808.31 upon which had been paid the sum of $6,011.97, leaving a balance of $8,796.34. The additional sum claimed approximates $5.000, and the record before us is somewhat hazy as to the basis of Garbutt's claim. Garbutt was not a witness at the trial. It is his contention here that, in addition to the written contracts providing for payment to him of a net of 3.83 cents per square foot, there was an additional oral contract under which he received $5,065. This sum he alleges was received, not as a payment upon the written contracts, but, as stated, he received it as payment under the terms of the oral agreement which added that amount to the contract price. The evidence supporting the claim is the testimony of one W. T. Chappe, who, with W. J. Curren, comprised the firm doing business as Oakland Contracting Company, the contractors. Chappe's testimony does not confirm the claim. While he is somewhat vague on the details, he testifies, however, that there were many discussions on the matter. His testimony is as follows: "In the first conversation, the $5,065 was to be in addition to the other sums of money paid under the written contract. There was a discussion as to that. Well, when we got the contract we got it for $9,000 [referring to the contract between Garbutt and the Oakland Contracting Company]; that was the written contract that was given to us. * * * The $5,000 was to apply on account of the contract, that was the way we understood it." Again, the witness testifies: "I know that the money was paid. * * * It was given on part of the license agreement for Excelsior Boulevard [the work here involved]. There was talk of a $14,000 royalty. We had the understanding that the contract would be written up with a $14,000 royalty. When we came to study the contract it was made for approximately $9,000. * * * The $14,000 figure was discussed verbally, but should have gone into the contract if it was going to go through." It is true that certain other excerpts from the testimony of the witness might lend support to appellant Garbutt's argument, but the foregoing remained uncontradicted.

[4] The court had before it the offer to the city of Oakland to furnish contractors the patent process for 8 cents per square foot, and had likewise before it the agreement of Garbutt, licensee of the process for Alameda county, with the contractors for that same amount. Any other secret oral agreement merited close scrutiny, and, where the evidence was indefinite and uncertain, the court was warranted in finding against such side agreement. Appellant Garbutt offered in evidence a letter written by W. J. Curren, partner in the Oakland Contracting Company. This letter acknowledges the claim of Garbutt for the full amount claimed. The trial court refused to admit the letter in evidence upon the ground that the same was written at a date subsequent to the dissolution of the partnership. There is sufficient evidence to establish this fact, notwithstanding the record does not disclose the exact date upon which the partnership was actually dissolved. The objection to the offer of the letter in evidence went further and specified as a ground of objection the lack of foundation as well as the general grounds of irrelevancy, incompetency, and immateriality. It was not shown that the partnership was in liquidation on the date of the letter; the only evidence on the subject was that the partnership had been dissolved. Section 1870, subd. 5, Code of Civil Procedure, permits proof of the act or declaration of a partner during the existence of the partnership. The letter on its face admitted that the claim of lien filed by Garbutt was correct in amount. The correctness of the amount depended upon the existence or nonexistence of an independent oral agreement, and the offer of the letter was for the purpose of establishing this said oral understanding. Under the written contracts in evidence, the amount claimed in the lien was not due. The only way that the lien claim could be held true and correct was by applying payments on a separate agreement. An exhaustive note on the subject is available in 73 A. L. R. beginning at page 459, wherein California is included among the jurisdictions excluding from evidence admissions made after dissolution. In volume 7, Uniform Laws Annotated, at page 20, the same rule is announced, and also in Rowley on Modern Law of Partnership, § 888. On the appeal of Garbutt the judgment is affirmed.

[5] The appeal of the sureties, Ford and Associated Gravel Company, will now be considered. This is an appeal from the judgment in favor of Garbutt. The first ground urged is that Garbutt has no capacity to sue. Garbutt alleges, and the court found, that he was at all times mentioned an individual doing business under the name and style of California Vibrated Concrete Company, and also the name of Vibrolithic Company of Oakland. These appellants, while they claim lack of capacity to sue, really seem to mean that Garbutt did not prove that at any of the times it was he who was doing business under either of the fictitious names. It is conceded that, at the time of trial and before the filing of his complaint, Garbutt had complied with the statutes requiring the filing and publication of certificates by persons doing business under fictitious designation. Granting this, these appellants urge that there is no evidence showing that he was so transacting business at the times here in question. The point is that there were other persons doing business under the designated titles at the time the contracts were entered into. We find sufficient in the record to support the finding. True, the evidence viewed from appellants' point, strengthened by inferences that may be permissible, might support a different conclusion. By the same token, similarly drawn inferences support the finding made.

[6, 7] The next contention is that the claim of Garbutt is not lienable under the provisions of section 19 of the Improvement Act of 1911 (as amended by St. 1929, p. 1655, § 3). This section provides that the bond shall inure to the benefit of any and all persons who perform labor on, or furnish materials to be used in, said work or improvement. It is then argued that Garbutt furnished neither labor nor materials; that the extent of his contribution to the work was the permission to use the patented process. There was something more than this. Garbutt furnished for use the appliances necessary to perform the work according to the patented process and furnished an inspector to advise the proper method of performance. Section 79e of the Improvement Act (added Stats. 1927, p. 636, § 7) contemplates the use of patented processes such as a city council may adopt. The point is disposed of in United States Fidelity & Guaranty Co. v. California-Arizona Construction Co., 21 Ariz. 172, 186 P. 502, 508. Without elaborate quotation from this authority, we may note the following: "The right to use the patented * * * process is as essential to the carrying out of the contract as the physical ingredients used in the performance of the work. Within the terms of the statute and the bond liberally construed a charge of this kind is therefore as much 'material' as the tangible, physical articles entering into the composition of the completed work and comes within the character of indebtedness secured by the terms of the bond." Appellant seeks to hold a construction of section 19 of the Improvement Act to the same strictness as a construction of a mechanic's lien. The weight of modern authority opposes such a course. A. L. Young Machinery Co. v. Cupps, 213 Cal. 210, 2 P.(2d) 321, and cases therein cited. Where a patented process is specified, the only way of performing the contract is to secure the right to the use of the patent. Without this the contract must fail. This seems almost self-demonstrative. The license is the most essential "material" going into the work. Under a liberal construction of the act, mindful of its aims, the word "material" would be sufficiently broad to include supplies of all sorts or kinds, and anything which is supplied comes within that word.

[8] Next, appellants argue that, because Garbutt was the licensee for Alameda county alone, the real owner of the patent was the one who had the claim. We find no merit in this claim, and no offer or attempt to show that at any time the original patentee entered into the negotiations or made any claim adverse to Garbutt or prejudicial to appellants. The judgment in favor of Garbutt is affirmed on the appeal of the sureties Ford and the gravel company.

[9, 10] We next take up the appeal of King. The judgment, as we have noted, allows Garbutt's claim for the entire work and awards King only a judgment against Garbutt. King now contends that Garbutt was a subcontractor whose obligations were protected by the bond, and not a materialman as found by the court. As before noted, we hold Garbutt to have been a materialman and this conclusion, more favorable to Garbutt than a strict construction would permit, suffices to answer the appellant King. With Garbutt a materialman furnishing materials to the contractor, the appellant King merely sold or sublet to Garbutt the license on the patented process for the county of Alameda. King was never a party to any of the contracts now before us. His relationship with Garbutt was entirely independent of any of the contractors in the instant case. The relationship of debtor and creditor existed between King and Garbutt solely by reason of their own contract regarding assignment of the license in the area noted. The statute would be impracticable of enforcement if one who supplied materials to a materialman could recover on the bond, as such a holding would continue indefinitely the chain of potential claimants. Under the judgment here, the condition of the bond is fulfilled. The bond satisfies the claim of Garbutt who furnished the material and in so doing pays for all material entering into the construction. Whether this paid materialman pays his vendor, or whether that vendor pays the jobber, or the jobber the manufacturer, are questions be-

yond the care of the sureties. Berger Mfg. Co. v. Lloyd, 209 Mo. 681, 108 S. W. 52; State ex rel. v. Warren Construction Co., 129 Or. 58, 276 P. 260.

The entire case was presented to the trial court in a difficult and halting manner; the identity of the parties seemed indistinct and the shifting of premises somewhat fatiguing. Under the various contracts in evidence, all that King and Garbutt did was to furnish certain materials and equipment, together with an inspector. The modified contract left the furnishing of material, the hauling, and the labor with the contracting company. Garbutt was the owner of the process, in as far as the right to use the same in Alameda county was involved. The process was used, and Garbutt received the agreed price therefor.

In all respects and as to all parties the judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

131 Cal.App. 496

ROOME et al. v. REAL ESTATE INV. CO. et al.

Civ. 7719.

District Court of Appeal, Second District, Division 2, California.

April 28, 1933.

1. Fraud ⇐59(2).

Purchaser must accept burden of contract with its benefits with right to recover for fraud where benefits received are not those he was entitled to receive under vendor's representations.

2. Appeal and error ⇐1064(1).

Where realty would have been worth purchase price of $18,000 if represented improvements in district had been made, but market value was only $2,000 without them, instruction that purchasers' measure of damages was difference between purchase price and market value was not prejudicial, where there was no evidence of purchase for resale.

3. Fraud ⇐34.

Under claim of fraud purchaser may withhold payment of purchase price of realty pending action for alleged damages, but must be willing and able to pay if and when liable therefor.

4. Evidence ⇐353(9).

In action for damages by husband and wife against vendor of realty, land contract signed by husband alone was admissible.

Appeal from Superior Court, Los Angeles County; H. S. Gans, Judge.

Action by F. M. Roome and another against the Real Estate Investment Company and another. From judgment for plaintiffs, defendants appeal.

Affirmed.

C. E. McDowell, of Los Angeles, for appellant Real Estate Inv. Co.

Howard F. Shepherd and James M. Carter, both of Los Angeles, for appellant Security First Nat. Bank of Los Angeles.

George Acret, of Los Angeles, for respondents.

CRAIG, Justice.

Certain real estate having been purchased under contract from the Security First National Bank of Los Angeles, a corporation, herein for convenience termed the bank, as trustee, through the Real Estate Investment Company, a corporation, and its representatives, alleged statements as to contemplated local improvements failed of fulfillment. The buyers instituted an action for damages claimed to have been sustained because of a failure of asserted increase in values of the properties affected, which was decided in favor of the plaintiffs, and the defendants appealed.

[1, 2] The principal ground assigned for reversal consists of a controversy as to the basis of computation in arriving at the amount of damage. The complaint alleged and it was testified that the sales company and its agents represented that one hundred new houses were immediately to be constructed upon the same tracts under existing contracts; that a school would be built for the ensuing semester; and that motion picture industries were purchasing and would be erecting studios in the near future upon properties in the immediate vicinity. It is not contended that any of these improvements were consummated, nor that any contract for the construction of said houses existed. It appeared that upon discovery of the true facts the respondents complained to the vendors and were advised to make no further payments on account of the principal. Witnesses swore that the value of the lots in question at the time of said sale and at the time of the trial was about the same, and that its fair value in view of all purposes to which the same was on said dates best adapted was its market value. It also was testified that the purchase price in the vendees' contracts named was the value which said property would have had if the representations prompting such sale had been fulfilled. It is insisted that the trial court erred in applying the rule and in charging the jury that damages, if any, should be determined by deducting

from the purchase price the market value; and that the amount of any judgment should be based upon the difference between such market value and that which it would have had if said alleged representations had been true. The respondents contracted to pay therefor the total sum of $18,000, and the jury would have been justified in finding upon substantial evidence before them that the market value at the time of the sale was $2,000. Expert witnesses testified that with the improvements said property would have had a possible value of about $18,000. As indicated by authorities invoked by both parties, one rule "refuses to recognize as a legitimate element of damage the prospective profits which the vendee expected to make by his transaction. It points out that damages at law are compensatory merely (where not strictly exemplary), and make good to an injured party in terms of money the loss or injury which he has sustained, so that, if a vendee buys and pays $2,000 for a piece of land worth only $100, he may either by rescinding recover the $2,000 with interest for its detention, and thus be made whole, or he may retain the land worth $100 and recover back $1,900 of the purchase price, and thus be made whole." Hines v. Brode, 168 Cal. 507, 143 P. 729, 730. Under the rule of this state "the vendee is obliged to accept the burden of the contract with its benefits, according to its terms, with the right to a recovery for the fraud based upon the fact that the benefits which he receives are not those which under the representations of the vendor he was entitled to receive." McKeever v. Locke-Paddon Co., 58 Cal. App. 51, 207 P. 1040, 1042. Since the "benefits" anticipated consisted of increasing values commensurate with the price which the respondents had agreed to pay, and there is no evidence of their contemplation of a sale for profit, it does not appear that had the representations been true the result would have been different or that the appellants were prejudiced by the asserted error.

[3] It is contended that the purchasers waived by cessation of payments upon their contracts the right to claim damage, for the reason that time was of their essence and that the vendors had elected to declare the principal due and payable. Under a claim of fraud in such a case the buyer will be permitted to withhold payment of the purchase price pending a suit for alleged damage, but must be willing and able to pay if and when liable therefor. Pembrook v. Houston, 41 Cal. App. 54, 181 P. 828. While the evidence was such as might entitle a court or jury to view it as conflicting, in this respect, and the contention becomes untenable upon appeal, the fact remains that a suit pending precluded its assertion under the law.

[4] Objections to introduction in evidence of the contracts of sale were interposed mainly upon the ground that the plaintiff, Myrtle Roome, was not a party thereto. It is argued that the contracts were personal property and under control of the plaintiff F. M. Roome, that there was no evidence that said lots were purchased as community property, and that her joinder as a party plaintiff was calculated to create sympathy with the jury and to permit her to relate conversations between herself and the defendants' agents not previously communicated to her coplaintiff. It appearing that she visited the townsite on several occasions she testified: "* * * I talked with Mr. Roome in the evening, did not say much about the lot, only I had made a deposit of $50.00 to hold these lots, because Mr. Gunderman told me that there were several looking at them and if I did not make a deposit the lots may be gone before I would take the chance to bring my husband"; that they had "agreed to buy this property together." To a question propounded while Roome was on the stand, "The contract is in my name. Was it being bought for you alone?" he answered, "No, sir, it was for Mrs. Roome and myself."

It may be added that the contracts were clearly admissible without regard to Mrs. Roome's being a party to the action. These agreements being between plaintiff F. M. Roome and the defendant made them admissible regardless of the existence of other parties thereto.

From this and other portions of the record it cannot be said that the trial court was not fully justified in declining to exclude the documents in question from consideration. Minor incidental questions presented by the appellant are covered by what has been said.

The judgment is affirmed.

We concur: WORKS, P. J.; STEPHENS, J.

ETHEL D. COMPANY v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al.*

Civ. 1210.

District Court of Appeal, Fourth District, California.

April 18, 1933.

Rehearing Denied May 18, 1933.

Hearing Granted by Supreme Court June 15, 1933.

1. Master and servant ⇐387.

"Serious misconduct" of employer warranting additional compensation for injury means conduct which employer knew or should have known to be likely to jeopardize employee's safety (St. 1917, p. 834, § 6(b), as amended by St. 1929, p. 430).

[Ed. Note.—For other definitions of "Serious Misconduct," see Words and Phrases.]

2. Master and servant ⇐414.

Whether employer was guilty of serious misconduct in not providing handholds required by Industrial Commission's safety order on ladder for ascending to roof of belthouse of oil derrick so as to warrant additional compensation for employee's injury *held* fact question for referee (St. 1917, p. 834, § 6(b), as amended by St. 1929, p. 430).

3. Master and servant ⇐414.

What referee observed on visit to place of employee's accident was evidence in compensation case.

4. Master and servant ⇐405(6).

Evidence warranted Industrial Commission's finding of employer's serious and willful misconduct in not providing handholds, required by commission's safety order, on ladder to roof of belthouse of oil derrick, warranting additional compensation to injured employee (St. 1917, p. 834, § 6(b), as amended by St. 1929, p. 430).

5. Master and servant ⇐417(7).

Annulment of award of Industrial Accident Commission is authorized only when commission acts beyond powers or when award is procured by fraud or is unreasonable, or fact findings do not support it.

6. Master and servant ⇐417(7).

Court, determining whether award of Industrial Commission should be annulled, cannot review findings except to determine whether there is any supporting evidence.

7. Negligence ⇐136(25).

Question of proximate cause of injury is one to be determined by trier of facts from facts developed by evidence.

8. Master and servant ⇐405(4).

Industrial Commission's finding that employer's failure to provide handholds required by commission's safety order was proximate cause of injury sustained by employee falling off ladder *held* warranted by evidence (St. 1917, p. 834, § 6(b), as amended by St. 1929, p. 430).

9. Master and servant ⇐352.

Employer's duty to comply with Industrial Commission's safety order was owed directly to employee.

10. Master and servant ⇐352.

Industrial Commission, in administrative capacity, cannot waive violation of duty owing directly to employee from employer.

11. Master and servant ⇐416.

Findings required in workmen's compensation cases are findings of ultimate facts.

12. Master and servant ⇐416.

Industrial Commission's finding that employee's injury was caused by serious and willful misconduct of employer was not defective because not specifying particular act or omission of employer (St. 1917, p. 834, § 6(b), as amended by St. 1929, p. 430).

Finding was not defective, because it could be made certain by reference to record, since only dereliction of employer for which it was claimed injured employee was entitled to additional compensation under St. 1917, p. 834, § 6(b), as amended by St. 1929, p. 430, was failure of employer to have provided secure safety handholds for ladder to roof of belthouse of oil derrick, and, in all other respects, record showed that construction of ladder complied fully with safety order of commission.

13. Master and servant ⇐416.

Findings in workmen's compensation case are sufficient if they can be made certain by reference to record.

14. Master and servant ⇐416.

Industrial Commission's finding that injuries were caused by serious and willful misconduct of employer, a corporation, *held* not fatally defective because not stating it was misconduct of executive or managing officer, or general superintendent (St. 1917, p. 834, § 6(b), as amended by St. 1929, p. 430).

"Corporation" is a purely legal fiction possessing neither physical nor mental attributes of a human being. Finding was not defective because record showed that certain person was general manager of employer at time accident occurred, and that he was also superintendent, and it did not appear that any person other than he exercised any control or supervision over oil well where accident occurred, so that only individual who could be charged with serious and willful misconduct was man who had entire supervision and control of oil well.

[Ed. Note.—For other definitions of "Corporation," see Words and Phrases.]

BARNARD, P. J., dissenting.

*For subsequent opinion see 28 P.2d 919.

Proceeding under the Workmen's Compensation Law by J. L. Johnston, claimant, for injuries, opposed by Ethel D. Company, employer. The Industrial Accident Commission awarded a certain sum to be paid by the insurance carrier, and an additional amount against the employer based on a finding of serious and willful misconduct, and employer brings certiorari to have the order awarding compensation annulled.

Award affirmed.

Rehearing denied; BARNARD, P. J., dissenting.

Everts, Ewing, Wild & Everts and L. N. Barber, all of Fresno, for petitioner.

A. I. Townsend and Everett A. Corten, Asst. Atty., both of San Francisco, for respondent Industrial Accident Commission.

JENNINGS, Justice.

This is a proceeding in certiorari to review an order of the Industrial Accident Commission awarding compensation to J. L. Johnston for injuries sustained by him during the course of his employment with the petitioner. The order of the commission awarded to the injured employee the sum of $1,324.70 to be paid by the insurance carrier and an additional amount of $662.35 against petitioner based on a finding of serious and willful misconduct on the part of petitioner. That part of the order awarding additional compensation against petitioner is sought to be annulled by this proceeding.

Respondent J. L. Johnston was employed as a pumper by petitioner, a corporation, which is engaged in the business of producing oil in Kern county, Cal. On December 5, 1929, Johnston ascended to the roof of the belthouse of an oil derrick on a well owned and operated by petitioner for the purpose of oiling the walking beam which was above the belthouse roof. The ascent was made by means of a ladder which extended from the floor of the derrick to the roof of the belthouse. In constructing this ladder, one of the braces of the Sampson post was utilized as the right-hand stringer, and the ladder rungs were fastened to this brace and to a left-hand stringer composed of 2-inch by 6-inch timber. The brace of the Sampson post was composed of 6-inch by 6-inch timber. The ladder rungs were of 2-inch by 6-inch timber and were uniformly spaced at a vertical distance of 11 inches. The width of the ladder was 16½ inches in the clear between the stringers. The ladder was not equipped with a railing nor with handholds. There was, however, a 2-inch by 4-inch post supporting the railing of the runway which extended along the side of the belthouse, and a bolt which extended through the Sampson post 29 inches above the level of the top rung of the ladder projected from the Sampson post on the side nearest to the belthouse for a distance of 2 or 3 inches. After Johnston had completed the task of oiling the walking beam he prepared to descend the ladder with his back thereto. He placed his right foot on the top rung of the ladder, the left foot being on the belthouse roof. When he placed his weight on the right foot preparatory to lifting the left foot from the roof to the ladder, the right foot slipped and he was precipitated a distance of approximately 18 feet to the derrick floor, sustaining thereby the injuries for which he was awarded compensation.

The Industrial Accident Commission made the following finding: "Said injury was caused by the serious and wilful misconduct of the employer, a corporation." The statute (St. 1917, p. 834, § 6(b), as amended by St. 1929. p. 430) which authorizes the allowance of an additional award against an employer amounting to 50 per cent. of the disability compensation contains the following language: "Provided, that where the employee is injured by reason of the serious and wilful misconduct of the employer * * * or if a corporation, on the part of an executive or managing officer or general superintendent thereof, the amount of compensation otherwise recoverable for injury or death, as hereinafter provided, shall be increased one-half." It is undisputed that the only dereliction on the part of the employer, petitioner herein, which, under the circumstances shown by the record, could justify the award of additional compensation against petitioner amounting to 50 per cent. of the disability compensation, consists of the failure of petitioner to provide secure handholds at the top of the ladder, heretofore described. Subdivision (f) of General Petroleum Industry Safety Order 1618, effective March 1, 1924, provides: "Secure handholds shall be provided at the top of the ladder."

[1, 2] Petitioner's chief contention is that the commission's finding that the injuries of respondent Johnston were caused by the serious and willful misconduct of petitioner is lacking in evidentiary support. In this connection, it is urged that at most there was a purely technical violation of subdivision (f) of Safety Order 1618, whose language requiring that secure handholds shall be provided is obviously vague and indefinite, and, further, that there was substantial compliance with the subdivision in that the post supporting the railing of the runway, which extended along the side of the belthouse and the projecting end of the bolt which passed through the Sampson post, were readily accessible to any one on the top rungs of the ladder and furnished covenient and adequate handholds.

"Serious misconduct" of an employer, within the meaning of the statute permitting the allowance of compensation amounting to 50 per cent. of the compensation for disability, was defined in E. Clemens Horst Co. v. Industrial Accident Commission, 184 Cal. 180, 188, 193 P. 105, 108, 16 A. L. R. 611, to be "conduct which the employer either knew, or ought to

have known, if he had turned his mind to the matter, to be conduct likely to jeopardize the safety of his employees." In the same case it was said that, in order that serious misconduct should also be willful misconduct within the meaning of the statute, the appearance of circumstances surrounding the act of commission or omission which "evinced a reckless disregard for the safety of others, and a willingness to inflict the injury complained of," would amount to sufficient proof of knowledge by the employer of the unsafe condition of the premises to fulfill the requirement that the employer charged with willful misconduct shall have knowledge that the act of commission or omission is wrongful. It may be conceded that, generally speaking, the mere failure of an employer to comply literally with the requirement of a safety order of the Industrial Accident Commission does not of itself justify a finding that the employer is guilty of serious and willful misconduct. In the final analysis, the circumstances presented by the evidence in any case will be determinative of the question of whether or not the employer's act may properly be characterized as "serious and willful misconduct." What would amount to no more than simple negligence in one situation may well be denominated serious and willful misconduct in another. Hoffman v. Dept. of Indus. Relations, 209 Cal. 383, 390, 287 P. 974, 68 A. L. R. 294. In the instant case the continued presence upon and about the derrick of so slippery a substance as crude oil would seem to point unmistakably to the necessity of strict compliance with the provisions of the commission's Safety Order 1618 and to suggest to the person in charge of the oil well that a ladder utilized by workmen should be provided with secure handholds rather than with such makeshift supports as the end of a bolt or an upright post supporting a railing. At all events, the question of whether, under the circumstances, the employer should have known that the failure to provide more secure and more readily accessible handholds would be so likely to jeopardize the safety of employees as to evince a reckless disregard for their safety and a willingness to inflict injury, was a question of fact to be determined by the referee to whom the evidence in the case was submitted.

[3, 4] During the course of the hearing, it was suggested by petitioner's counsel that the referee visit the scene of the accident and make an inspection of the premises. This was accordingly done. What the referee observed on this visit was evidence in the case. People v. Milner, 122 Cal. 171, 54 P. 833; Hatton v. Gregg, 4 Cal. App. 537, 540, 88 P. 592; Wright v. Locomobile Co. of America, 33 Cal. App. 694, 167 P. 407; Vaughan v. County of Tulare, 56 Cal. App. 261, 265, 205 P. 21; MacPherson v. West Coast Transit Co., 94 Cal. App. 463, 466, 271 P. 509. Undoubtedly, the knowledge gained by this visit had much to do with the conclusions embodied in the referee's report to the commission which forms the basis for the findings and award of the commission. The knowledge thus acquired may in and of itself amply justify the finding of serious and willful misconduct on the part of petitioner. It is not available to us other than it is to some extent reflected in that portion of the referee's official report to the commission which is included in the answer of respondent Industrial Accident Commission to the petition. Therein is set forth in the language of the referee a description of the visit made by him to the scene of the accident, the pertinent observation that he descended the ladder in the same manner in which respondent Johnston testified that he descended "because I should have certainly been afraid to do so in any other manner," together with the referee's observations respecting the nonaccessibility of the post of the railing and the projecting end of the bolt which petitioner contends furnished convenient handholds and amounted to substantial and sufficient compliance with the commission's safety order. To sustain petitioner's contention in this regard would mean that we should have to reject the referee's expressed conclusion respecting the nonaccessibility of those parts of the derrick relied upon by petitioner as affording secure and convenient handholds. This we are not justified in doing unless the other evidence which is presented by the record produces settled conviction that the referee's conclusion respecting the nonaccessibility of the claimed handholds was incorrect. Careful examination of the record has failed to produce such conviction, and we therefore conclude that the finding of serious and willful misconduct is not so entirely lacking in evidentiary support as to require annulment of the award.

[5, 6] Furthermore, in this connection, it is to be borne in mind that, in a proceeding of this character, where this court is asked to review an award of the Industrial Accident Commission, annulment of the award is authorized only when the commission acted without or beyond its powers, or when the award was procured by fraud, or is unreasonable, or when the findings of fact do not support it. The findings themselves are not subject to review except in so far as they may have been made without any evidence whatever in their support. Even then a review of the findings is based upon the theory that the commission had no jurisdiction to make a finding entirely unsupported by evidence rather than upon the theory usually presented upon appeals that findings of a trial court are lacking in sufficient evidentiary support which imposes upon the reviewing tribunal the duty of weighing evidence to arrive at a determination of that proposition. Dearborn v. Industrial Acc. Com., 187 Cal. 591, 594, 203

P. 112; Hartford A. & I. Co. v. Industrial Acc. Com., 202 Cal. 688, 692, 262 P. 309, 58 A. L. R. 1392; Independence Indem. Co. v. Industrial Acc. Com., 203 Cal. 51, 56, 262 P. 757; Newton v. Indust. Acc. Com., 204 Cal. 185, 189, 267 P. 542, 60 A. L. R. 1279.

[7, 8] It is further objected that the finding of the commission that the failure of petitioner to have provided secure handholds was the proximate cause of the injuries sustained by respondent Johnston is not warranted by the evidence. In support of the objection thus presented it is argued that the sole proximate cause of the injuries sustained was the negligence of the employee in attempting to descend the ladder in the manner in which he did as though he were descending a flight of stairs rather than by using both hands and feet in the manner which a person usually does in descending a ladder. It is pointed out that Johnston could have rendered the beginning of his descent more steady by grasping either the supporting post of the railing of the runway or the portion of the bolt projecting from the Sampson post and that by failing to do so and by stepping on the ladder facing out from it as though he were walking down a stairway he was himself guilty of negligence, which was the sole proximate cause of the fall and the injuries resulting therefrom. Respondent Johnston was questioned at length as to these matters on cross-examination. He testified that he always descended the ladder in the manner in which he began the descent on the date of the accident for the reason that the ladder was too nearly vertical to permit descent in the usual manner, and that in making the descent facing out from the ladder the upright post supporting the railing of the runway was behind him, making it impracticable for him to utilize it as a handhold. It further appears from his testimony that, as he prepared to descend the ladder on December 5, 1929, he held in one hand a quart can fastened to the end of a stick three feet in length, and that the can contained an unspecified quantity of crude oil. The general superintendent of petitioner admitted upon cross-examination that a man descending the ladder face outward would be compelled to reach behind him in order to grasp the upright post of the runway railing, but stated that he could utilize the end of the bolt protruding from the Sampson post as a handhold if he desired.

It is the general rule that the question of the proximate cause of injury is one to be determined by the trier of facts from the facts and circumstances developed by the evidence. In the instant case, it is to be remembered that the referee visited the scene of the accident and observed the ladder, its manner of construction, and the post and protruding bolt which it is claimed furnished secure handholds. As above noted, the knowledge thus acquired by the trier of facts was evidence, and it may well be that this evidence in and of itself was sufficient to justify the finding that the failure of petitioner to provide secure handholds was the proximate cause of the fall and the ensuing injuries. At all events, it does not sufficiently appear from the record that respondent Johnston was negligent in attempting to descend the ladder in the manner above described, nor that, incumbered as he was by the oil can in his hand, he was negligent in failing to grasp the upright post some distance behind him or the protruding bolt some distance in front of him. Furthermore, if it be assumed that Johnston was negligent in attempting to descend the ladder facing outward, it does not necessarily follow that his negligence in this regard was the proximate cause of the injuries which he sustained. The fact still remains that the ladder was not equipped with secure handholds and that the post and projecting bolt were not so readily accessible to him as to afford adequate security for his descent under the circumstances narrated.

[9, 10] A further contention is presented that the evidence shows that the oil well where the accident occurred had been visited on various occasions by inspectors of the State Industrial Accident Commission and that such inspectors had recommended various unspecified changes which were always made, but that at no time was any recommendation made with respect to the ladder. From this it is argued that the Accident Commission in its administrative capacity, in effect, approved the ladder and its method of construction and that such approval is sufficient to obviate the charge of serious and willful misconduct in having failed to provide secure handholds. The contention is untenable. In the first place, the evidence with respect to the visits of inspectors is too vague to support so bold an argument. More important, the duty of petitioner to comply with the safety order of the Accident Commission was one that petitioner owed directly to its employees. It is their safety which is at stake when there is noncompliance with the orders of the commission, the very object and purpose of which is obviously to insure the maximum safety to individuals engaged in the performance of work which presents unusual hazards and dangers. The Industrial Accident Commission, in its administrative capacity, possesses no authority to waive or consent to the violation of a duty owing primarily and directly to the employee from the employer.

[11-13] It is further contended that the commission's findings are fatally defective in that they fail to specify what was the particular act or omission of petitioner which was concluded to amount to serious and willful misconduct. This contention is likewise without merit. It is well established that findings

are required to be findings of ultimate facts. 24 Cal. Jur., p. 968; Coit v. Western Union Telegraph Co., 130 Cal. 657, 63 P. 83, 53 L. R. A. 678, 80 Am. St. Rep. 153; Talbot v. Ginocchio, 18 Cal. App. 390, 123 P. 223. The ultimate fact upon which the right of respondent Johnston to receive an award of additional compensation depended was that his injuries were caused by the serious and willful misconduct of his employer. Clarke v. Industrial Acc. Com., 87 Cal. App. 766, 771, 262 P. 471. It is also the rule that findings are sufficient if they can be made certain by reference to the record. 24 Cal. Jur., p. 964; Kennedy, etc., Co. v. S. S. Const. Co., 123 Cal. 584, 56 P. 457. Application of this latter rule establishes the sufficiency of the findings. The only dereliction of petitioner for which it was claimed the injured employee was entitled to be awarded additional compensation was the failure of petitioner to have provided secure handholds for the ladder. In all other respects, it was shown that the construction of the ladder complied fully with the safety order of the commission, and there was no pretense by the injured employee that it did not, with the single exception that it was not provided with secure handholds.

[14] The final contention advanced by petitioner is that the finding of the commission that the injuries were caused by the serious and willful misconduct of the employer, a corporation, is fatally defective in that it fails to state that the injuries were caused by the serious and willful misconduct of an executive or managing officer or general superintendent of the corporation. The statute which authorizes the recovery of additional compensation provides, as heretofore noted, that, where the employee is injured by reason of the serious and willful misconduct of the employer, "or if a corporation, on the part of an executive or managing officer or general superintendent," additional compensation may be awarded. It is obvious that a corporation is incapable of willful misconduct. Willfulness presupposes mentality. A corporation is a purely legal fiction possessing neither the physical nor mental attributes of a human being. The record herein shows that H. F. Owen was general manager of the petitioner corporation at the time the accident occurred, and that from 1913 until 1929 he was superintendent of petitioner, and that all properties of petitioner were under his supervision as superintendent. It does not appear from the record that, at any time material to the inquiry herein, any person other than Owen exercised any control or supervision over the oil well where the accident occurred. It is thus apparent that the only individual who could be charged with serious and willful misconduct was the man who had entire supervision and control of the oil well. Since the commission's finding can so readily be rendered definite and certain by reference to the record, no difficulty is encountered in declaring that the finding is not fatally defective in the respect claimed by petitioner.

For the reasons stated, the award is affirmed.

I concur: MARKS, J.

BARNARD, Presiding Justice (dissenting).

I dissent.

A penal provision of this nature should not be given effect, in addition to the regular compensation provided, in the absence of a clear and satisfactory showing. In Helme v. Great Western Milling Co., 43 Cal. App. 416, 185 P. 510, 512, the court said: " 'Willful misconduct' means something different from and more than negligence, however gross. The term 'serious and willful misconduct' is described by the Supreme Judicial Court of Massachusetts as being something 'much more than mere negligence, or even gross or culpable negligence,' and as involving 'conduct of a quasi criminal nature, the intentional doing of something either with the knowledge that it is likely to result in serious injury or with a wanton and reckless disregard of its probable consequences.' In re Burns, 218 Mass. 8, 105 N. E. 601, Ann. Cas. 1916A, 787. The mere failure to perform a statutory duty is not, alone, willful misconduct. It amounts only to simple negligence. To constitute 'willful misconduct' there must be actual knowledge, or that which in the law is esteemed to be the equivalent of actual knowledge, of the peril to be apprehended from the failure to act, coupled with a conscious failure to act to the end of averting injury."

To support a finding of serious and willful misconduct it should not be necessary to rely upon an expressed conclusion or upon an inference that something seen on a personal inspection may have been sufficient to support the same. While implied knowledge "of the peril to be apprehended from the failure to act, coupled with a conscious failure to act to the end of averting injury," may be sufficient to constitute willful misconduct, it seems to me that no such knowledge with failure to act is to be attributed to an employer for failing to anticipate that an employee will walk backward down a ladder "too nearly vertical to permit descent in the usual manner," without a more substantial showing than is here made.

131 Cal.App. 418

McPHEETERS v. McMAHON.

Civ. 8739.

District Court of Appeal, First District, Division 1, California.

April 26, 1933.

Hearing Denied by Supreme Court June 23, 1933.

1. Injunction ⇐144, 145, 171, 173.

To justify issuance of restraining order in first instance, or continuance thereof, it must appear from verified complaint or from affidavit that sufficient grounds exist therefor (Code Civ. Proc. § 527).

2. Nuisance ⇐31.

Complaint *held* insufficient to authorize temporary restraining order or preliminary injunction against conducting dance hall being reconstructed near hospital on theory that dance hall was nuisance (Code Civ. Proc. § 527).

The principal allegations in complaint were to effect that, while dance hall was conducted by owners, managers, or lessees prior to the fire which destroyed it, some of its patrons or visitors disturbed peace and quiet of neighborhood and of patrons and employees of hospital by loud and tumultuous laughter and obscene and profane language, and by unnecessary racing of engines in their automobiles and unnecessary honking of the horns thereof, and that such conditions would be repeated at frequent intervals whenever a dance was given at such hall and would continue indefinitely.

3. Nuisance ⇐3(9).

Dance hall is not per se a "nuisance," and conducting thereof or of public dances therein is lawful business.

[Ed. Note.—For other definitions of "Nuisance," see Words and Phrases.]

4. Pleading ⇐72.

Though prayer is not part of complaint, it may properly be consulted in determining whether pleading was intended to include any specific character of relief or to show what kind of case plaintiff supposes he has made.

5. Nuisance ⇐31.

Temporary restraining order and preliminary injunction, absolutely enjoining operation or maintenance of premises as dance hall, *held* too sweeping, even if dance hall as conducted constituted nuisance.

6. Injunction ⇐1.

Power to grant injunction should be exercised only when right is clear and injury is impending and threatened.

7. Nuisance ⇐37.

Conduct of defendant's entire business should not be enjoined where it is not nuisance per se, if less measure of restriction will afford plaintiff relief to which he may be entitled.

8. Nuisance ⇐37.

Dance hall not being nuisance per se, injunction should not be granted further than to enjoin manner of conducting it so far as such conduct constitutes nuisance.

9. Injunction ⇐120.

In proper case, demurrer may be sustained to complaint, and amendment allowed without prejudice to preliminary restraining order or temporary injunction already granted.

Appeal from Superior Court, Stanislaus County; J. C. Needham, Judge.

Action by E. R. McPheeters against Teddy McMahon and others. From orders denying a motion to dissolve restraining order and granting temporary injunction, named defendant appeals.

Reversed, with directions.

C. W. Durbrow, of San Francisco, and Hawkins & Hawkins, of Modesto, for appellant.

Roy B. Maxey and J. M. Walthall, both of Modesto, for respondent.

COMSTOCK, Justice pro tem.

Respondent brought this action on April 1, 1932, against the appellant and certain other persons to secure an injunction prohibiting them using or conducting certain premises in the city of Modesto as a dance hall, or giving dances therein, or permitting them to be so used.

The court below issued a temporary restraining order upon the verified complaint, without notice. An order to show cause why a preliminary injunction should not be granted was issued, returnable April 9, 1932. On April 8, 1932, the defendant Teddy McMahon, appellant herein, served and filed a general demurrer to the complaint and an affidavit in opposition to the granting of a preliminary injunction. The other defendants did not appear. Counsel for the parties so appearing stipulated in open court that a hearing might be had on said 8th day of April, 1932, on the demurrer and order to show cause. It appears from the bill of exceptions that on said day the plaintiff had witnesses in court and was prepared to present oral testimony in support of his application, but that counsel for the defendant McMahon stated in open court that it would not be necessary to take the testimony of any witnesses, and that said defendant's demurrer was his answer to the order to show cause, and that the court thereupon excused the witnesses and proceeded with the hearing of the application for a preliminary injunction upon the complaint and said demurrer. Both matters were then

argued and submitted for decision, and the court took them under advisement. Thereafter, on April 18, 1932, and before the court had passed upon the demurrer and application for preliminary injunction, upon moving papers duly served and filed, the defendant McMahon moved to dissolve the temporary restraining order.

The ground of the motion which we deem most important is that the complaint did not state facts sufficient to constitute a cause of action. The motion was made and presented upon the notice of motion, the pleadings on file, and the affidavit of the defendant McMahon. The court thereupon denied the motion to dissolve the temporary restraining order and sustained the demurrer and gave the plaintiff ten days' time to amend his complaint. It further ordered that, upon plaintiff filing a bond in the sum of $1,000 within forty-eight hours of the making of said order, he should be granted a preliminary injunction as prayed for. All of said rulings and orders were made on April 18, 1932, and entered as parts of one minute order. On April 20, 1932, the court issued its preliminary injunction. An amended complaint was served and filed on April 22, 1932, and on April 25, 1932, the defendant McMahon served and filed two notices of appeal; one appeal being from the order denying the motion to dissolve the temporary restraining order, and another from the order granting the preliminary injunction.

[1] The ruling of the trial court in sustaining the demurrer is not before us for review, but its correctness is involved in the question of whether the court erred in denying appellant's motion to dissolve the restraining order and in issuing the preliminary injunction, for, to justify the issuance of a restraining order in the first instance, or the continuance of it in force, it must appear from the verified complaint, or from affidavit, that sufficient grounds exist therefor. Code Civ. Proc. § 527.

The original complaint is defective in several particulars. We shall not notice in detail the defects which rendered it demurrable, in view of the conclusions herein reached as to its insufficiency to support the injunctive orders. The substance of the complaint is as follows: That plaintiff owns and conducts a hospital within 180 feet from the dance hall premises; that for some time prior to 1931 a dance hall was operated on said premises by the owners, managers, or lessees thereof, at which public dances were held; that some of the patrons or visitors of such dances, while patrons or visitors at said dance hall, disturbed the peace and quiet of the people in the neighborhood, and particularly disturbed the peace and quiet of plaintiff and of his patrons and employees in said hospital, by loud and tumultuous laughter and obscene and profane language, and by unnecessary racing of the engines of their automobiles and unnecessary honking of the horns thereof; that in 1931 the dance hall was destroyed by fire; that plaintiff is informed and believes and therefore states as a fact that the dance hall is being reconstructed upon said premises and upon completion will again be occupied and used as a dance hall and for public dances and other gatherings of people, and that the said condition of said disturbances and annoyances will be repeated at frequent intervals and whenever a dance is given in said dance hall, and will continue indefinitely unless restrained; that the continued repetition of said disturbances and annoyances will cause a considerable number of people and residents of the neighborhood of said dance hall and particularly the plaintiff and the patrons and employees of plaintiff's hospital great discomfort and annoyance, which has been and will continue to be injurious to the health and offensive to the senses of a considerable number of people residing in said neighborhood, and particularly to the plaintiff and his said patrons and employees, and will greatly depreciate the value and use of the property of the said residents in said neighborhood, and particularly the value and use of the said property of plaintiff; that plaintiff is informed and believes and therefore alleges that a dance will be given at said dance hall by the defendants or their agents or lessees on or about Saturday evening, April 2, 1932, unless restrained by an order of the court, and that, if given, the same disturbances and annoyances will result, as before alleged, to the same persons and with the same effects; that the defendant McMahon is the agent and manager for the owner, or the lessee of the dance hall premises, and in possession and control thereof; that plaintiff has no plain, speedy, or adequate remedy at law, and that plaintiff and the other people alleged to be affected by said disturbances and annoyances will suffer great and irreparable damages before the matter can be heard on notice. The prayer is that the said dance hall be declared a nuisance, and that it be abated, and that the defendants, and each of them, and their agents, attorneys, and employees, be restrained and enjoined from operating or maintaining said premises as a dance hall and from giving or permitting dances to be held therein.

[2-5] We are of the opinion that the court below erred in granting the preliminary restraining order upon this complaint and in denying the motion to dissolve it and issuing the preliminary injunction. Waiving all considerations of whether the complaint showed a public nuisance which could be abated at the suit of a private individual only if the injury alleged were shown to be special and peculiar to him and different in kind from that suffered by the public, and of the im-

propriety of granting injunctive relief upon a verified complaint whose material allegations are stated on information and belief, and certain other matters of pleading which undoubtedly claimed the attention of the trial court in sustaining the demurrer, and considering the complaint solely from the viewpoint of its substantiality as a basis for the orders appealed from, and, further, considering the orders themselves, we find that a more serious situation exists than would have been presented by a mere sustaining of a demurrer, with leave to amend, without prejudice to a restraining order or temporary injunction proper in substance and scope. In the case before us the principal allegations of nuisance are to the effect that, while the dance hall was conducted by its owners, managers, or lessees, prior to the fire which destroyed it in 1931, some of the patrons or visitors of the dances there held disturbed the peace and quiet of the people of the neighborhood and of the patrons and employees of plaintiff's hospital by loud and tumultuous laughter and obscene and profane language, and by unnecessary racing of the engines in their automobiles and unnecessary honking of the horns thereof, and that said condition of the said disturbances and annoyances will be repeated at frequent intervals, and whenever a dance is given in said dance hall, and will continue indefinitely. These are wholly insufficient to justify the restraining order or its continuance, or the preliminary injunction in the form issued. A dance hall is not per se a nuisance, and the conducting of one, or of public dances therein, is a lawful business. Pavilion Ice Rink v. Bryant, 58 Cal. App. 584, 209 P. 76; note, 19 A. L. R. 1441; 46 C. J. 699. Respondent concedes this, but contends that his case comes within the purview of Blanton v. State, 38 Okl. Cr. 149, 259 P. 655, 657. That case is authority for the proposition that in a criminal prosecution for maintaining a public nuisance the charge is sufficiently sustained by proof of the offensive and annoying manner in which a dance hall is conducted and of the lewd, immoral, drunken, profane, and offensive conduct at and in the vicinity of it of the persons frequenting the dances. The court there said: "A dance hall is not per se a nuisance, but may become such by the manner in which it is conducted and by the conduct of the persons assembled in and around it. The proof is not restricted to what occurs within the building at which the nuisance is charged to be maintained, but acts constituting a nuisance and having an evident connection and relation to the offensive matter charged as a nuisance occurring adjacent to and about the building so near as to constitute a part of the nuisance charged are competent." Injunctive relief was not involved in the case. We have no doubt that in a proper case appropriate injunctive relief may be granted affecting the manner of conducting a public dance hall. The character of the neighborhood, the hours at which the music is played or its type and volume, the orderly or disorderly conduct of the patrons, the frequency of the occurrences, and many other factors are to be considered, and whether or not it is a nuisance is a question of fact. The complaint here does not disclose whether plaintiff's hospital is in a residential neighborhood or a business or industrial district. For aught that appears, the neighborhood may be of a sort where wholly apart from the dance hall, or the manner in which it has been or may be conducted, the usual and customary noise of street car or motor traffic or the voices and conduct of some members of the public may be such that the presence or absence of the dance hall would effect no material change of conditions. The allegation is that "some of the patrons of such dances, or visitors thereto, while patrons of or visitors at said dance hall" committed the acts complained of. There is no showing of how many of said patrons and visitors so acted, or how frequently the acts occurred. The allegations of past conduct refer to the actions of persons responsible for the conditions existing before the destruction of the building by fire at a time which, for all we are told by the complaint, may have been more than a year prior to its threatened opening now complained of. It does not appear that the defendants are the same persons who conducted the dance hall previous to the fire. In respect to threatened future acts, the averments in substance are that the dance hall building is being reconstructed and that upon its completion it will again be used as a dance hall for public dances and other gatherings of people; that a dance will be given on a particular night at said hall by the defendants, their agents or lessees, and that the condition of disturbances and annoyances complained of as having existed in the past will be repeated at frequent intervals and whenever a dance is given in said dance hall, and will continue indefinitely unless restrained. It is apparent from the context of the complaint that the dance hall as such and not merely the manner of conducting it is the thing sought to be enjoined. The pleading seems to proceed upon the theory that, because it is a dance hall and was once objectionable in the surrounding incidents mentioned, it follows that it will again be so, regardless of change of management, difference in construction of the building, or any other consideration. We do not agree that this is necessarily true. The prayer is not merely that the disturbing and annoying manner of conducting the dance hall be enjoined. While the prayer is no part of the complaint, it may properly be consulted in determining whether a pleading was intended to include any specific character of relief, and may well serve to show what kind of case the plaintiff supposes he has made. 1 Bancroft's Code Pleading 35; Nevada Coun-

ty & Sacramento Canal Co. v. Kidd, 37 Cal. 282; Arrington v. Liscom, 34 Cal. 365, 94 Am. Dec. 722; Green v. Thornton, 8 Cal. App. 160, 96 P. 382; Canby v. Council of City of Los Angeles, 114 Cal. App. 94, 299 P. 732. The orders follow the prayer, and absolutely and unqualifiedly restrain and enjoin the operation or maintenance of the premises as a dance hall and the giving or permitting of dances therein. This is far too sweeping an injunction to be granted or continued in force upon the facts alleged, even conceding that the defects upon which the demurrer was sustained might have been cured by amendment. As was stated in People v. Selby Smelting & Lead Co., 163 Cal. 84, 124 P. 692, 694, 1135, Ann. Cas. 1913E, 1267, which was a suit to abate the nuisance of conducting a lawful business in an offensive manner: "Our statute defining 'nuisance' does not refer to that which produces the injurious substance as the nuisance. The offensive gases, and not the factory emitting them, would come within the definition given by section 3479 of the Civil Code. That section is, in its essential part, as follows: 'Anything which is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, * * * is a nuisance.' Under this section it seems clear that the offensive matter, and not its source, is regarded."

[6, 7] An injunction should rarely, if ever, be issued in a doubtful case. The power should be exercised only when the right is clear, the injury impending and threatened, so as to be averted only by the protecting preventive process of injunction. Willis v. Lauridson, 161 Cal. 106, 118 P. 530. It is evident from the nature of the business here involved that it may be carried on without annoyance. There is nothing inherent in the operation of a public dance or dance hall that need disturb the neighborhood. If music, laughter, and the sounds of merrymaking be such as to disturb persons of ordinary sensibility in the vicinity in the reasonable comfort and enjoyment of their lives and property, there are feasible means to obviate the annoyance by eliminating the escape of the noise from the building where it is carried on. Disorderly conduct about the premises and having a relationship to the maintenance or operation of the dance hall can be controlled by proper disciplinary regulation, and may be a matter of police control. It is not a condition requiring or justifying an injunction so broad as to deny absolutely to a property owner or his lessee the right to lawfully pursue his lawful business. The rule applicable in such a case, and where appropriate facts are alleged or proven, is that a court of equity will not enjoin the conduct of the defendant's entire business, where such business is not a nuisance per se, if a less measure of restriction will afford to the plaintiff the relief to which he may be entitled. Vowvinckel v. Clark & Sons (Cal. Sup.) 13 P.(2d) 733; McMenomy v. Baud, 87 Cal. 134, 26 P. 795; Williams v. Blue Bird Laundry Co., 85 Cal. App. 388, 259 P. 484. Thus, in Phelps v. Winch, 309 Ill. 158, 140 N. E. 847, 850, 28 A. L. R. 1169, in which the manner of conducting a public dance in a summer residential community was proven to be a nuisance, the court so framed its decree as to enjoin the defendants "from the operation of the pavilion in such manner as to interfere with the reasonable comfort and enjoyment of life by complainants and other persons of ordinary sensibility occupying their premises."

In Thoenebe v. Mosby, 257 Pa. 1, 101 A. 98, an injunction against a public dance hall was refused where it appeared that in a neighborhood not strictly residential, but partly business in character, everything had been done by the proprietors to lessen the sound of the music after 11 o'clock on nights when a dancing school was held therein, and that on other nights, occurring about once a month when an entertainment was given lasting until about 2 o'clock in the morning, the noises in the street from the saying of parting words and calling to friends by people leaving the hall could properly be left to the police to regulate.

[8] We have found no California cases directly involving the question of enjoining dance halls or dances as nuisances. We think the principle involved, however, is precisely that which applies to any other lawful business which when so conducted as to constitute a nuisance may be enjoined as to the hurtful manner of its conduct, but should not be restricted further.

Respondent urges that his amended complaint relates back to and speaks as of the time of the filing of the original and hence supports the restraining order and the preliminary injunction. A sufficient answer to this is that the amended pleading, notwithstanding it directly alleges some of the matters originally stated on information and belief and enlarges upon the averments of special injury to plaintiff, is still wholly insufficient to justify the orders made. It is therefore unnecessary for us to burden this opinion with a discussion of whether the appeals speak as of the date of the orders appealed from or must be considered as if the amended pleading filed after the entry of the orders from which the appeals are taken had fallen into the place of the original one.

[9] Appellant based a part of his argument for reversal upon the theory that, since the general demurrer was sustained, there was no basis for the temporary restraining order and preliminary injunction. In upholding his appeals, we are not to be understood as placing our opinion on this ground, but upon

that heretofore discussed, namely, that the case made by plaintiff was insufficient to justify the particular orders made. It is settled that in a proper case a demurrer may be sustained and an amendment allowed without prejudice to a preliminary restraining order or temporary injunction already granted. Barber v. Reynolds, 33 Cal. 497; County of Tehama v. Sisson, 152 Cal. 167, 92 P. 64; Humphry v. Buena Vista Water Co., 2 Cal. App. 540, 84 P. 296; 14 Cal. Jur. 259.

The matters we have already discussed are determinative of the appeals; hence we shall not discuss the other points made.

The orders appealed from are reversed, with direction to the court below to grant the motion to dissolve the restraining order and deny the application for a temporary injunction.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

131 Cal.App. 357

BRINEY v. SANTA ANA HIGH SCHOOL DIST. et al.

Civ. 1441.

District Court of Appeal, Fourth District, California.

April 24, 1933.

1. Estoppel ⇐62(6).

School district *held* estopped to deny teacher's classification as permanent employee where board of education classified her as permanent employee in her contract for third consecutive year, and she accepted contract and rendered services thereunder (School Code, § 5.500; § 5.500, as amended by St. 1931, p. 1394, § 4).

2. Mandamus ⇐12.

Peremptory writ of mandate should only require performance of act within the law where duty and legal ability to perform appear.

3. Mandamus ⇐107.

Mandate to compel school district to pay permanent teacher amount of her salary for year district attempted to release her from service *held* not to lie in absence of showing judgment could be paid out of district's revenue of fiscal year in which it was ordered to be paid (School Code, § 5.500; § 5.500, as amended by St. 1931, p. 1394, § 4; Const. art. 11, § 18).

Appeal from Superior Court, Orange County; Erwin W. Owen, Judge.

Petition for writ of mandate by Bertha Briney, also known as Bertha G. Briney, against the Santa Ana High School District, George R. Wells, and others as members of the board of education of the city of Santa Ana and constituting the high school board of Santa Ana High School District. From a judgment for plaintiff, defendants appeal.

Modified and, as modified, affirmed.

Harvey & Harvey, of Santa Ana, for appellants.

R. Y. Williams and Chas. D. Swanner, both of Santa Ana, and Briney & Ekdale, of San Pedro, for respondent.

MARKS, Justice.

Respondent filed her petition seeking an order "directing said respondents by a peremptory writ of mandate to recognize said petitioner as a permanent teacher in said school district from the commencement of the school term in September, 1932, and that she be paid the salary to which she is entitled from said date, and be allowed to teach in said high school district as a permanent teacher in said high school district." After a trial in which the material facts at issue were stipulated, a judgment was entered directing the issuance of the peremptory writ of mandate, as prayed for. The judgment contained a direction to appellants to pay to respondent the sum of $2,300 as salary for the school year, 1932–33.

It was stipulated at the trial that respondent was successfully employed by appellants as a teacher of the Santa Ana High School District for the two school years, 1929–30 and 1930–31. A third contract was entered into for the school year 1931–32, during which time she successfully taught in the appellant school. Her first contract was tendered her on June 18, 1929, wherein she was offered a salary of $2,100 a year and in which she was not classified as a substitute, probationary, or permanent employee. Her second contract was tendered her on May 7, 1930, at a salary of $2,200 a year. She was therein classified as a probationary employee. The third contract was tendered her on May 11, 1931, as teacher at a salary of $2,300. This contract contained the following: "You have been classified by this board as a permanent employee." These contracts were all filed with the superintendent of schools of Orange county and among the records of the appellant school board and duplicates were delivered to respondent. Under date of April 27, 1932, she was notified in writing that the appellant board of education had passed a resolution releasing her from service at the expiration of her then contract. The reason given was that, "This action is occasioned because of the pressing need to reduce personnel in the interest of economy and tax reduction, and

also because the board is loathe to place any teacher on permanent tenure at this time."

But two questions are presented on this appeal: First, was respondent classified as a permanent employee under the provisions of her contract with the board of education made in May, 1931, and, second, could the lower court order the payment of her salary during the school year 1932–33?

[1] Section 5.500 of the School Code, as adopted in 1929 and in effect prior to August, 1931, provided as follows: "Boards of school trustees, and city, and city and county boards of education shall have power and it shall be their duty to classify as permanent employees all persons, except those hereinafter specified, who shall have been successfully employed by the district for two or three complete consecutive school years in positions requiring certification qualifications." This section was amended in 1931 (St. 1931, p. 1394, § 4) requiring the probationary teacher to serve "for three complete consecutive school years" before being classified as a permanent employee, the amendment becoming effective in August, 1931. Under the authority of Owens v. Board of Education, 68 Cal. App. 403, 229 P. 881, we have concluded that the provisions of section 5.500 of the School Code, adopted in 1929 govern in this case. While the question was not directly considered in the Owens Case, the conclusion there reached could not have been arrived at unless the court were of a like opinion concerning the amendment to section 1609 of the Political Code, there under consideration.

It is admitted that the board of education at no time during the employment of respondent took any formal action to classify her other than by the execution of her contracts. It is apparent that the same condition existed as to the classification of other teachers in the appellant high school district during the same period. Under this state of facts, respondent having accepted her contract, rendered her services for the year in question, and having been paid her compensation by the school district after the contract had been filed with the superintendent of schools in Orange county and among the records of the district, and wherein it was stated that she was classified as a permanent employee, is the district estopped from now denying that she was classified as a permanent employee? We think the answer to this question must be in the affirmative.

Section 5.500 of the School Code, as adopted in 1929, provided that the classification by the board of education might be made at the end of either two or three years' successful service as a probationary employee. Respondent had successfully completed her two years of probationary service. It was then within the power of appellants to give her the classification of a permanent employee at that time.

Respondent relies upon section 1962, Code Civ. Proc., and section 1635 of the Civil Code, and McCormick Lumber Co. v. Highland School District, 26 Cal. App. 641, 147 P. 1183, 1184, Brown v. Town of Sebastopol, 153 Cal. 704, 96 P. 363, 19 L. R. A. (N. S.) 178, and Sacramento v. Southern Pacific Co., 127 Cal. 217, 59 P. 568, 825, as upholding the doctrine of estoppel.

In McCormick Lumber Co. v. Highland School District, supra, it was said: "The question presented is as to whether, admitting the informalities of notice in the calling of the meeting and advertising for bids for the construction of the building, the school district, having received and appropriated the benefit of the labor and materials supplied by the contractor, is estopped from maintaining a defense based upon the irregularities noted. We think, under the circumstances of this case, the contractor, or his assignee, was entitled to recover. Substantially, the authorities indicate no different rule in applying the doctrine of estoppel to the acts of individuals or private corporations, than is proper to be applied to the acts of municipal corporations. There is, however, a distinction suggested, and it is this: That where the contract or agreement upon which recovery is sought is one wholly without the scope of the power of the municipality to make—in other words, is ultra vires—then there can be no estoppel; but, where the authority exists to make the contract, but the proceedings precedent thereto have been informally taken only, then the rule of estoppel may be made to operate against a municipality as completely as it would against an individual under the same circumstances." The authorities just cited furnish ample ground for our upholding the contention of respondent under the doctrine of estoppel.

Appellants rely upon the cases of Zottman v. San Francisco, 20 Cal. 96, 81 Am. Dec. 96, and Taylor v. Spear, 196 Cal. 709, 238 P. 1038, in support of their theory that the doctrine of estoppel cannot be applied to the facts of this case. The two cases just cited are easily distinguishable from the instant case. In the Zottman and Taylor Cases the municipal authorities had no power to make the contracts concerning which the estoppel was urged. These cases held that estoppel could not be invoked where the original contract was beyond the power of a municipality to make, or was contrary to law. In the instant case, as we have already remarked, the appellant board of education had the express power and authority to classify respondent before the close of the school year 1931–32.

[2, 3] The next question to which we must direct out attention is whether or not the lower court should have ordered appellants to pay respondent $2,300, the amount of her salary for the preceding school year.

Section 18 of article 11 of the Constitution

prohibits any board of education or school district from incurring any indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for such year. It is admitted that this question was not raised by either party in the court below and nothing appears in the record to indicate whether the order directing appellants to pay the sum of $2,300 will cause them to make an expenditure in excess of the income and revenue provided for the fiscal year 1932–33.

This section of the Constitution has been frequently construed by the courts and its application cannot now be doubted. The effect of these decisions has been clearly summarized as follows: "The provision means, * * * that each year's income and revenue must pay each year's indebtedness and liability, and that no indebtedness or liability incurred in any one year shall be paid out of the income and revenue of any future year." 18 Cal. Jur. 880. "A claim which is valid when the indebtedness is incurred does not become bad by reason of the subsequent exhaustion of funds from which it can be paid before the claimant is able to obtain formal allowance and payment; and while his remedy to obtain payment is affected, the claimant is nevertheless entitled to have his claim established by a judgment for the amount due. He is entitled to a general judgment, though by reason of the constitutional provision, the judgment may not be paid out of the revenues of a fiscal year other than the one in which the liability or indebtedness was created, even though taxes have been levied in a subsequent year for the express purpose of paying it." 18 Cal. Jur. 887. See, also, Kennedy v. City of Gustine, 210 Cal. 18, 290 P. 38.

Had respondent recovered an ordinary judgment for her annual salary, and were such case here on appeal, with the pleadings and evidence silent on the question of whether or not the judgment could be paid out of the income and revenue provided for the high school district for that fiscal year, we would be compelled to affirm the judgment under the authority of the cases cited in the notes to the foregoing quotations from California Jurisprudence. The question of the sufficiency of the income and revenue to pay the judgment could be determined at the time the plaintiff sought to collect it. Buck v. City of Eureka, 119 Cal. 44, 50 P. 1065.

In the instant case, if we affirm the judgment in its entirety, we are required to go further than merely to affirm a judgment for money against the school district. We would have to approve a peremptory order requiring the district to pay out of its funds $2,300, without knowing whether such funds were available for such purpose. By so doing we might be affirming a portion of a judgment which might require appellants to perform an unconstitutional act. We should not be expected to do this. A peremptory writ of mandate should only require the performance of an act within the law, where the duty and legal ability to perform appear.

In Martin v. Fisher, 108 Cal. App. 34, 291 P. 276, 278, it was said: "To hold that the obligation to pay the demand of respondent does not come within the provisions of section 18 of article 11 of the Constitution, we would have to conclude that the statutory right to be classified as a permanent teacher, and paid as such, existed under the provisions of the Political Code regardless of the provisions of the Constitution. This section of the Political Code provides three occasions for the dismissal of a permanent teacher. The first is upon charges brought, and after a hearing, and upon any of the grounds specified. The second is upon the decrease of the number of the pupils attending the schools of the district, so that the dismissal of the teacher becomes necessary. The third is upon the discontinuance of a course of instruction in which the teacher is engaged. To these statutory grounds of dismissal we conclude that the Constitution adds another, namely, lack of available revenue during a fiscal year to pay the salary of a teacher. A school district may suffer a loss of revenue just as it may suffer a loss in the number of children attending its schools. The Legislature in adopting section 1609 of the Political Code could not have intended to attempt to make school districts retain and pay teachers when funds were not available for the district so to do. To so hold would be to defeat the very purpose of the framers of the section of the Constitution we are considering, and return to the conditions existing before its adoption, which condition it was intended to prevent. * * * We must conclude that the Legislature adopted section 1609 of the Political Code with the provisions of section 18 of article 11 of the Constitution in mind. The provisions of the Code section are limited by those of the Constitution."

Respondent has cited us to cases where a peremptory writ of mandate was ordered to issue directing the reinstatement of the teacher and the payment of her salary. Goldsmith v. Board of Education, 63 Cal. App. 141, 218 P. 296; Anderson v. Scranton, 111 Cal. App. 322, 295 P. 544; Morris v. Board of Education, 119 Cal. App. 750, 7 P.(2d) 364, 8 P.(2d) 502; Saxton v. Board of Education, 206 Cal. 758, 276 P. 998. In none of these cases was the question we are considering presented to or passed upon by the court. In the case of Goldsmith v. Board of Education, supra, the superintendent of the Sacramento city high school district was ordered suspended without pay from September 22, to November 30, 1922. He sought a writ of mandate directing his reinstatement and the payment of his salary during the time of the suspension. Judgment went against him and

he appealed. The opinion was written on a motion to dismiss the appeal and what was said by the District Court of Appeal was not on the merits of the cause, but argument showing how the school superintendent might benefit if the judgment were recovered and he should prevail upon a second trial. None of these cases are direct authority against the position we are here taking.

It is ordered that the following be stricken from the second paragraph of the judgment: "And that respondents pay her out of the funds of such district the salary to which she is entitled as a permanent teacher in said district from the commencement of the school term on September 12th, 1932, on a basis of the same annual salary which petitioner received under her contract with said district for the school year 1931–32 of $2,300.00, payable in ten equal payments at the beginning of each calendar month, at the rate of $230.00 per month, the first payment to cover the payment due and payable on October 3rd, 1932," and in lieu thereof the following be substituted: "Such employment to be at a salary of $2,300.00 per year for the school year 1932–33."

As so modified the judgment is affirmed. Each party will pay his own costs of appeal.

We concur: BARNARD, P. J.; JENNINGS, J.

EGAN v. McCRAY.*

Civ. 7687.

District Court of Appeal, Second District, Division 2, California.

May 1, 1933.

Hearing Granted by Supreme Court June 29, 1933.

Dismissal and nonsuit ⊂=81(2).

Trial court, having entered erroneous order of dismissal, had no jurisdiction to set aside order, where there was no mistake or inadvertence (Code Civ. Proc. § 473, and § 581, subds. 4, 5).

Appeal from Superior Court, Los Angeles County; Fletcher Bowron, Judge.

Action by D. Webster Egan against Irene C. McCray. From an order setting aside a previous order dismissing the action, defendant appeals.

Order setting aside order of dismissal reversed.

Bodkin & Lucas and G. Stuart Silliman, all of Los Angeles (Bourke Jones, of Los Angeles, of counsel), for appellant.

Frank Lober and D. Webster Egan, both of Los Angeles, for respondent.

CRAIG, Justice.

An order of the superior court erroneously dismissing an action having been set aside, defendant appealed.

The respondent herein commenced suit in the superior court upon a demand not excepted by the provisions of subdivision 1, section 76, of the Code of Civil Procedure. After issue joined, and on the date set for trial, the court declined to assume jurisdiction of said action and dismissed the same. Thereafter the motion of the plaintiff to vacate and set aside such dismissal was granted by an order entered in the minutes. It is contended that upon settled principles applicable in the event of mistake, surprise, or excusable neglect the order first made was not subject to the relief provided by section 473 of the Code of Civil Procedure, and hence must be held to have become final.

"An examination of the record in the instant case shows that there was no mistake or inadvertence on the part of the court in the legal sense, and that the order of dismissal was the order intended to be made; and, while the court may have erred in the use of its discretion, there was no abuse of it. The plaintiff asked leave to amend, and the court denied the motion. The plaintiff then could not prove the allegation in her complaint that the defendant Liberty Produce Company was a corporation, and so she could proceed no further with the trial under the circumstances. The court had jurisdiction, under subdivisions 4 and 5 of section 581 of the Code of Civil Procedure to dismiss the action even though it erred in so doing, and its action is conclusive except on appeal or other direct attack authorized by the code. Cozad v. Raisch Imp. Co., 208 Cal. 496, 281 P. 1017. The action of the court in our opinion being merely erroneous and not void, the motion to set aside the order of dismissal would seem to afford no basis for the order made. A motion for new trial would have done so, but it was not made; and, while we are heartily in accord with the principle of determining each case on the merits if possible, we see no way to accomplish that here, as in our opinion the court had no jurisdiction to vacate the order of dismissal under the circumstances shown by the record."

The language used in the opinion of this court in Robinson v. Southland Produce Co., 112 Cal. App. 106, 296 P. 303, 304, is equally applicable here.

The order appealed from is reversed.

We concur: WORKS, P. J.; STEPHENS, J.

⊂=For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes
*For subsequent opinion see 31 P.2d 1041.

131 Cal.App. 351

PEOPLE v. CROGHAN.

Cr. 242.

District Court of Appeal, Fourth District, California.

April 24, 1933.

Rehearing Denied May 8, 1933.

1. Criminal law ⇐1141(1).

All intendments favor upholding judgment of conviction on appeal; evidence being viewed in light most favorable to prosecution.

2. Taxation ⇐571.

Evidence *held* to sustain conviction of tax collector for failure to pay over public moneys (Pen. Code, § 425; Pol. Code, §§ 3750, 3754).

3. Criminal law ⇐1169(1).

Where evidence complained of did not enter into proof of those of offenses charged of which accused was found guilty, admission thereof *held* not prejudicial error.

4. Criminal law ⇐829(1).

Instructions fully covered by other instructions *held* properly refused.

Appeal from Superior Court, San Diego County; L. N. Turrentine, Judge.

Herbert A. Croghan was convicted of failure to pay over public moneys, and he appeals.

Affirmed.

M. W. Conkling, of San Diego, for appellant.

U. S. Webb, Atty. Gen., John L. Flynn, Deputy Atty. Gen., and Thomas Whelan, Dist. Atty., and F. P. Buckley, Deputy Dist. Atty., both of San Diego, for the People.

CAMPBELL, Justice pro tem.

The appellant, tax collector of San Diego county, was tried on two indictments, one of which contained twenty counts alleging twelve separate offenses and termed the "Long Indictment"; the other contained six counts alleging two separate offenses and also two distinct counts alleging acts of perjury. By their verdict the jury found appellant guilty of counts 2 and 5 of the "Short Indictment." The trial court directed a verdict of not guilty on the perjury counts, and the jury disagreed as to all of the remaining counts. The court denied appellant's motion for a new trial, but granted his application for probation.

The counts upon which appellant was convicted charged two separate violations of section 425 of the Penal Code, which reads as follows:

"*Officers Neglecting to Pay Over Public Moneys.* Every officer charged with the receipt, safe-keeping, or disbursement of public moneys, who neglects or fails to keep and pay over the same in the manner prescribed by law, is guilty of felony."

Sections 3750 and 3754 of the Political Code also apply to the case at bar, and are as follows:

"§ 3750. *Tax-Collector to Note Date of Payment.* The tax-collector must mark the date of payment of any tax, or of the several partial payments, as the case may be, in the assessment-book, opposite the name of the person paying."

"§ 3754. *Liability of Tax-Collector Refusing or Neglecting to Settle.* A tax-collector refusing or neglecting for a period of five days to make the payments and settlements required in this title, is liable for the full amount of taxes charged upon the assessment-roll."

Appellant urges three grounds of appeal: (1) That the evidence is insufficient to sustain the verdict; (2) errors of the court in the admission of certain evidence; (3) error of the court in refusing to give defendant's requested instructions.

[1] At the outset it will be observed that an appellate court has nothing to do with weighing the evidence on appeal. All intendments favor upholding the judgment and the action of the trial court, and to that end the evidence is to be viewed in the light most favorable to the prosecution.

[2] Appellant's brief consists principally of a negation containing a challenge to point out evidence sufficient to sustain the verdict. Having found the defendant guilty, it must be assumed that the jury believed such testimony as points to his guilt. That evidence is ample to sustain the verdict. Accepting it, and disregarding that which contradicts it, the transcript, which is voluminous, discloses the following material facts:

Appellant was appointed tax collector of the county of San Diego on June 1, 1921, and served continuously in that capacity until the trial of this action. Various employees of the tax collector's office received payments, and appellant also made collections at a special cashier's window, but did not make any entries in any cash book and did not turn his cash over daily, but turned it over at irregular times to the chief deputy or one of the cashiers for entry in the cash book, with the request that the cash be balanced, and, if there was anything wrong, to let him know. The evidence shows that appellant was short in the cash he turned over on frequent occasions; that he personally deposited the collections of his office in the bank. For the year 1929–1930 there was a general shortage in

the tax collector's office of $11,918.64. This general shortage was reduced to particular items by showing that certain stubs had been found in the completed stub files that had never been entered on the summary cash book nor included in any apportionment statement. The general shortage was reduced to two assessment rolls, and finally traced to a shortage in assessment roll No. 53 for the sum of $4,128, being the amount involved in the second count of the "Short Indictment," and a shortage in assessment roll No. 42 for the sum of $4,527.04, being the amount involved in the fifth count of the "Short Indictment." Appellant was found guilty on these two counts.

The testimony established the general shortage, and reduced it to two particular items.

With reference to the $4,128 item, of which defendant was convicted in count 2 of the indictment, the evidence showed that the payment was made by a check dated December 3, 1928; that the check was given by a taxpayer to appellant personally with the request that appellant "hold it up and not put it through the bank for some time." The check bears bank cancellation date of December 28, 1928. On December 27, 1928, People's Exhibit No. 31 was written by appellant. This exhibit is the original deposit slip covering the deposit of the check in question in the First National Bank. Appellant testified he had a distinct recollection of handling the account in question; that he made the deposit slip out himself; that he did not know of any other occasion on which he personally made out a deposit slip; that the reason he handled the deposit the way he did was to get the check to the bank as quickly as possible. Appellant testified that he had no definite recollection of having given the chief deputy the stubs for this collection, but believed he did. The chief deputy testified he never saw the deposit slip in the tax collector's office nor a duplicate of it; that appellant never told him he had deposited a check for $4,128 in December, 1928, although he had several conversations with appellant concerning this account after the close of the fiscal year, and particularly about the fact that it had not been entered on the cash books or the summary cash book or the apportionment statements, but had been entered on the assessment rolls as "paid." The cashiers handling appellant's collections testified that they listed all stubs that came to them for the purpose of listing, yet this payment was not listed. A number of witnesses testified they had never seen a deposit slip similar to Exhibit No. 31 in the tax collector's office; that they had never seen one made out by appellant.

With reference to the offense alleged in the fifth count of the "Short Indictment," on which count appellant was found guilty, the following evidence directly connected appellant with the payment involved. The payment in the sum of $4,527.04 was received in the mail in the form of a check, and the tax receipt bears the "paid" stamp of the chief deputy. Appellant frequently used the regular cashier's stamp at the time this payment was received, as he had no stamp of his own. It was also characteristic of appellant to affix the "paid" stamp upside down, as it appears on People's Exhibit No. 32. The check (People's Exhibit No. 33) bears on its reverse side the word "deposited," in appellant's handwriting. Appellant stated that he received the check around May 10, 1929, and that he added the check to a deposit of that date, and that this addition was made in his own handwriting; that he does not know why he personally added the check to the deposit slip already made up; that the reason he did not use the regular indorsement stamp on the check was that it possibly was not available; that he is not positive that he turned the stub over to the chief deputy for entry. Three separate searches were made of the records in the tax collector's office for a duplicate deposit slip showing an item of $4,527.04, and none was found. On the morning of December 5, 1931, a search was made for the deposit slip dated May 10, 1929. The duplicate deposit slips were kept flat in a bundle. In this last search People's Exhibit No. 34 was found bearing the figures "$4,527.04" written on it, but not added to the total. These figures were in appellant's handwriting. On the day Exhibit No. 34 was found in the tax collector's office the deputy who found it was discharged by the appellant. Search was made, but no entry was found for this item in the cash book, although it was posted as "paid" in the assessment roll. It was not reported to the auditor on the apportionment statements, and a sum of money in the amount of the payment was not paid into the county treasury.

Thus the evidence shows that appellant was personally responsible for failing and neglecting to keep and pay over, as required by law, the equivalent of the checks received in payment of the two accounts involved. The evidence shows generally that the chief cashier had entered in the cash book all payments received by the appellant, and that he turned over to appellant for deposit all moneys he received in his capacity as chief deputy, except such as he returned to the taxpayer, and that thereafter appellant had exclusive control of the money. Under this state of facts, it was for the jury to determine whether or not the defendant had actually turned over the stubs of the payments for handling in the regular way, with their resultant entry in the proper books and a report of same given to the county auditor, or whether the defendant willfully failed and neglected to turn over the stubs of these payments for entry in the proper records, with the resultant willful failure and neglect to pay over the money to the treas-

urer. The appellant's failure to turn over the records for proper handling was indicative of his failure and neglect to pay over the money. The jury decided these questions adversely to appellant, and this court is bound by its finding.

[3] Appellant complains that the court erred in admitting People's Exhibit No. 41, being one of the summary cash books for the year 1929–1930. The summary cash book was one of the cash records kept in the regular course of business by deputy tax collectors under the general supervision of the appellant as tax collector. The books in question, the foundation having been laid, were admitted for what they might show as to any differences that might exist between payments received and deposited. At the proper time the court gave its instruction No. 21 to the jury, properly limiting the purposes for which the books could be reviewed by them. If we read the record correctly, the books did not enter into the proof of the offenses of which the appellant was found guilty. Hence there could be no prejudicial error.

[4] The instructions requested by appellant were refused, for the reason that they were fully covered by other instructions. The court fairly and fully instructed the jury on the law of the case.

The judgment and order from which this appeal has been taken are affirmed.

We concur: BARNARD, P. J.; MARKS, J.

131 Cal.App. 565

HADDAD v. McDOWELL et al.

Civ. 7599.

District Court of Appeal, Second District, Division 2, California.

May 2, 1933.

Rehearing Denied May 31, 1933.

Hearing Denied by Supreme Court June 30, 1933.

1. Pleading ⇐403(1).

Defect in matter of pleading lease in amended petition *held* cured, where amended answer alleged execution of lease and set up copy thereof as exhibit.

2. Landlord and tenant ⇐80(3), 177½.

Possession of subtenants is possession of lessee, and lessee can recover damages from lessor for eviction of subtenants.

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Action by Alexander Haddad against Afue McDowell and the California Escrow & Finance Corporation. Plaintiff recovered judgment against last-named defendant, and said defendant appeals.

Affirmed.

Afue McDowell, of Los Angeles, for appellant.

Henry M. Lee, of Los Angeles, for respondent.

WORKS, Presiding Justice.

This is an action to recover damages for the wrongful eviction of plaintiff, as a tenant, by defendants, as his landlords. A nonsuit was granted as to defendant McDowell. Plaintiff had judgment against defendant corporation, and that defendant appeals.

The trial court found to be true an allegation of the complaint that respondent had leased from appellant the westerly 150 feet of "lots 10 and 11" ; the court having also found that appellant was the owner of the property mentioned. It is contended that the finding first mentioned is not supported by the evidence, for the reason that the lease covered only the westerly 100 feet of lot 11. It is said in the brief: "All the rest of lot 11 and all of lot 10 were not leased to him, but were subjected to a right of way for Haddad and his tenants." The nature and extent of this right of way are not pointed out, but it is stated in appellant's brief that "the amended answer alleged that each lot was only 150 [sic] long, and that the easterly 50 feet of each of the lots was improved with an automobile shop not concerned in this lease." There is, however, nothing to show that evidence was introduced to prove the allegation, if the answer in fact contained such an allegation, for the brief fails to indicate where the averment is to be found. But it was stipulated at the trial that the real property involved in the action "is just that covered or just that real estate mentioned in the lease." The property mentioned in the instrument was the westerly 100 feet of lot 11. It would appear that the finding is not supported by the evidence. We doubt whether the erroneous finding did appellant any harm, but, rather than discuss his argument on that head, we prefer to make a new finding on the subject. Appellant says that "the decision should be corrected" with respect to this matter, and we have the power to make the correction in the mode just stated. Code Civ. Proc. § 956a.

[1] The pleading of respondent upon which the cause was tried was an amended complaint. In it the lease between the parties was mentioned, and the pleader then proceeded, "a copy of which is attached to the original complaint herein and made a part thereof, and reference to which is hereby made a part of this amended complaint." This language was followed by a statement

of certain of the provisions of the lease according to its legal effect. Laying aside the question whether in his amended complaint respondent properly made the lease an exhibit, by adoption from the superseded complaint, laying aside also the point whether the document was fully enough pleaded in the later pleading according to its legal effect, we think appellant is in no position to urge the contention that the amended complaint was defective. If there was a defect in the pleading, it was cured by the fact that appellant alleged the execution of the lease in his amended answer and set up a copy of it as an exhibit to that pleading.

[2] The trial court found that respondent and his subtenants were in possession under the lease at the time of the alleged eviction. The building on the property was what is known as a "drive-in market," and was constructed in such manner as to house several businesses of different characters. Appellant assails the finding just mentioned, because, as it is said, respondent himself was not in possession, he having testified that he had no business in the building but that he had sublet all parts of it. The point is not tenable. As between lessor and lessee, the possession of subtenants is the possession of the lessee. To put the matter differently, the eviction of subtenants by a lessor is an eviction of the lessee. These questions are so clear that citation of authority upon the subject is not necessary.

Appellant makes many other points, but none of them requires a separate discussion. Some of the questions stated are not argued, nor are authorities cited to support them. Some of the points now referred to are answered by what we have said above. It is at once apparent that some of the points are wholly without merit. Perhaps fifteen or twenty points are made as to the admission or exclusion of evidence, but none of these is sufficiently argued to show the materiality of it to a disposition of the cause, either in the trial court or upon this appeal. Several points are made as to the insufficiency of the evidence to support the findings, but in support of each such point statements of alleged fact are made in the language of appellant's counsel, without adequate reference to places where evidence concerning the matters stated are to be found. Appellant's opening brief is over 125 pages in length. Very many of these pages consist of these general statements of fact, with very rare and wholly insufficient references to the transcript on appeal.

In lieu of finding I of the trial court this court finds: "I. That each and all of the allegations contained in paragraphs I, II, III and IV of plaintiff's amended complaint are true, except that it is not true, as alleged in said paragraph III, that plaintiff leased from defendant corporation the entire real property described in said paragraph II. It is hereby found that the lease in question covered only the westerly one hundred (100) feet of said lot eleven (11)."

Judgment affirmed.

We concur: CRAIG, J.; ARCHBALD, Justice pro tem.

131 Cal.App. 317

MINEHAN et al. v. SILVERIA et al.

Civ. 8803.

District Court of Appeal, First District, Division 1, California.

April 21, 1933.

1. Judgment ⇐530.

Judgment caption, not referred to, cannot be considered in clarifying uncertainty as to judgment debtors.

2. Judgment ⇐530.

To remove uncertainty of judgment against "defendants" as to which defendants are indebted and determine scope and effect of judgment, entire judgment roll may be examined.

3. Pleading ⇐212.

Defendant copartners' filing of answer, without disposition of general demurrer, in which codefendant partnership, sued as distinct legal entity, joined, did not operate as withdrawal or abandonment of demurrer by partnership (Code Civ. Proc. § 388).

4. Partnership ⇐219(1).

Judgment against "defendants" in action against partners and firm, which did not join in partners' answer, filed without disposition of defendants' joint demurrer to complaint, must be construed as against partners only to uphold its regularity.

5. Judgment ⇐530.

Judgment must be construed with reference to condition of pleadings and parties liable in determining those against whom it was rendered, if uncertain.

6. Judgment ⇐530.

Judgment against "defendants" will be presumed to be against all defendants against whom it could have been rendered.

7. Appeal and error ⇐673(2).

Defendants' claim that action against copartnership and members thereof was tried, with plaintiffs' consent, on theory that it was at issue as to copartnership not joining in answer, cannot be considered on plaintiffs' appeal, where evidence is not in record.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

8. Costs ⇐32(3).

Costs should have been awarded plaintiffs by judgment for less than amount sued for, in absence of offer by defendants to permit judgment for specified sum or allegation in answer that they tendered and deposited in court full amount due plaintiffs (Code Civ. Proc. §§ 997, 1022, 1030).

Appeal from Superior Court, Santa Clara County; F. B. Brown, Judge.

Action by T. P. Minehan and others, copartners, doing business under the firm name and style of T. P. Minehan & Sons, against I. V. Silveria and others. From the judgment rendered, plaintiffs appeal.

Affirmed in part and reversed in part, with instructions.

Carl R. Schulz, of San Francisco, for appellants.

John J. Jones, of San Jose, for respondents.

GRAY, Justice pro tem.

The record, on this appeal, consists of the judgment roll. The complaint alleges that three defendants, named therein, to wit, a copartnership and its two partners, were indebted to plaintiffs in the sum of $1,993.45 for goods sold and delivered. The three defendants filed a joint general demurrer, of which no disposition is shown. Subsequently the two copartners answered, in two inconsistent counts, denying any indebtedness and admitting an indebtedness of $344. The court found "that defendants are indebted to plaintiffs in the sum of $343.55. * * * That defendants have heretofore tendered said sum of $343.55 into court," and concluded "that plaintiffs are entitled to a judgment against said defendants in the sum of $343.55 without costs and that defendants are entitled to their costs herein." The judgment adjudged "that plaintiffs do have and recover from defendants the sum of $343.55, without costs, said sum having been paid into court" and "that defendants are entitled to their costs."

[1-7] Assuming that the judgment against "defendants" included all defendants, plaintiffs argue that, as the answer of the copartners abandoned the joint demurrer, and the copartnership defaulted by failing to join in the answer, the judgment against the copartnership for less than the demand of the complaint is erroneous. The judgment against "defendants" is uncertain as to which defendants are indebted. There being no words of reference to the caption of the judgment, no resort to it can be had for aid. Hawley Bros., etc., Co. v. Brownstone, 123 Cal. 643, 56 P. 468; Morton v. Shannon, 26 Cal. App. 689, 147 P. 1179. Neither do the recitals of the findings and judgment that "defendants" were present at the trial remove the uncertainty, for the same uncertainty is also there present. To remove this uncertainty and to determine the scope and effect of the judgment, the entire judgment roll may be examined. Freeman v. Donohoe, 188 Cal. 170, 204 P. 593; Atlantic, Gulf & Pacific Co. v. Wright, 11 Cal. App. 179, 104 P. 460; Brown v. Superior Court, 110 Cal. App. 464, 294 P. 428. The allegations of the complaint show that the copartnership was sued, under section 388 of the Code of Civil Procedure, as a legal entity, distinct from the copartners. John Bollman Co. v. S. Bachman & Co., 16 Cal. App. 589, 117 P. 690, 122 P. 835; Craig v. San Fernando Furniture Co., 89 Cal. App. 167, 264 P. 784. The copartnership appeared by the general demurrer, jointly with the two copartners. It may be conceded, for present purposes, that the filing, by the copartners, of their answer, without any disposition of the demurrer, constituted an abandonment or waiver of it, as to themselves. Moran v. Abbey, 58 Cal. 163; Booth v. Chapman, 59 Cal. 149; Lynch v. Gagnon, 96 Cal. App. 512, 274 P. 584. But such answer did not operate as a withdrawal or abandonment of the joint demurrer, by the copartnership. Travest v. Alport, 13 N. Y. Civ. Proc. R. 161. It would have been irregular to have rendered judgment against the copartnership, without disposing of the demurrer, and a judgment, so rendered, would be reversible on appeal. Davidson v. Graham, 25 Cal. App. 484, 144 P. 147. The judgment must therefore be so construed as to uphold its regularity. Pacific Paving Co. v. Vizelich, 1 Cal. App. 281, 82 P. 82. It must also be construed with reference to the condition of the pleadings and the parties against whom judgment could have been rendered. Watson v. Lawson, 166 Cal. 235, 135 P. 961. "A judgment against 'defendants' will be presumed to be against all the defendants against whom it could have been properly rendered." 33 C. J. 1198. Since the judgment so construed ran against the copartners and not against the copartnership, there is no basis in fact for plaintiffs' argument. No consideration can be given to respondents' claim that the action was tried, with appellants' consent, upon the theory that it was at issue as to the copartnership, because the evidence is not in the record.

[8] Plaintiffs further contend that costs were erroneously denied them and awarded defendants. Plaintiffs were entitled to costs, by virtue of section 1022 of the Code of Civil Procedure, unless defendants either, under section 997 of the same Code, before trial or judgment, served upon plaintiffs an offer to allow judgment to be taken for a specified sum, or, pursuant to section 1030, alleged in their answer that before the commencement of this action they tendered the full amount

to which plaintiffs were entitled, and thereupon deposited in court such amount. The record is silent as to any such offer, and the answer does not contain any allegation of tender or deposit. The finding of tender into court is insufficient without such allegations, and also fails to meet the Code requirements, because it is a different kind of tender and omits a finding of deposit. Costs, therefore, should have been awarded plaintiffs instead of defendants.

The portion of the judgment awarding plaintiffs the sum of $343.55 is affirmed. The portion as to costs is reversed, with instructions to modify the judgment so as to award costs to plaintiffs.

We concur: TYLER, P. J.; CASHIN, J.

131 Cal.App. 468

TAYLOR v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 4868.

District Court of Appeal, Third District, California.

April 27, 1933.

Hearing Denied by Supreme Court June 26, 1933.

1. Master and servant ⇐405(5).

Evidence supported Industrial Commission's finding that woman living with employee for 18 years did not believe herself to be his wife and was not entitled to compensation as his widow or as member of family and household (St. 1917, p. 844, § 14 (a) (1, 2), (b, c), as amended by St. 1919, p. 917).

2. Master and servant ⇐417(7).

Power of District Court of Appeal to review findings of fact by Industrial Commission is limited to consideration of question whether there is substantial evidence supporting findings (St. 1917, p. 831, as amended).

3. Master and servant ⇐417(7).

Where evidence is conflicting or if opposing inferences may be drawn, conclusion of Industrial Commission is final and cannot be disturbed (St. 1917, p. 831, as amended).

4. Master and servant ⇐417(7).

District Court of Appeal could consider evidence adduced on compensation hearing before Industrial Commission for purpose only of determining its sufficiency to warrant commission's finding (St. 1917, p. 831, as amended).

Proceeding under the Workmen's Compensation Insurance and Safety Act by Georgia Taylor, claimant, for compensation for the death of her alleged husband, opposed by Leonard T. Isham, employer, and the State Compensation Insurance Fund, insurance carrier. The Industrial Accident Commission denied compensation, and claimant applies for certiorari.

Affirmed.

Donald Wachhorst, of Sacramento, for petitioner.

A. I. Townsend, of San Francisco, for respondents.

Mr. Presiding Justice PULLEN, delivered the opinion of the court.

Leon L. Taylor sustained an injury in the course of his employment, which resulted in his death. The State Compensation Insurance Fund was the insurance carrier, and both the employer and the employee were subject to the provisions of the Workmen's Compensation Insurance and Safety Act (St. 1917, p. 831, as amended).

After the death of Taylor, an application for an adjustment of the claim and establishment of dependency was filed by Georgia Taylor as his wife, and a hearing was held thereon before the Industrial Accident Commission. The findings and award by the commission held the evidence did not establish that the applicant Georgia Taylor bore to the deceased any of the relationships specified in section 14 of the Compensation Act (as amended by St. 1919, p. 917), and that she was not in good faith a member of the family or household of said deceased. The applicant being dissatisfied, has brought the record to this court to review the evidence and findings so made.

Petitioner in order to recover compensation must bring herself within the provisions of the act above referred to, particularly section 14 thereof, which reads:

"(a) The following shall be conclusively presumed to be wholly dependent for support upon a deceased employee:

"(1) A wife upon a husband with whom she was living at the time of his death, or for whose support such husband was legally liable at the time of his death.

"(2) [This clause specifies the children who are deemed to be dependent and is not important to the present case.]

"(b) In all other cases, questions of entire or partial dependency and questions as to who constitute dependents and the extent of their dependency shall be determined in accordance with the fact, as the fact may be at the time of the injury of the employee.

"(c) No person shall be considered a dependent of any deceased employee unless in good faith a member of the family or household of such employee, or unless such person bears to such employee the relation of

husband or wife, child, posthumous child, adopted child or stepchild, father or mother, father-in-law or mother-in-law, grandfather or grandmother, brother or sister, uncle or aunt, brother-in-law or sister-in-law, nephew or niece."

As will hereafter appear, Georgia Taylor has not come within the provisions of subdivision 1 of section 14 (a), which involves only those who stand in the legal relation of husband and wife, and excludes persons who, though not legally married, live together believing themselves to be husband and wife. It is under subsection (b) that the commission is empowered to inquire into the conditions of dependency actually existing and ascertain whether or not the applicant was in fact dependent upon the deceased for support at the time of the injury.

[1] It is admitted by petitioner that she was not the legal wife of deceased but she claims she lived with the deceased for a period of eighteen years immediately prior to his death, as his wife, believing herself to be his wife, held out as such by him, and entirely dependent upon him for her support and maintenance, and that she therefore constituted a member of the family and household of deceased.

To determine the good faith of the petitioner, an essential element in her petition, it is necessary to briefly review the facts leading up to the inception of the relationship existing between the petitioner and the decedent. Georgia Taylor was born in San Francisco in 1879, where she attended the public schools, and as a small child attended for a brief period, perhaps, both the Protestant and Catholic churches and Sunday schools. In 1914, she being then approximately thirty-five years of age, met Taylor, and after an acquaintance of about a week they began living together. A few days thereafter Taylor stated to petitioner that they would get married. Later, however, he told her, "Well, we are just as good as being married—it is a state law," and she, believing him, so she testified, accepted the arrangement, and for eighteen years they lived together uninterruptedly excepting for short periods of time when Taylor was away searching for work or on short jobs when it was not convenient to change their abode. By their friends and acquaintances, and to those with whom they associated, they were considered as married, Taylor introducing petitioner as his wife. No license to marry was ever obtained or applied for nor was any ceremony of any kind ever performed.

The Industrial Accident Commission found upon the foregoing facts that petitioner did not bear to deceased any relationship specified in the act quoted above, and was not in good faith a member of the family or household of the decedent.

Petitioner cites several cases which, she urges, support her position that she was such a member of the household, and which she contends warrants this court in annulling the order of the commission. The first is Temescal Rock Co. v. Industrial Accident Commission, 180 Cal. 637, 182 P. 447, 13 A. L. R. 683, where an award was made to a woman who was living with the deceased at the time of his death, as his wife, although never married to him. It appeared that both the man and the woman were ignorant foreign-born persons, unacquainted with the legal requirements of marriage in this country, and both believed that the marriage license they had obtained from the county clerk was sufficient in and of itself to constitute a valid marriage.

In the case of Moore Shipbuilding Co. v. Industrial Accident Commission, 185 Cal. 200, 196 P. 257, 260, 13 A. L. R. 676, the commission awarded compensation to a minor child of the woman with whom deceased was living in an adulterous relationship. Mr. Justice Olney very fairly analyzes the relations between the deceased and the minor child when he says: "It seems to me that in view of the finding of the commission that Bauer had assumed the relation of father toward the child, the character of his relations with the child's mother is a false quantity in the case. The final question was, Did Bauer stand in loco parentis toward the child, had he genuinely assumed toward the child the relation of father? If he had (and the commission finds he had and the finding is supported by the evidence), it makes no difference how or why he had. The relation was there, and by virtue of it the child was a member of his household in good faith, and that is enough."

This court in the case of Louden v. Industrial Accident Commission, 105 Cal. App. 65, 286 P. 1045, held that an Indian woman who had been married by tribal custom, and thereafter lived with her husband as his wife, did so in good faith, and was entitled to compensation.

In the case of Landsrath v. Industrial Accident Commission, 77 Cal. App. 509, 247 P. 227, 228, a woman who went through a marriage ceremony believing she was thereby legally married, and thereafter lived with the man, believing in good faith she was married to him, is entitled to compensation. These cases are all much stronger than the case at bar. Here, as already pointed out, petitioner, although a woman of thirty-five, born in California, and to some extent at least had attended schools and churches in her youth, began living with a man, and after a week of such relationship, accepted without a question, the statement that they were as good as married, is scarcely entitled to full credit. The commission was justified in holding

she did not come within the provisions of the act.

[2-4] "The power of this court to review findings of fact by the Industrial Accident Commission is limited to a consideration of the question of whether there is any substantial evidence upon which such findings may rest. In the absence of evidence to support a given finding, it cannot stand, but if with relation to such finding a mere conflict appears in the evidence, or if opposing inferences may reasonably be drawn therefrom, the conclusion reached by the commission is final and cannot be disturbed by this court. Walker v. Industrial Acc. Com., 177 Cal. 737, L. R. A. 1918F, 212, 171 P. 954. So far, therefore, as concerns this tribunal in the instant case, it is authorized to consider the evidence adduced on the hearing before the respondent commission for the purpose only of determining its sufficiency to warrant the finding that the evidence was insufficient to establish either the dependency of the petitioner or that she was the widow of the deceased." Landsrath v. Industrial Acc. Com., supra.

We find ample support in the record for the order of the commission; and for the reasons given, the order appealed from is affirmed.

We concur: PLUMMER, J.; R. L. THOMPSON, J.

131 Cal.App. 579

GRAHAM v. SUPERIOR COURT OF SISKIYOU COUNTY et al.

Civ. 4940.

District Court of Appeal, Third District, California.

May 2, 1933.

Courts ⇐489(5).

Action to determine right to possession of mineral lands, title to which is in federal government, *held* within jurisdiction of state court.

Original application by Robert J. Graham for a writ of prohibition prayed to be directed to the Superior Court of Siskiyou County and the Honorable C. J. Luttrell, a Judge thereof, to prevent further proceedings in a certain action by the Minerals Recovery Corporation, Limited, against petitioner and his wife.

Order to show cause vacated, and writ of prohibition denied.

Chas. L. Gilmore, of Sacramento, for petitioner.

Allen & McNamara, of Yreka, for respondents.

Mr. Justice PLUMMER delivered the opinion of the court.

This proceeding is before us based upon an application of the above-named petitioner, and order to show cause why the respondent court and Hon. C. J. Luttrell, the judge thereof, should not refrain from further proceedings in a certain action pending in said court entitled, "Minerals Recovery Corporation, Ltd., a corporation, plaintiff, v. Robert J. Graham and Mary Doe Graham, his wife, defendants."

It appears from the record that the above-entitled cause was tried in said Superior Court and judgment entered therein in favor of the plaintiff for the possession of the lands and premises known as certain mining claims, and that a writ of assistance will be issued in said action to place the plaintiff in possession thereof. The judgment in the action is to the effect that the plaintiff have judgment against the defendants restoring the possession of the premises described in the complaint to the plaintiff. The judgment in itself does not purport to affect the title to the premises. There is nothing in the judgment adjudging that either the plaintiff or the defendants have title to the disputed premises. The findings upon which the judgment is based go further and do find that the plaintiff is the owner of the premises involved. The conclusion of law based upon the findings of fact is only to the effect that the plaintiff have restitution and possession of the premises set forth in the plaintiff's complaint.

The record shows that the premises involved includes three placer mining claims, of which the complaint alleges that the plaintiff is the owner and entitled to the possession thereof, said mining claims being situate in the county of Siskiyou. It is further set forth in the complaint that the defendants wrongfully and without right entered upon said premises, took possession of certain buildings thereon which had theretofore been erected and placed upon the premises by the plaintiff, and at the time of the beginning of the action withheld the possession thereof from the plaintiff, to the plaintiff's damage in the sum of $1,000.

As against the claim set forth, upon which the plaintiff bases his right of possession, the defendants answer, setting up a certain homestead entry No. 255, in which the defendants assert a homestead interest in and to the premises described in the complaint.

The record shows that the plaintiff, prior to the alleged homestead entry on the part of

the defendants, had built upon the premises a large store building and living apartment, five cabins, gas pump and other mining buildings, of which the defendants have taken possession. It is further alleged by the defendants that the plaintiff, prior to the alleged homestead entry, abandoned, all and singular, the premises described in the complaint. The court found that the plaintiff had erected the buildings upon the premises, was entitled to the possession, and was, at the time of the beginning of the action, entitled to the possession. As we have said, the findings went further, and to the effect that the plaintiff was the owner of the placer mining claims involved in the action. The question of ownership was not carried into the judgment, and if carried therein, of course would be ineffective, as the title to the premises is still in the general government, and only the right of possession could be determined in the action.

Among other things the trial court found as follows: "That the defendants wrongfully and without right entered into and upon the possession of said premises, occupied and used the buildings thereon and have collected and are collecting rents from said buildings." etc.

The only question for us to determine is whether the trial court had jurisdiction to adjudge the right of possession pending the outcome of any controversy as to the right of the respective parties to obtain title to the controverted premises from the general government.

The record of the trial court as presented to us does not show that any contest is pending in the general land office, wherein the title to the disputed premises is involved. The petition for the injunction in this proceeding does set forth that after the trial in said action a contest has been filed. This, however, cannot be considered in determining the jurisdiction of the trial court to pass upon the right of possession pending the outcome of such contest.

While the state courts have no jurisdiction to determine questions of title or right to public lands of the United States subject to settlement, it appears almost without a dissenting opinion that state courts do have jurisdiction of merely possessory actions.

In volume 12, Ann. Cas., page 32, are collected a number of cases supporting the following statement of the law: "The courts are without jurisdiction to determine the rights of rival claimants of public lands while a controversy is being waged before the proper officers of the interior department to settle such right, and will refuse to aid either party, by way of affirmative relief, until the controversy is finally determined by that department; but they have jurisdiction to prevent the wrongful invasion of the possession of one in the actual occupancy of the public domain, so long as the title remains in the government. * * *" (Citing a long list of authorities.) And further: "In the exercise of this jurisdiction, the courts do not attempt to pass upon the merits of the respective claims of the contending parties and decide which has successfully initiated and established his right ultimately to receive the legal title to the land, but only protect the actual possession, and prevent any wrongful and forcible interference therewith, until the government parts with its title. Fulmele v. Camp, 20 Colo. 495, 39 P. 407. By protecting the possession of one claiming public lands against an adverse claimant, there is no attempt to control the action of the land department, or to determine the question before it; but the court simply maintains the parties in statu quo until their rights are determined by the proper tribunal." Likewise: "One in possession of public lands who claims under the homestead law is entitled to protection in his possessory rights until the questions of law involved in a dispute as to the title of the property have been settled by the land department." A long list of authorities is cited to the following statement: "Where land in the possession of one claiming under the pre-emption or homestead law is wrongfully and forcibly entered upon by another, the pre-emptor or homestead entryman may maintain an action for the possession thereof pending the decision of the land department as to the title to the property." Likewise, in Sproat v. Durland, 2 Okl. 24, 35 P. 682, 689, 886, the Supreme Court of Oklahoma ruled as follows: "It may be stated, as a well-settled proposition, that the courts have the right to deal with the question of possession, as between settlers upon the public domain, until such time as the government, by its issuance of a patent, puts forever at rest the title to the lands. It is the duty of the court, in dealing with such matters, to exercise its equitable powers, and see to it that possession is given to the person who, under the laws of congress, is entitled thereto; and, when it is ascertained that a person claiming the right to the use and occupancy of a tract of land, the title of which is still in the United States, is, under the laws of congress, a mere trespasser, it becomes the plain duty of the courts having jurisdiction to give to the proper party the possession of the land upon which the trespass is committed. * * * To say that no relief can be granted, or that our courts are powerless to do justice between litigants in this class of cases, pending the settlement of title in the land department, would be the announcement of a doctrine abhorrent to a sense of common justice. It would encourage the strong to override the weak, would place a premium upon greed and the use of force, and, in many instances, lead to bloodshed and crime. Such a state of affairs is to be avoided, and the

courts should not hesitate to invoke the powers inherent in them, and lend their aid, in every way possible, to prevent injustice, by preventing encroachments upon the possessory rights of settlers, or by equitably adjusting their differences."

To the same effect is the case of Reaves v. Oliver, 3 Okl. 62, 41 P. 353, where it is said: "Courts have the power to deal with possession of land prior to the issue of patent, and will protect the possessory rights of those entitled to the same under the laws relating to public lands."

In Bay v. Oklahoma Sou. Gas, Oil & Mining Co., 13 Okl. 425, 73 P. 936, 939, the Supreme Court of Oklahoma, after citing a number of cases in which the court had held that a homestead entryman would be protected in his possession, used the following language: "We are now confronted for the first time in this court with a claimant under the mineral laws of the United States. * * * We can see no reason why the same rule applied by this court in former cases is not applicable to the case of a mineral claimant claiming adversely to a homestead claimant. The land is prima facie nonmineral, the entryman has made the necessary nonmineral affidavit, and the officers of the land department have allowed his entry. This impresses the land embraced in his entry with the character of agricultural nonmineral land. If there was a valid prior location of a mineral claim on the tract, such location entitles the mineral claimant to possession of his mineral claim until the Land Department hears and determines the question as to the character of the land." That is all which is involved in the present action so far as the judgment is concerned. It is alleged in the complaint, and also found that the defendants wrongfully and unlawfully entered upon the premises of which the plaintiff had formerly, and was at the time of the beginning of the action, entitled to the possession; that the defendants had so wrongfully and unlawfully taken possession of buildings erected upon the premises belonging to the plaintiff, and of which the plaintiff was entitled to the immediate possession. We are bound by the record before us. Whether these findings are supported by the evidence presents a question which could only be determined upon appeal.

In 30 USCA, page 269 (section 30), is quoted a list of cases, so long that only general reference thereto can be made, supporting the following: In the absence of diverse citizenship, and where there is no question as to the meaning and construction of a statute, state courts are regarded as having competent jurisdiction to determine the right of possession. Whether the state court in the action involving the possession of the premises set forth in the complaint of Minerals Recovery Corporation v. Robert J. Graham et al., correctly determined the right of possession is immaterial. The cases to which we have called attention establish the fact that state courts have jurisdiction to determine who is entitled to possession of disputed premises pending determination of a contest before the general land office involving the title. For this reason the order to show cause heretofore issued in this proceeding is vacated, and a writ of prohibition denied.

We concur: PULLEN, P. J.; R. L. THOMPSON, J.

131 Cal.App. 345

GOULD v. SANTA ANA HIGH SCHOOL DIST. et al.

Civ. 1442.

District Court of Appeal, Fourth District, California.

April 24, 1933.

1. Schools and school districts ⇐133.

Term "employment," as used in school laws, including Teachers' Tenure Act, implies services rendered or to be rendered for compensation under express contract (Pol. Code, § 1609; School Code, § 5.500, as amended by St. 1931, p. 1394, § 4).

[Ed. Note.—For other definitions of "Employment," see Words and Phrases.]

2. Schools and school districts ⇐133.

Position of teacher in public school system is created by contract.

3. Schools and school districts ⇐133.

Evidence *held* not to show "employment" of teacher by high school district under contract, as required to establish her right to permanent tenure (Pol. Code, § 1609; School Code, § 5.500, as amended by St. 1931, p. 1394, § 4).

4. Schools and school districts ⇐141(4).

Evidence *held* to show that "particular kind of service" rendered by teacher of elementary orchestra classes in junior high schools was discontinued by high school district, so as to justify her dismissal (School Code, § 5.710).

Appeal from Superior Court, Orange County; Erwin W. Owen, Judge.

Action by Lois A. Gould for a writ of mandate to the Santa Ana High School District and others. From a judgment granting the writ, defendants appeal.

Reversed.

Harvey & Harvey, of Santa Ana, for appellants.

West & McKinney, of Santa Ana, for respondent.

Stanley Mussell, Dist. Atty., and James L. King, Chief Deputy Dist. Atty., both of San Bernardino, amici curiæ, for appellants.

MARKS, Justice.

Petitioner is a teacher of music possessed of the necessary qualifications to permit her to teach in the respondent school. The city of Santa Ana is a city of the fifth class, organized under the Municipal Incorporation Act of the state of California. Stats. 1883, p. 93. It has an elementary school district with boundaries coextensive with the city limits, and a high school district which embraces all the territory within its boundaries, as well as certain elementary school districts outside the city limits. Each district is a separate legal entity, but both are governed by the board of education of the city of Santa Ana.

Petitioner was first employed in 1927 by the "Board of Education of Santa Ana School District" as a probationary teacher of "music and art—orchestra in the schools of this elementary school district." In 1928 a similar contract was entered into, except that it was specified that she was employed by the Santa Ana city school district as a supervisor, and the reference to her teaching in the schools of the "elementary school district" was omitted. A similar contract was entered into in 1929. Her contract dated May 7, 1930, was identical with that of the previous year except that the salary was fixed at $1,800 per year and it was therein specified that she was classified as a probationary employee. She was again employed in May, 1931, for the ensuing school year at a salary of $1,875 per annum, as a teacher, and classified for the first time as a permanent employee. She was not re-employed in 1932, and was notified that the board of education of the city of Santa Ana had "eliminated the teaching of orchestra and orchestral instruments in the elementary schools of this district," which "was a definite 'discontinuance of this particular kind of service' in the Santa Ana School District." It cannot be doubted that her contracts of employment were with the board of education of the city of Santa Ana in its capacity as the governing board of the elementary schools of the city. Her compensation was paid to her out of the funds provided for the operation of these schools. At no time did she receive any compensation directly from the high school district, nor did she ever have any contract of employment with this district, though she rendered part-time service in two of its junior high schools for several years.

At the opening of the school year in 1932, petitioner presented herself at the junior high schools, which are a part of the high school system of Santa Ana, and offered to perform her duties as a teacher, claiming to be a permanent teacher of the high school district. Upon being refused employment, she brought this action in the court below seeking a writ of mandate to compel the Santa Ana high school district and its board of trustees "to recognize and employ your petitioner as a permanent teacher and permanent employee in said district, until her status under said tenure shall change, and to pay her salary to which she is entitled, as of last year." The trial court ordered the writ of mandate to issue as prayed for, requiring the high school district to pay petitioner a salary of $1,875 for the school year commencing in September, 1932. This equaled the amount paid her by the elementary school district during the preceding year.

It is admitted that petitioner possessed all the qualifications necessary to teach in the junior high schools. If she was a permanent teacher of the high school district and the "particular kind of service" she had rendered was not discontinued, then the judgment must be affirmed.

Petitioner taught what was called "elementary orchestra" in the elementary schools. This included the instruction of beginners who had no knowledge of music or musical instruments, continuing with these same pupils as they advanced in the knowledge of music during their courses in the elementary schools. For convenience she divided them into two classes—the beginners forming what she chose to designate the "elementary" classes, and those more advanced, the "junior" classes. Commencing at some time during the school year of 1928, she taught the same subjects for one period each day in each of the two junior high schools in Santa Ana. These junior high schools had "advanced orchestra" classes which were open to any pupil who had successfully completed the course in "elementary orchestra." Petitioner taught these classes in "advanced orchestra" during the last semester of the school year of 1931–32, and the high school district paid the elementary school district some money, in an amount which is not disclosed, for her services in teaching both classes during that year. Nothing was paid by the high school district for her services during the previous years.

In considering the question of whether or not petitioner became a permanent teacher of the Santa Ana high school district, we must bear in mind that this district was as much of an entirely separate and distinct entity from the Santa Ana school district (elementary schools) as though the two were in separate cities and governed by separate boards.

[1] The Teachers' Tenure Act has always made the right of a teacher to be classified

as a permanent employee dependent upon her having been "employed as a teacher by the district," or, "employed by the district" for a given number of years. Section 1609, Pol. Code; section 5.500, School Code (as amended by St. 1931, p. 1394, § 4). We must therefore determine whether or not petitioner was ever "employed" by the Santa Ana high school district as the word is used in these sections.

The words "employ" and "employed" can be used in various senses and be given different meanings. They are sometimes used in the sense of "engage" or "engaged in." A person may be said to be "employed" in a certain avocation when such person's time is occupied therein without a contract of hiring or expectation of compensation. Funk & Wagnalls Standard Dictionary; McCluskey v. Cromwell, 11 N. Y. 593. In another sense the words imply services rendered, or to be rendered, for a compensation upon a contract either express or implied. Bingham v. Scott, 177 Mass. 208, 58 N. E. 687. We think the latter definition descriptive of the term "employment," as used in the school laws of California, with the notation that these laws require the employment to originate in an express and not an implied contract.

[2] It is now the law in this state that the position of teacher in the public school system is created by contract. In Leymel v. Johnson, 105 Cal. App. 694, at page 702, 288 P. 858, 862, it is said: "The conclusion that the status of a teacher is that of an employee is irresistible. The position is secured by selection by the board of trustees and the terms of the employment are fixed by contract, the authority for which is found in the Political Code (section 1609). Under its general powers the board of education is authorized to enter into contracts with teachers and fix their compensation and terms of employment. Marion v. Board of Education, 97 Cal. 606, 20 L. R. A. 197, 32 P. 643. It may make reasonable rules governing vacations of teachers and providing their duties where such rules do not conflict with a statute. Fairchild v. Board of Education, 107 Cal. 92, 40 P. 26; Loehr v. Board of Education, 12 Cal. App. 671, 108 P. 325. The contract of employment of a teacher produces the relation of employer and employee, the first, the board of education, and the second, the teacher."

In the same case the following is quoted from the dissenting opinion of Mr. Justice Fox, in Kennedy v. Board of Education, 82 Cal. 483, 22 P. 1042, 1045: "The position of a teacher is distinctly defined by the Code (Pol. Code, § 1617) to be that of an employee. If the statutes and rules of the board determine his duties, powers, and rights, all that remains to complete the contract is his selection for the place; and it makes no difference whether that selection is made by a vote of the board, commonly called an 'election,' by appointment, or by specially negotiated contract. It does not change the fact that he is still an employee, and that his rights are based upon his contract of employment."

In Martin v. Fisher, 108 Cal. App. 34, 291 P. 276, 277, it is said: "Respondent must find her authority for a judgment in the right given her by section 1609 of the Political Code to continue her duties as a permanent teacher in the schools of the district. This right finds its origin in a contract between herself and the board of trustees of the district, together with two years satisfactory service as a teacher under the terms of her contract or contracts. Therefore the cause of action finds its source, first, in a contract, second, in services satisfactorily performed under the terms of the contract, and, third, in the provisions of the law."

[3] We can find no evidence in the record that would remotely indicate an "employment" of petitioner by defendants under a contract between them. Without such employment, the relation of teacher with a permanent tenure could not arise. The mere lending of the services of petitioner by the elementary school district to the high school district, without any payment at all to her by the high school district, and without any payment by this district to the elementary district, except during the last year of the arrangement, is not sufficient to establish an employment by the high school district upon which petitioner could predicate her claim of being a teacher of that district with a permanent tenure.

[4] The trial court found, on undisputed evidence, that the course in elementary orchestra had been discontinued in the elementary schools of Santa Ana during the school year in question. It also found that "it is not true that the said Board of Education at said time or meeting, or at any other time or meeting, discontinued the teaching of orchestra and orchestral instruments and the subjects covered by the credentials of petitioner in the junior high schools or either of the junior high schools maintained by said Board of Education, and it is further not true that the said Board of Education discontinued in the said junior high schools the subjects taught by petitioner during the four and one-half school years next preceding the school year of 1932–33."

The evidence shows that what we have described as the course in "elementary orchestra" was discontinued in the junior high schools of Santa Ana during the school year of 1932–33. There was no instruction in these schools for beginners. It may be that some of the pupils, in what petitioner chose to designate as the "junior" division of the "elementary orchestra" class, might have re-

ceived instruction in the "advanced orchestra" classes of the junior high schools during that year, but the classes in "elementary orchestra," which corresponded to the classes bearing the same name in the elementary schools, were entirely discontinued. These were the classes taught by petitioner in the junior high schools during her service there, with the exception of one semester when she taught the "advanced orchestra" classes. This evidence does not support the quoted finding.

Section 5.710 of the School Code provides in part as follows: "It is hereby provided that whenever it becomes necessary to decrease the number of permanent employees in a school district * * * on account of the discontinuance of a particular kind of service in such district, the governing board may dismiss such employee at the close of the school year." We are of the opinion that the "particular kind of service" rendered by petitioner (excluding her teaching of advanced orchestra for one semester) was discontinued and that her dismissal was justified under the terms of the quoted section.

Judgment reversed.

We concur: BARNARD, P. J.; JENNINGS, J.

131 Cal.App. 465

In re WOOD'S ESTATE.

WOOD et al. v. HARKER et al.

Civ. 8628.

District Court of Appeal, Second District, Division 2, California.

April 27, 1933.

1. Appeal and error ⇐979(4).

Granting or denying new trial for insufficiency of evidence to justify verdict, where there is substantial conflict in evidence, is conclusive on appellate court, in absence of abuse of discretion, and it is immaterial whether evidence is insufficient to sustain all or only portion of issues.

2. Wills ⇐155(1).

"Undue influence" is exercise of acts or conduct by one person toward another, by means of which mind of latter is subjugated to will of person seeking to control it.

3. Wills ⇐159.

To establish undue influence in execution of will, it must be shown that as result of such influence will is not expression of testator's own desires.

There must be substantial proof of pressure which overpowered volition of testator at time will was made, no presumption of undue influence being raised by proof of interest and opportunity alone.

4. Wills ⇐163(6).

That will may be unnatural, unfair, or unjust does not of itself create presumption of decedent's incompetence or of undue influence, nor does it shift burden of proof to proponent.

5. Wills ⇐384.

In will contest, record *held* not to show abuse of discretion in granting new trial after verdict of undue influence.

6. Wills ⇐384.

In will contest, all presumptions in favor of order granting new trial are indulged on appeal.

Appeal from Superior Court, Los Angeles County; Elliot Craig, Judge.

In the matter of the estate of Lillian B. Wood, deceased. Will contest by Guy F. Wood and others against Mabel E. Harker and others. From an order granting a motion for a new trial after a verdict that deceased was unduly influenced in making and executing a purported will, contestants appeal.

Affirmed.

Joseph M. Maltby, of Long Beach, for appellants.

John C. Packard, of Los Angeles, for respondents.

CRAIG, Justice.

The third and final testamentary act of Lillian B. Wood, deceased, came before the superior court of Los Angeles county upon a contest by certain relatives of the deceased husband of said testatrix. To the question as to whether or not at its date she was unduly influenced in its making and execution by her sister and brother-in-law a verdict was returned in the affirmative. Thereafter a motion for a new trial was granted, from which order the contestants appealed, upon the ground that the evidence was sufficient to sustain the verdict.

[1-4] Briefly stating the appellants' contention in support of the verdict of the jury, there was evidence tending to support the same had it withstood the test of scrutiny upon the motion for a new trial. They present as a basis for determining whether the testatrix was unduly influenced in making and executing her last will and testament the question as to whether or not Bert Harker and Mabel E. Harker, his wife, a sister of the deceased, sustained a confidential relationship toward her, actively participated in the making and execution of said will, at a

time when the deceased was in a condition which would permit a subversion of her free will, and whether or not they benefited by the new will. By the appellants' summary in the superior court and upon appeal of the facts upon which the verdict was founded, positive testimony, in part uncontradicted, was given to the effect that the two relatives mentioned profited through an increase by said last will and testament of gifts made in previous testamentary dispositions of the property of said deceased; that the testatrix resided with them, at her request letters and checks were at times written by her said sister who on one occasion also loaned her money; that the brother-in-law had no knowledge or conversation at any time with the deceased as to her property; that one week before her demise she insisted in the presence of her sister and a nurse upon dictating her last will and testament to him; that when he demurred the testatrix arose from bed stating that she would have a will written or would write one herself; that Harker thereupon wrote as she dictated, and said document was signed and witnessed by said nurse and a neighbor. Upon such evidence was predicated the argument that the decedent was in a condition and so situated as to permit a subversion of her will, that her sister and the latter's husband occupied a confidential relationship, were in a position to exercise undue influence upon her, and that the latter had in fact prepared said will for her. "The granting or denying a new trial on the ground that the evidence is insufficient to justify the verdict, where there is a substantial conflict in the evidence, rests so fully in the discretion of the trial court that its action is conclusive upon this court, unless it appears that there has been an abuse of such discretion; and it is immaterial whether the evidence is insufficient to sustain all, or only a portion of, the issues on which the judgment must depend." Domico v. Cassassa, 101 Cal. 411, 35 P. 1024. "Undue influence has been repeatedly defined to be 'the exercise of acts or conduct by one person toward another person by means of which the mind of the latter is subjugated to the will of the person seeking to control it' (Estate of Newhall, 190 Cal. 709, 717, 28 A. L. R. 778, 214 P. 231, 234), that 'In order to establish that a will has been executed under undue influence, it is necessary to show, not only that such influence has been exercised, but also that it has produced an effect upon the mind of the testator by which the will which he executes is not the expression of his own desires. * * * The presumption of undue influence is not raised by proof of interest and opportunity alone. In order to set aside a will for undue influence, there must be substantial proof of a pressure which overpowered the volition of the testator at the time the will was made.' * * * The fact that the will of a testator may be unnatural, unfair, or unjust creates of itself no presumption that the decedent was incompetent or that the instrument was procured by undue influence, nor does it shift the burden of proof to the proponent. In Estate of Martin, 170 Cal. 657, 663, 151 P. 138, 141, it is declared that 'a testator has the right to make an unjust or an unreasonable, or even a cruel will and that no will may be legally set aside upon the mere establishment that it is such a will.'" In re Withington's Estate, 99 Cal. App. 617, 279 P. 196, 199, 280 P. 152.

[5, 6] In no instance does the record disclose any substantial evidence of a testamentary act contrary to the desires of the testatrix from which it may be said that the trial court abused that degree of sound judicial discretion from which the order assailed must be presumed to have resulted. All presumptions in favor of such an order are indulged upon appeal. Hiraide v. Cochran, 109 Cal. App. 377, 293 P. 165; West Coast Securities Co. v. Kilbourn, 110 Cal. App. 293, 294 P. 57; Wulbern v. Gilroy Express, 116 Cal. App. 222, 2 P.(2d) 508. Speculation or suspicion as to the exercise of a corrupt influence flowing merely from opportunity must be substantiated by satisfactory evidence of a character which overcomes all such presumptions. It cannot be said from the record presented that the grounds of contest are so supported.

The order is affirmed.

We concur: WORKS, P. J.; STEPHENS, J.

McPIKE v. SUPERIOR COURT OF SAN FRANCISCO COUNTY et al.*

Civ. 8857.

District Court of Appeal, First District, Division 2, California.

April 25, 1933.

Hearing Granted by Supreme Court June 23, 1933.

1. Certiorari ⇐64(1).

In certiorari proceeding, appellate court is not concerned with propriety of order attacked, but only with question whether trial court had jurisdiction to enter such order.

2. Executors and administrators ⇐87.

Probate court has power to authorize compromise of third party's adverse claim to property claimed by estate (Probate Code, § 578).

3. Executors and administrators ⇐435.

Ordinarily, a probate court has no jurisdiction over adverse claims of third persons to property in estate.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 30 P.2d 17.

4. Courts ⊜198.

Though superior court, sitting in probate, is court of general jurisdiction, proceedings are statutory and court has no powers except those given by statute and incidental powers which enable court to exercise jurisdiction conferred upon it.

5. Executors and administrators ⊜435.

Superior court sitting in probate was without power to compel administrator to carry out compromise with person claiming entire estate theretofore authorized by court (Probate Code, § 578).

Certiorari to Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

Petition for certiorari by H. W. McPike, administrator of the estate of Margaret A. Jennings, deceased, to annul an order entered by the Superior Court of the County of San Francisco, State of California, Frank H. Dunne, Judge, directing petitioner to pay Annie Gillespie $1,000 pursuant to an agreement of compromise and an order of the court approving such compromise.

Order annulled.

H. H. McPike, of San Francisco, for petitioner.

Cleveland R. Wright, of San Francisco, for respondent.

DOOLING, Justice pro tem.

The petitioner seeks by certiorari to have annulled an order of the Superior Court sitting as a probate court. From the return it appears that the petitioner is the duly appointed and qualified administrator of the estate of Margaret A. Jennings, deceased. On June 27, 1932, petitioner, as such administrator, filed in the respondent court a petition for permission to compromise certain litigation pending against the estate of his decedent. In such petition he alleged that an action had been commenced against him, as administrator, by one Annie Gillespie, claiming title to all the property of the estate, consisting of a sum of money slightly in excess of $4,000, which at the time of decedent's death had been on deposit in a certain bank, and seeking judgment against him, as administrator, adjudging that she was such owner and declaring that petitioner, as administrator, held such sum in trust for her; that such action was at issue and ready for trial; and "that a few days before the date of trial of said action counsel for defendant and counsel for plaintiff held a consultation and agreed that a reasonable and proper settlement of said action could and should be made by defendant, therein as administrator of the said estate, paying to plaintiff the sum of one thousand ($1,000.00) dollars." The petition asked that the court authorize petitioner as such administrator to settle said action for such sum. The court fixed a date for the hearing of the petition to compromise, and ordered a citation to issue to Kate Sidles, the sole heir of the decedent. The citation was regularly issued and served and notice of the hearing given by posting, and the court after hearing the petition made its order on July 25, 1932, by which petitioner herein was "authorized to pay to said Annie Gillespie the sum of one thousand ($1,000.00) dollars in full settlement of all claims and demands of Annie Gillespie against the said estate and said administrator" upon the receipt of a dismissal of her said action with prejudice and a signed satisfaction.

Thereafter, Cleveland R. Wright, an attorney at law, filed in the matter of such estate an affidavit reciting that he is the attorney for Annie Gillespie in the action against petitioner, as administrator of the estate of Margaret A. Jennings, deceased; the nature and purpose of said action; the fact that when said action was ready for trial he and counsel for petitioner had agreed to compromise it for the sum of $1,000; the proceedings had in the probate court terminating in the making of the order authorizing such compromise; repeated demands for the payment of such sum of $1,000, coupled with the tender of a dismissal with prejudice and a satisfaction as required by said order; and the failure and refusal of petitioner herein to pay the $1,000 or carry out the compromise. Affiant asked for the issuance of an order to show cause to petitioner herein, and for an order of the court directing him, as administrator, to pay to Annie Gillespie such sum of $1,000. A citation issued and petitioner herein appeared by demurrer attacking the jurisdiction of the court over the subject-matter. The order herein attacked followed, by which petitioner herein is "ordered and directed to pay to Annie Gillespie within five (5) days from date hereof the sum of one thousand dollars ($1,000.00) pursuant to his said agreement of compromise and the order of this court made on July 25, 1932, approving the same."

[1] Upon this proceeding we are not concerned with the propriety or impropriety of petitioner's conduct with regard to the compromise, nor with the correctness or incorrectness of the action of the trial court in making the order complained of, further than to determine the single question whether the respondent court had jurisdiction to make such order. 4 Cal. Jur. p. 1106.

[2] The probate court has the power to authorize the compromise of an adverse claim of a third party to the property of an estate. Probate Code, § 578, formerly Code Civ. Proc.

§ 1588, as construed in Merrill v. Bachelder, 123 Cal. 674, 676, 56 P. 618. The precise language of that Code section is: "A compromise may also be authorized by the court or judge when it appears to be just and for the best interest of the estate."

[3, 4] Nowhere in express terms is the probate court given the power, sought to be exercised by the order here under attack, of compelling the administrator to carry out and perform the provisions of a compromise so authorized. It is settled that ordinarily a probate court has no jurisdiction over the adverse claims of third persons to property in the estate (11 Cal. Jur. p. 262, § 42), and this for the reason "that either the person initiating the attack or the person resisting the attack is lacking in privity to the probate proceedings." Bauer v. Bauer, 201 Cal. 267, 271, 256 P. 820, 821. It is equally well settled that while the superior court, sitting in probate, is a court of general jurisdiction, "the proceedings being statutory in their nature, the court has no other powers than those given by statute and such incidental powers as pertain to it and enabling the court to exercise the jurisdiction conferred upon it, and can only determine those questions or matters arising in the estate which it is authorized to do. Thus, in the exercise of the powers conferred upon it, its jurisdiction is limited and special, or limited and statutory." 11 Cal. Jur. pp. 248, 249, § 34.

It is respondent's theory that the power to make the order under attack is incidental to and to be implied from, and necessary to carry out and make effective, the power of the court to authorize the administrator to make *a* compromise. It is the petitioner's contention that the jurisdiction of the court goes no further than the express language of the statute.

The language of the statute is permissive, and not mandatory: "A compromise *may* also be authorized by the court." In this connection it is worthy of note that in other proceedings where it was the purpose of the Legislature to make the action of the administrator mandatory and subject to the order of the court in dealings with strangers to the estate appropriate language is used to indicate that intention. Thus in the matter of the payment of approved claims the court is given the express power to order their payment (Probate Code, § 952); in the matter of carrying out a decedent's contracts to convey property the court is given a like express power (Probate Code, §§ 850–853); in the case of the mortgaging of property of the estate it is mandatory upon the administrator to execute the mortgage or deed of trust (Probate Code, § 833) which the court "shall make an order authorizing and directing" him to do (Probate Code, § 832); in the case of leases of property of the estate similar mandatory provisions are found (Probate Code, §§ 842, 843); and in the case of probate sales after the order confirming the sale is made "conveyances must thereupon be executed." Probate Code, § 786. See, also, Probate Code, §§ 802, 812.

It is thus apparent that in the several instances enumerated where the Legislature intended to give the court jurisdiction to compel action by the administrator in his dealings with strangers to the estate it used definite and appropriate language to expressly grant such power. In the case of compromises, however, no such language was used. The court is not given power to "direct" the making of compromises, but only to "authorize" them. It is not provided that compromises "shall" or "must" be made by the administrator when authorized by the court, but that they "may" be made. The internal evidence of the Probate Code indicates strongly that it was not the intention of the Legislature to confer upon courts sitting in probate the power or jurisdiction to compel action by the administrator in the case of compromises.

As petitioner well points out, a compromise agreement, even though entered into, may be attacked for fraud in the inducement (5 Cal. Jur. p. 403, § 17) or may lack consideration where the claim which is the subject of the compromise is "wholly without foundation, and known to the claimant to be so." Union Collection Co. v. Buckman, 150 Cal. 159, 163, 88 P. 708, 710, 9 L. R. A. (N. S.) 568, 119 Am. St. Rep. 164, 11 Ann. Cas. 609; McClure v. McClure, 100 Cal. 339, 343, 34 P. 822. We are not called upon to speculate about the reasons which moved petitioner to refuse to carry out his compromise agreement. We are only concerned with the jurisdiction of the court in a probate proceeding to compel him to do so. If the court had jurisdiction to make such an order, it would necessarily have jurisdiction to try the issues raised by such defense as petitioner saw fit to make. But the jurisdiction to try purely collateral matters with strangers to the estate is not to be lightly inferred.

Respondent cites and strongly relies upon In re Davis' Estate, 27 Mont. 490, 71 P. 757. There a will contest was instituted over which the probate court had express statutory jurisdiction. A compromise was effected which was confirmed by decree of the court determining that the estate should be distributed to certain persons in designated proportions as determined by the compromise agreement. Thereafter the power of the court to order distribution in accordance with this decree was attacked on the ground that certain of the parties were strangers to the proceedings. The court very properly held that having jurisdiction of the parties and of the subject-matter it had jurisdiction to enter the consent decree pursuant to the agreement of compromise, and that such decree became the basis of administration so far as the distribution of the estate was con-

cerned. This case is not apposite here. The respondent court had no jurisdiction of the person of Annie Gillespie, who was claiming adversely to the estate, nor of her action against petitioner as administrator, and could not acquire jurisdiction over either. It had only the limited jurisdiction to authorize petitioner to compromise with her.

[5] We conclude that a superior court sitting in probate has no jurisdiction over the matter of compromising a claim against an estate except that expressly given by the Probate Code, viz., to authorize the administrator to make a compromise.

The order of November 23, 1932, here under review, is accordingly annulled.

We concur: SPENCE, Acting P. J.; STURTEVANT, J.

131 Cal.App. 409

In re EILERT'S ESTATE.

EILERT v. SECURITY-FIRST NAT. BANK OF LOS ANGELES.

Civ. 1245.

District Court of Appeal, Fourth District, California.

April 25, 1933.

As Amended on Denial of Rehearing May 22, 1933.

Hearing Denied by Supreme Court June 23, 1933.

1. Trusts ⇐272(3).

Where trust estate consisted of stock in general trading corporation, and corporation reduced certain real estate to cash, which it distributed to stockholders, any incidental increase in value of real estate must be considered, as between life tenant and remaindermen, as additions to corpus of trust estate.

2. Trusts ⇐328.

Court having charge of trust estate, in exercise of its equitable jurisdiction, may, in proper case, grant relief from final order or judgment obtained through fraud or mistake.

3. Trusts ⇐271½.

Court having charge of trust estate was under duty, so far as it could, to see that principal thereof was kept intact for remaindermen.

4. Courts ⇐200¼.

Superior court has both probate and equity jurisdiction, and may exercise its equity powers in connection with powers as probate court.

5. Trusts ⇐271½.

Where trust estate consisted of stock in corporation, and corporation distributed part of assets to stockholders through dividends, and life tenant received moneys which belonged ultimately to remaindermen, superior court having charge of trust estate properly, under equity powers, directed trustee to hold income due life tenant thereafter until trust estate was reimbursed, separate suit being unnecessary, though order settling former accounts had become final (Code Civ. Proc. §§ 1699, 1701).

6. Trusts ⇐271½.

Where trustee erroneously paid certain funds to life tenant, court's directing trustee to take steps and proceedings to recoup loss suffered by trust estate was within court's discretion.

Appeal from Superior Court, Fresno County; S. L. Strother, Judge.

In the matter of the estate of Delia Eilert, deceased. The Security-First National Bank of Los Angeles filed its fifth annual account as trustee under the will of Delia Eilert, deceased, to which W. J. Eilert, a beneficiary, filed objection. From the order made, W. J. Eilert appeals.

Order modified, and, as modified, affirmed.

Everts, Ewing, Wild & Everts, A. W. Carlson, and L. N. Barber, all of Fresno, for appellant.

Frank Kauke, of Fresno, for respondent.

BARNARD, Presiding Justice.

This is an appeal from an order settling the fifth annual account of a trustee under the will of Delia Eilert, deceased. Delia Eilert died on May 29, 1923, and in accordance with her will there was distributed to the respondent, as trustee, 53⅘ shares of the capital stock of Eilert Products Company, a corporation, the net earnings and income to be paid to the appellant, William J. Eilert, during his lifetime and, on his death, the corpus of the trust to go to certain remaindermen. The appellant was president of the Eilert Products Company. This corporation owned 24 acres of land in the city of Fresno, upon which were situated certain buildings and equipment formerly operated as a brewery and later used in the manufacture of ice cream and soft drinks. The corporation also owned three other pieces of real property, of which one had been used for warehouse purposes and the other two had formerly been leased to others for saloon purposes.

In 1925 the 24-acre tract of land, with the buildings and equipment thereon, was sold for $400,000, the purchase price to be paid in installments, and in 1926 the three other properties were sold for $125,484. During the next few years the corporation distributed a large part of its assets, in the form of cash received from the sale of these real proper-

ties, through dividends to its stockholders. The respondent received during several years the proportion of the amounts thus distributed to which the shares of stock it held in trust were entitled. Each check received was marked "dividend," and the respondent assumed that the same represented income upon the stock held in trust. Four annual accounts were filed by the respondent trustee showing the receipt of such sums as income and the payment of practically all of the same to the appellant as life tenant, under the provisions of the trust. An order was made by the court approving each of said four annual accounts, which orders were never appealed from and have become final.

A fifth annual account was filed on November 25, 1930, setting forth the receipt during that year of $3,998.40, derived through such dividends from the sale of real estate by the corporation, and also the receipt of $574.60 from dividends paid by the corporation from operating profit during the current year. It was further reported that the trustee had discovered that the corporation had sold its properties and was reducing them to cash, and that all the dividends theretofore received by the trustee had included a pro rata portion of the moneys received by the corporation from the sale of properties held by the company at the time of the creation of the trust. The report then set forth an account of the moneys coming from the proceeds of the sales of the corporation properties which had theretofore been paid to the appellant; that said amounts had theretofore been paid to the appellant under the mistaken belief that they represented income from the corpus of the estate, and were previously reported to the court, by reason of this mistake, as income received and paid to appellant; that, since the discovery of the mistake, the trustee had withheld further payments to the appellants, and was retaining all amounts received from the corporation since the rendition of the last account as a part of the principal of the trust fund; and instructions and directions were asked from the court as to the duty of the trustee under the trust provisions.

The appellant filed objections to the account and report, and, after evidence taken at a hearing in which all parties took part, the court found that $16,820.70 of the amounts shown to have been paid to the appellant and accounted for in the four previous accounts was, in fact, a part of the capital or corpus of said trust funds; that the same came from the sale of properties owned by the corporation at the time of the death of the testatrix; that the same had been delivered to the trustee by the corporation as earnings; that the same were understood by the trustee to be earnings of the corporation, and were received and disbursed as such; that the trustee had no knowledge of the source of these funds until after the receipt of the amounts reported as received in the fifth account; and that prior to the receipt of the sums accounted for in the fifth account the trustee had no information which would put it on inquiry or lead it to suspect that the so-called dividends received by it from the corporation were not paid out of earnings of the corporation, or that the same were derived from the sale of the corporation assets. After appropriate conclusions of law, the court directed the trustee to take steps and proceedings to recover from the appellant the sum of $16,820.07, to be held as a part of the capital or corpus of the trust when and as recovered. The court further ordered the trustee to retain all income from the trust estate then in its hands or subsequently received, to which the appellant would otherwise be entitled, and to apply the same upon the amount found to have been overpaid to appellant, until such time as that amount had been returned to the corpus of the trust. From this order the life tenant or beneficiary has appealed.

[1] In effect, at least, the court ordered the trust estate's share of the proceeds from the sale of properties held by the corporation at the time of the death of the testatrix to be kept intact as a part of the corpus of the trust estate. This brings up the first question presented to us as to whether the appellant, as life tenant, is entitled to an alleged increase in the value of the real estate owned by the corporation; it being claimed that this real estate greatly increased in value after the death of the testatrix. It is argued that, of the 24 acres of land upon which the business of the corporation was located, only 3 acres had been used in connection with the business carried on, while the rest was unused and vacant land. The statement is made in appellant's brief that this land was worth $5,000 an acre at the time of the death of the decedent and $10,000 an acre at the time the property was sold. No evidence of this latter value is pointed out, and reference is apparently made to a provision in the mortgage, taken back when the land was sold, to the effect that certain specified portions of the land could be released from the mortgage upon the payment of $10,000 an acre. This by no means fixes such a value, and the entire property, consisting of land, buildings, equipment, and stock, was sold for a lump sum of $400,000. It further appears that at the time of the death of the testatrix all of the properties of the corporation were carried on the books of the corporation at a value of $522,850.59. These properties were later sold for $525,884, leaving no such increase as that contended for. Irrespective of its amount, we think this increase became a part of the corpus of the trust estate.

In support of his contention that such increase must be considered as income, the ap-

pellant relies upon Estate of Gartenlaub, 185 Cal. 375, 197 P. 90, 24 A. L. R. 1. While the court in that case recognized the general rule that a mere enhancement of the value of assets owned by a corporation belongs to the remaindermen and not to the life tenant, where shares of stock of the corporation are held in such a trust as we are here considering, it was held that the facts then under consideration brought that case within an exception to the general rule, in that the corporation there involved was solely engaged as a trading corporation in handling a certain tract of real estate; this being the only purpose of the corporation, and an increase in the value of the land sold being the only possible source of any income or profit. It is clear that the facts of the instant case do not bring it within that exception to the general rule. The corporation here involved was engaged in manufacturing and selling certain products, and the real estate owned by it was held in connection with said business and incidental thereto. While all of the 24 acres of land were not occupied by the buildings used by the corporation in its business, the entire tract was held and sold as a unit. An analysis of the evidence fully shows that this land had been held many years, and that the corporation had in no way segregated any part of its capital for the purpose of conducting a separate real estate business. The other parcels of real property were all acquired in connection with and for the purpose of promoting the real business in which the company was engaged. All of these properties were held as assets by the corporation at the time of the death of the testatrix and by the subsequent sales were merely changed into another form. The life tenant is no more entitled to any increase in their value than he would be subject to having any possible depreciation in the value thereof charged against him. Any increase in value should accrue to the corpus of the estate; the life tenant presumably receiving his full benefit through the increased income therefrom. Estate of Canfield, 104 Cal. App. 181, 285 P. 363; Estate of Gartenlaub, 198 Cal. 204, 244 P. 348, 351, 48 A. L. R. 677. In the last-named case, the court said: "* * * We think it may be taken to be settled law that accretions to a trust fund resulting from the increase in value of the bonds or other securities in which its corpus is invested, due to whatever cause, are to be regarded as part of the corpus of the trust and not as income * * * or profits to which the life beneficiary is entitled."

Where, as here, the trust estate consists of shares of stock in a general trading corporation which in the conduct of its business has acquired certain assets, and where such corporation is reducing these assets to cash and distributing the same to its stockholders, we think any incidental increase in the value of such assets must be considered, as between the life tenant and the remaindermen, as additions to the corpus of the trust estate.

[2-6] The next point raised relates to the right of the trial court to make an order to the effect that $574.60 included in this account, which was admittedly income, and the subsequent income to which the appellant would otherwise be entitled, should be held by the trustee and applied toward reimbursing the trust estate for moneys theretofore erroneously paid to appellant, and directing such trustee to take steps or proceedings to collect the balance. Appellant argues that, the order settling the four former accounts having become final, the court was without power to reopen the matters contained therein on the hearing of a subsequent account, and that the effect of the order here made is to set aside the former orders and reopen the matters therein adjudicated, which may not be done. The appellant cites sections 1701 and 1699 of the Code of Civil Procedure (then in effect), and such cases as Estate of Pratt, 119 Cal. 156, 51 P. 47; Estate of Fernandez, 119 Cal. 579, 51 P. 851; Estate of Carver, 123 Cal. 102, 55 P. 770; Estate of Bell, 142 Cal. 97, 75 P. 679; and Estate of Rider, 199 Cal. 742, 251 P. 805. The respondent, while conceding the finality of these previous orders, points out that the trial court did not attempt to disturb the former orders and did not order the life tenant to return the money mistakenly paid or received. The court did, after a hearing, find facts justifying the conclusion that a mistake had been made through which the life tenant had received certain moneys to which, in equity and good conscience, he was not entitled. Without doubt the court, in the exercise of its equitable jurisdiction, has the power, in a proper case and in a proper way, to grant relief from a final order or judgment obtained through fraud or mistake. Such relief has been frequently given in this state. Bacon v. Bacon, 150 Cal. 477, 89 P. 317, 323; Estate of Walker, 160 Cal. 547, 117 P. 510, 511, 36 L. R. A. (N. S.) 89; Simonton v. Los Angeles Trust & Savings Bank, 192 Cal. 651, 221 P. 368; Estate of Bloom, 213 Cal. 575, 2 P.(2d) 753. The appellant argues that no such relief is here possible because the mistake here made was intrinsic and not extrinsic. In Bacon v. Bacon, supra, the court said:

"The case at bar comes fully within these principles. The plaintiff, by reason of the common mistake, believed that her legacy was only $2,000, instead of $10,000, as it was in fact. She had been fully paid the $2,000, which she believed to be the extent of her demand. Her claim was, as she supposed, satisfied, and she was thereby fully justified in assuming that she had no further concern with the estate and no interest in the distribution. * * * The obvious result was the decision of the court, based on the uncon-

tested facts set forth in the petition for distribution, that the plaintiff had been paid in full, with the corresponding decree distributing to the residuary legatees, $8,000 of the money of the estate, which, of right, belonged to the plaintiff. The mistake of the plaintiff, which led to this injury, was clearly caused by matters extraneous and collateral to the merely formal inquiry made by the court upon the hearing."

In Estate of Walker, supra, the court said: "The sanctity and immunity of a decree of distribution which has become final attaches to the decree itself, and not to those who under it may have derived an unconscionable advantage through fraud, accident, or mistake."

The mistake here made was "extraneous and collateral to the merely formal inquiry made by the court upon the hearing," and we are unable to see why it is not, under the facts found, similar in character to those for which relief has frequently been granted and of a nature fully justifying equitable relief.

The question remains, however, whether such equitable relief could be given by the court in this proceeding, or whether a separate suit in equity was essential. In most of the cases cited above, a final decree of distribution having been entered and the estate closed, a separate suit in equity was filed upon the theory that the distributees held the property distributed to them in trust for the rightful owners thereof. In the matter now before us the trust estate was still pending in the trial court. Under such circumstances, if the trial court has the requisite equitable jurisdiction, we know of neither reason nor authority for the proposition that a separate suit is essential. In Verdier v. Roach, 96 Cal. 467, 31 P. 554, 557, it is said: "Our superior courts have both probate and equity jurisdiction, so that whenever, in the course of the administration and settlement of estates, our probate statutes are found to be inadequate to authorize and accomplish all that a court of equity is authorized to do in such cases, our superior courts may exercise their equity powers in connection with, and as incidental to, their powers in probate matters, to the extent necessary to a complete administration and distribution of estates: provided, of course, that nothing be done in contravention of any statutory provision."

Having charge of this trust estate, it was the duty of the trial court, so far as it could, to see that the corpus or principal thereof was kept intact for the remaindermen. A complete administration of the trust estate involved this duty as well as seeing that income payments were made to the life tenant as he became entitled to them. The superior court not only had both probate and equity jurisdiction, but it had the undoubted right to exercise its equity powers in connection with, and as incidental to, its powers as a probate court. Having determined that this life tenant had received moneys to which he was not entitled and which belonged ultimately to the remaindermen, and having under its control at the same time other moneys to which the life tenant was entitled and also other property which could be expected to make further moneys available to him while the matter was still in charge of the court, all of which was a part of the same matter then pending before the court, it would be contrary to all principles of equity to hold that the court must first order the income in the hands of the trustee paid to the life tenant and that a separate action must then be brought to compel him to repay this money on account of sums theretofore mistakenly paid to him from the same fund and which the court had already found he was not entitled to retain. Estate of Whitney, 124 Cal. App. 109, 11 P. (2d) 1107. The entire matter being before the court, and all of the parties having been heard, the court had full power to complete the same and to render its order in accordance with the facts and the principles of equity involved. We think it also follows that the matter of directing the trustee to take other steps and proceedings for the purpose of recouping the loss suffered by the trust estate is one entirely within the discretion of the trial court.

While the court found that the appellant had received $16,820.07 from the corpus of the estate to which he was not entitled, the respondent concedes an error in the amount named and that the correct figure, as to the amount improperly received by the appellant, is $15,360.79. The order appealed from should therefore be modified by changing the amount which the trustee is directed to take steps to recover, and when recovered to return to the trust estate, from $16,820.07 to $15,360.79, of which $574.60 is now in the hands of the trustee, leaving a balance of $14,786.19 still due to the trust fund.

As so modified, the order appealed from is affirmed, the appellant to pay costs on appeal.

We concur: MARKS, J.; JENNINGS, J.

GOODFELLOW et ux. v. GOODFELLOW et al. *

Civ. 840.

District Court of Appeal, Fourth District, California.

April 27, 1933.

Rehearing Denied May 26, 1933.

Hearing Granted by Supreme Court June 26, 1933.

1. Mortgages ⇐39.

Whether deed to grantee was outright deed of conveyance with verbal option in another to purchase land from grantee for original purchase price *held* for trial court.

2. Mortgages ⇐38(2).

To warrant determination from oral evidence that purported absolute deed was something essentially different, testimony must be clear and conclusive.

3. Mortgages ⇐1.

Mortgage presupposes existence of debt for which conveyance was security.

4. Mortgages ⇐32(5).

Agreement that grantee paying purchase price on behalf of alleged purchaser take deed, and that purchaser could pay grantee purchase price when he was able, *held* insufficient to create indebtedness from purchaser to grantee, so as to constitute deed a mortgage as security for indebtedness.

5. Mortgages ⇐38(1).

Evidence in quiet title action sustained finding that grantee taking deed gave plaintiff claiming deed was mortgage, option to purchase land at original purchase price, and that option was terminated.

6. Contracts ⇐235.

Where sales contract required payment in money, buyer's obligation to pay may only be satisfied by payment in money unless parties agreed to substitute other medium.

7. Contracts ⇐248.

Whether party to agreement calling for payment in cash agreed to accept payment in different medium *held* for trial court.

8. Appeal and error ⇐1010(1).

Trial court's findings supported by evidence must be upheld by reviewing court.

9. Quieting title ⇐44(3).

Evidence in quiet title action failed to establish acceptance of option to purchase land involved.

Appeal from Superior Court, Kings County; K. Van Zante, Judge.

Action by George W. Goodfellow and wife against A. W. Goodfellow and others. From a judgment for defendants, plaintiffs appeal.

Affirmed.

Head, Wellington & Jacobs, of Santa Ana, for appellants.

B. H. Cory, of Fresno, and Simpson & Simpson, of Los Angeles, for respondents.

JENNINGS, Justice.

This action was instituted by plaintiffs to quiet their title to certain real property located in Kings county. The complaint recites that on October 22, 1920, negotiations for the purchase of the land were entered into between plaintiff George W. Goodfellow, and certain parties by the name of Barritt, who then owned the property and that it was agreed that the defendant A. W. Goodfellow would pay to B. F. Barritt the purchase price of the property, being the sum of $1,600 in cash, and that the deed to the property should be made to A. W. Goodfellow as security for the repayment to him of said sum by the plaintiff George W. Goodfellow. It is further alleged that the defendant A. W. Goodfellow specifically agreed with plaintiff George W. Goodfellow that when the sum of $1,600 should be repaid to said defendant the property would be conveyed to the plaintiff George W. Goodfellow and that in reliance upon this promise the said plaintiff permitted the deed to the property to be executed in the name of A. W. Goodfellow as grantee. The pleading alleges that the aforementioned plaintiff and defendant at all times material to the controversy between them were permitted to draw certain moneys from the estate of their father, which estate was in charge of their mother, and that pursuant to this arrangement defendant A. W. Goodfellow caused the account of plaintiff George W. Goodfellow with the estate to be charged with the sum of $1,600 for the purchase of the land and his own account with the estate to be credited with said sum. It is then alleged that from November 6, 1920, until March 26, 1926, defendant A. W. Goodfellow held the property thus conveyed to him in trust for the plaintiff George W. Goodfellow, and that on March 26, 1926, said defendant and his wife conveyed the property to the defendant L. L. Cory; that the conveyance to Cory was without consideration and for the purpose of defrauding plaintiff. The prayer of the complaint is that it be decreed that the deed to the defendant A. W. Goodfellow be declared void and canceled and the deed to Cory likewise ordered canceled and that it be adjudged that the plaintiff George W. Goodfellow is the owner in fee of the land free and clear from any claim of said defendants.

The answer of the defendants A. W. Goodfellow and L. L. Cory admits that negotiations were entered into for the purchase of the land between plaintiff and the Barritts, as alleged in the complaint, but that the plaintiff was unable to comply with the terms agreed upon for the purchase and that by

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 27 P.2d 898.

the mutual agreement of the vendors and the plaintiff and the defendant A. W. Goodfellow the land was actually purchased by A. W. Goodfellow and that with the acquiescence and consent of the plaintiff the deed conveying the land was executed to defendant A. W. Goodfellow as grantee; that the land was purchased by defendant A. W. Goodfellow, who paid the purchase price therefor for his sole use and benefit and not upon the understanding or agreement that the deed to the land was to be made to said defendant as security for the repayment to him by the plaintiff of the purchase price; that at the time the land was so purchased by said defendant A. W. Goodfellow he gave to the plaintiff a verbal option to purchase the land, which option was without consideration and revocable by said defendant and was thereafter and prior to the commencement of the action revoked by defendant A. W. Goodfellow and by mutual consent of plaintiff and said defendant was terminated; that the defendant A. W. Goodfellow did not charge the sum of $1,600, being the purchase price of the land, to the account of plaintiff with the estate of the father of plaintiff and said defendant nor did he credit his account with said estate with such amount; that on March 26, 1926, the defendants A. W. Goodfellow and Katherine C. Goodfellow, in good faith and for a valuable consideration, executed and delivered to defendant L. L. Cory a deed to the said land, which deed was executed without knowledge or notice on the part of the grantors or grantee that plaintiff George W. Goodfellow had any right, title, interest, or claim in the said property.

Upon the issues framed by the aforementioned pleadings the action proceeded to trial. Upon the conclusion of the trial the court found that the land was purchased by the defendant A. W. Goodfellow for his sole use and benefit and that the deed conveying the land to said defendant was not delivered to him as security for the repayment of the purchase price of $1,600 by the plaintiff George W. Goodfellow or that said plaintiff agreed to pay to said defendant the sum of $1,600 or that defendant A. W. Goodfellow agreed to pay the purchase price of $1,600 upon the understanding or agreement that the deed to defendant A. W. Goodfellow was to be made as security for the repayment to said defendant of said sum by the plaintiff George W. Goodfellow. The court further found that at the time the deed was executed and delivered to the defendant A. W. Goodfellow said defendant granted to the plaintiff George W. Goodfellow a verbal option to purchase the land from him, which option was without any consideration and was revocable at the pleasure of said defendant and that thereafter and prior to the commencement of the action the option was repudiated by the plaintiff George W. Goodfellow and by mutual consent of the said parties was canceled and annulled. The court further found that on March 26, 1926, the defendants A. W. Goodfellow and Katherine C. Goodfellow, in good faith and for a valuable consideration, executed a deed conveying the property to the defendant L. L. Cory, which deed was made with knowledge on the part of plaintiff George W. Goodfellow that it was executed for a valuable consideration and without knowledge or notice on the part of the defendants that said plaintiff had or claimed to have any right, title, claim, or interest in or to said property. It is also found that the plaintiffs have not nor has either of them any right, title, or interest in or to said property. From the findings thus made the court drew the conclusion that the plaintiffs were not entitled to succeed and rendered judgment accordingly in favor of the defendants. From this judgment plaintiffs have prosecuted the present appeal.

The principal contention presented by appellants which they claim warrants a reversal of the judgment is the familiar contention that the findings which form the basis for the judgment are not sufficiently supported by the evidence. To be more explicit, it is particularly urged that the court's finding that the respondent A. W. Goodfellow purchased the property for his own use and benefit and that the deed conveying the land to him was not delivered to him as security for the payment by appellant George W. Goodfellow of the amount paid by A. W. Goodfellow as the purchase price of the land is lacking in evidentiary support.

In the final analysis the evidence respecting the sale of the land and the circumstances under which the deed was made and delivered to A. W. Goodfellow rests entirely upon the testimony of appellant George W. Goodfellow and respondent A. W. Goodfellow. The testimony of these witnesses with respect to what was agreed upon between them is irreconcilably conflicting. Appellant George W. Goodfellow testified that at the time he made the oral agreement with the owner of the land to purchase it the vendor insisted that he be paid for it in cash, that appellant replied he could not pay all cash, and that respondent A. W. Goodfellow, who was present, stated that the deed to the land could be made to him as grantee and that appellant could pay him "when he gets it." It is undisputed that the purchase price of $1,600 was paid by respondent A. W. Goodfellow. Appellant George W. Goodfellow further testified that in the year 1926, after he had been advised that A. W. Goodfellow had conveyed the land to L. L. Cory, he demanded of A. W. Goodfellow that he execute a deed to the land to appellant. Respondent A. W. Goodfellow testified that at the time the oral agreement for the purchase of the land was made between B. F. Barritt, the owner, and appellant George W. Goodfellow, the latter did not have the money to pay for the

land and that the witness stated to the vendor, "Well I will purchase this one hundred sixty acres of land from you and you give me a deed to the land in my name," and that he stated to appellant George W. Goodfellow, "I will buy this one hundred sixty acres of land and I will give you an option to buy it from me at what I have paid for it." This witness further testified that he thereupon permitted the appellant to have the use of the land and that appellant in return therefor agreed to pay the taxes, that in the year 1925 it was brought to his attention that certain taxes assessed upon the land had not been paid by appellant, and that he then stated to appellant that he would pay the taxes that had become delinquent and that he then and there terminated the verbal option he had given appellant to purchase the land from him. It is undisputed that appellant George W. Goodfellow did have the use of the land from the time the deed conveying it to A. W. Goodfellow was executed until the year 1925 and that he agreed to pay the taxes assessed against the land and that he did pay the taxes with the exception of one instalment for the year 1925 which was allowed to become delinquent and that A. W. Goodfellow paid the delinquent taxes and redeemed the land.

[1] From the aforesaid evidence it was incumbent upon the trial court to determine whether the deed conveying the land to respondent A. W. Goodfellow was intended to operate as a mortgage securing the payment of the purchase price of the land or whether it was what it showed on its face, a deed outright vesting title in the grantee, and that the parties interested, to wit, respondent A. W. Goodfellow and appellant George W. Goodfellow, intended that the latter should have merely a verbal option to purchase the land at some future time upon payment by appellant to respondent of the sum paid by the latter as the purchase price. Certainly so far as the latter theory is concerned there was evidence produced which justified the court in adopting it and in arriving at the conclusion that the deed was what it purported to be, an outright deed of conveyance, and that respondent and appellant so considered it and further intended that appellant should have a verbal option to purchase the land from respondent at the price originally paid therefor.

[2] That the court's determination of the question of fact thus presented was justified upon the conflicting testimony above mentioned is rendered the more certain when it is borne in mind that it is well settled that to warrant a trial court in determining from oral testimony that a deed purporting to convey land absolutely in fee simple is in reality something essentially different, viz., a mortgage or trust, such testimony must be clear, convincing, and conclusive. Sheehan v. Sullivan, 126 Cal. 189, 58 P. 543; Emery v. Lowe, 140 Cal. 379, 73 P. 981; Kohn v. Parent, 174 Cal. 570, 163 P. 1008; Stevens v. Fetterman, 76 Cal. App. 741, 246 P. 102.

[3-5] It may be observed that the trial court would have encountered further difficulty in sustaining the contention of appellants that the deed to A. W. Goodfellow, although in form a deed absolute, was in reality a mortgage, since a mortgage presupposes the existence of a debt for which the conveyance was security. Henley v. Hotaling, 41 Cal. 22; Holmes v. Warren, 145 Cal. 457, 78 P. 954. The testimony of appellant George W. Goodfellow was that A. W. Goodfellow said that the deed could be made to him and that appellant could pay him when "he gets it." Assuming that the trial court accepted this testimony as a true and correct statement of what was said by A. W. Goodfellow at the time the deed was executed to him, so vague, uncertain, and indefinite an agreement could hardly be held sufficient to create an indebtedness from George W. Goodfellow to A. W. Goodfellow. Had the latter instituted an action against the former to enforce collection of the amount paid as the purchase price and sought to foreclose the mortgage on the theory that the deed was a mortgage and the evidence showed that the agreement was in accordance with appellant's testimony the burden would have rested upon respondent to prove that appellant was in fact able to make payment. Van Buskirk v. Kuhns, 164 Cal. 472, 129 P. 587, 44 L. R. A. (N. S.) 710, Ann. Cas. 1914B, 932; California Prune, etc., Growers v. Baker, 77 Cal. App. 393, 397, 246 P. 1081. It is also significant that appellant George W. Goodfellow did not testify that he expressed his assent to the statement attributed to A. W. Goodfellow that appellant could pay him when he should become able to do so. We think the court was amply warranted in accepting the testimony of the respondent A. W. Goodfellow that he gave appellant a verbal option to purchase the land conveyed to him and that the option was terminated by A. W. Goodfellow prior to the institution of this action.

Some consideration should be given to the contention of appellants that respondent A. W. Goodfellow had in fact received payment of the sum originally paid by him as the purchase price of the land prior to the institution of this action, and that therefore, accepting as correct his version of the agreement between the parties, viz., that he granted to appellant George W. Goodfellow an option to purchase the land at the original purchase price, appellants are nevertheless entitled to the relief demanded in their complaint.

The record shows that George W. Goodfellow and A. W. Goodfellow are brothers and that for some considerable period of time

prior to the commencement of this action loans of money were made to both brothers by their mother, Alice R. Goodfellow, and that in the books of the mother an account was carried in the name of each brother in which were entered the various amounts advanced from time to time to the debtor as well as such items of credit as he was entitled to receive. The record further shows that a short time subsequent to the purchase of the land the title to which is here in controversy, A. W. Goodfellow's bookkeeper charged George W. Goodfellow's account with the amount paid by A. W. Goodfellow as the purchase price of the land and forwarded to the office of Alice R. Goodfellow in San Francisco a schedule of items which were to be charged to the account of George W. Goodfellow, in which there was one item of $1,600 representing the price paid for the land and that as a consequence the indebtedness of George W. Goodfellow to Alice R. Goodfellow as shown by the latter's books was increased by this amount and the indebtedness of A. W. Goodfellow to Alice R. Goodfellow was decreased by the same amount. A. W. Goodfellow testified that he did not learn that George W. Goodfellow's account on his books was charged with the amount paid by him for the land or that this amount formed one of the items forwarded by his bookkeeper to the office of Alice R. Goodfellow in San Francisco until the year 1926. The record contains no evidence that Alice R. Goodfellow knew that such an entry was to be made or that she approved or consented to it after it was made. A. W. Goodfellow also testified that the transaction whereby he paid the purchase price of the land was a cash transaction "which he was supposed to pay me in cash."

[6-9] The principle is well established that where a contract for the sale of property is entered into and it appears that the terms of such contract require payment to be made in money the obligation of the purchaser to pay may only be satisfied by payment in money unless the parties to the contract agree that some other medium of payment shall be substituted therefor. Borland v. Nevada Bank, 99 Cal. 89, 33 P. 737, 37 Am. St. Rep. 32; First National Bank v. Corcoran, 105 Cal. App. 116, 286 P. 1105; Margolis v. Los Angeles-First Nat., etc., Bank, 122 Cal. App. 186, 9 P.(2d) 526. As above noted, there was evidence that the agreement between respondent A. W. Goodfellow and appellant George W. Goodfellow called for payment by the latter to the former in cash and it was for the trial court to determine whether the evidence showed that A. W. Goodfellow ever agreed or consented to accept a different medium of payment than cash. The court's findings make it clear that the trier of facts accepted the testimony of A. W. Goodfellow as the correct explanation of the transaction between the brothers, and under the circumstances disclosed by the record we cannot declare that the court erred in so doing. It must again be observed in this regard that the court specifically found that the deed from Barritt to A. W. Goodfellow was not executed pursuant to an agreement between the brothers that it should be held by the grantee as security for the payment to him by George W. Goodfellow of the amount of the original purchase price or that A. W. Goodfellow held title to the land in trust for George W. Goodfellow but that A. W. Goodfellow purchased the land for his own use and benefit and merely granted to his brother, George, a verbal option to buy the land from him at the price which he had paid for it which option was entirely unsupported by any consideration and revocable at the pleasure of said respondent. The court also found that the option thus given was terminated by A. W. Goodfellow prior to the institution of this action. As heretofore pointed out, there was evidence to support the findings thus made and we are therefore bound to uphold them. The contention of appellants that the entries in the books of Alice R. Goodfellow whereby the indebtedness of George W. Goodfellow to his mother was increased in the amount of $1,600 and the indebtedness of A. W. Goodfellow was decreased by a like amount amounted to payment of the sum of $1,600 without any additional evidence that George W. Goodfellow ever exercised the option to purchase the land was in conformity with the theory and contention consistently advanced by appellants throughout the trial that the two brothers agreed at the time the deed was executed that A. W. Goodfellow should take title to the land and hold the same as security for the payment to him of an indebtedness of $1,600 then created in his favor by George W. Goodfellow. There was evidence, however, which warranted the court in finding that there was no such agreement between the brothers and that no such indebtedness was created. The purported payment made in the manner above indicated standing alone could hardly be said to discharge an obligation which never existed.

Our conclusion that the court's findings with respect to the nature of the transaction between George W. Goodfellow and A. W. Goodfellow and that the deed to the latter was not given as security for the payment of the purchase price of the land are not lacking in evidentiary support eliminates the necessity for any consideration of those findings which relate to the position of the respondents Carolyn A. Cory as executrix and Benjamin H. Cory as executor of the last will and testament of L. L. Cory, deceased. Since there was evidence that A. W. Goodfellow purchased the property for himself and merely granted an option for its sale to George W. Goodfellow which was terminated prior to the time when A. W. Goodfellow ex-

ecuted the deed conveying the land to L. L. Cory, no question can arise as to the good faith or knowledge of L. L. Cory or the consideration paid by L. L. Cory to A. W. Goodfellow and Katherine C. Goodfellow.

For the reasons stated the judgment is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

131 Cal.App. 393

PLATNAUER v. FORNI et al.

Civ. 4654.

District Court of Appeal, Third District, California.

April 25, 1933.

Rehearing Denied May 25, 1933.

1. Attorney and client ⇐165.

Complaint, not demurred to, alleging employment of attorney by deceased, employment by widow as executrix, who without notice fraudulently procured distribution of estate to herself and discharge before attorney's services, worth $2,000, were completed, stated good equitable cause of action against widow personally (Probate Code, § 910).

2. Pleading ⇐49.

Nature of action must be determined from pleadings as a whole, prayer of complaint not being controlling.

3. Pleading ⇐49.

Theory on which action is tried by parties may determine nature of cause.

4. Trial ⇐397(5).

Finding that resulting trust was created by executrix' fraud in procuring distribution of estate to herself and discharge to defeat attorney's claim was unnecessary, where complaint clearly presented issue and court found that allegations of complaint were true (Probate Code, § 910).

5. Trial ⇐404(4).

Where allegations of pleading are specific, general finding that all the allegations are true is sufficient to support judgment.

6. Appeal and error ⇐1071(6).

Where judgment is fully supported by court's findings, failure to find upon material issue does not necessarily require reversal if it is apparent that appellate court in support of judgment would be required to adopt finding adverse to appellant.

7. Appeal and error ⇐1071(6).

Failure to find that resulting trust arose from executrix' fraudulent procurement of distribution to herself and discharge to defeat claim was harmless, where complaint raising issue was found to be true and appellate court in support of judgment would be required to adopt finding adverse to appellant (Probate Code, § 910).

8. Executors and administrators ⇐315(6).

While decree of distribution is ordinarily conclusive as to rights of heirs, devisees, and legatees, it does not protect distributee who procured it by extrinsic fraud (Probate Code, § 910).

9. Executors and administrators ⇐315(6).

Executrix who prevents, by decree of distribution and discharge, attorney conducting litigation for estate from presenting claim, is guilty of "extrinsic fraud," and equitable action against her is not "collateral attack" upon decree of distribution (Probate Code, § 910).

"Extrinsic fraud" is such acts as prevent one from having opportunity for fair submission of controversy.

[Ed. Note.—For other definitions of "Collateral Attack" and "Extrinsic or Collateral Fraud," see Words and Phrases.]

10. Executors and administrators ⇐433.

Attorney conducting unconcluded litigation for estate was not "creditor" of estate, or entitled to present claim, and was not negligent in failing to serve request for notice of filing of petitions and accounts (Probate Code, §§ 1200, 1202).

[Ed. Note.—For other definitions of "Creditor," see Words and Phrases.]

11. Attorney and client ⇐145.

Attorney ordinarily is not entitled to claim for services until work is fully performed.

12. Attorney and client ⇐166(1).

Evidence in equitable action against executrix for fraudulently procuring distribution to herself and discharge to defeat attorney's claim *held* to support judgment for attorney (Probate Code, § 910).

13. Executors and administrators ⇐456(2).

Costs were improperly allowed against estate and associate attorneys who refused to join in action of attorney against executrix who had fraudulently procured distribution to herself and discharge to defeat attorney's claim (Probate Code, § 910).

Appeal from Superior Court, El Dorado County; George H. Thompson, Judge.

Action by R. Platnauer against Nettie L. Forni and others. From a judgment for plaintiff, defendants appeal.

Modified and affirmed.

Bradford, Cross & Prior and S. H. Jones, all of Sacramento, for appellants.

R. Platnauer, of Sacramento, in pro. per.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

This is an appeal from a judgment rendered against the distributee of an estate, for attorney's fees for services performed with the acquiescence of the administratrix, which employment was not completed at the time of final distribution.

The respondent is an attorney at law. He was employed by Alexander F. Forni as an associate counsel with other attorneys in the prosecution of three important civil actions. Pending the trial of these cases, Forni died. His surviving widow, Nettie L. Forni, who is one of the defendants in this action, was appointed executrix of his estate. The respondent did not represent the executrix in the probating of the estate. There is ample evidence to indicate that subsequent to her appointment as executrix of the estate of her deceased husband, Nettie L. Forni ratified the employment of respondent as one of the attorneys in the civil actions and accepted the benefit of his legal services in behalf of the estate; that these actions were terminated favorably to the interest of the estate, but were not completed until after distribution of the estate had been made; that the residue of the estate valued at $200,000 was distributed to the widow of said deceased; that the respondent had no knowledge of the proposed distribution of the estate until after the decree had been rendered, and that the probate court had no knowledge of the pending litigation or the unpaid counsel fees at the time of distribution.

After the termination of the civil suits, the respondent demanded of the defendant Nettie L. Forni payment of his fees. This was refused on the claim that he was employed by the other associate lawyers to assist them, and that he did not represent the executrix. This suit was then instituted against Mrs. Forni, the distributee of the residue of the estate of her husband, on the theory that she ratified respondent's employment and accepted the benefit of his legal services in behalf of the estate, and that she wrongfully procured a settlement of the final accounts of the estate representing that all debts and expenses of administration had been paid, and obtained distribution of the residue of the estate to herself before the legal services of the respondent were completed and without notice of the distribution or knowledge thereof on his part. The other attorneys were made parties defendant because they did not join respondent as plaintiffs in the action.

Upon trial, the court found that the respondent was employed by Nettie L. Forni, as executrix of the estate, together with the other attorneys, and that he performed legal services for the benefit of the estate of the reasonable value of $700, no part of which had been paid. All of the allegations of the complaint were found to be true. Judgment was accordingly rendered against her for that sum. Judgment for costs only was rendered against the other defendants. From this judgment all of the defendants have appealed.

The appellants contend that under the provisions of section 1619 of the Code of Civil Procedure, now section 910 of the Probate Code, an administrator or executor is not personally liable for the payment of attorney's fees for services rendered in behalf of an estate, but upon the contrary that compensation for such services is a proper charge against the estate as a necessary expense thereof. In support of this claim the cases of Kelleher's Estate, 205 Cal. 757, 272 P. 1060, and Zagoren v. Superior Court, 117 Cal. App. 548, 4 P.(2d) 279, are cited. It is accordingly asserted the probate court has exclusive authority to allow claims for such counsel fees, and that a court of equity has no jurisdiction thereof. It is also asserted that neither the pleadings, the findings, nor the evidence supports the judgment.

[1] The complaint alleges facts sufficient to constitute an equitable cause of action against the defendant Nettie L. Forni personally. It recites that the respondent was employed by Alexander F. Forni, together with other attorneys, to represent him in three civil actions; that pending the trial of these cases Forni died; that his surviving widow, Nettie L. Forni, was appointed executrix of his estate; that as such executrix she thereafter employed these attorneys, including the respondent, to continue their employment until the civil actions which involved property belonging to the said estate were completed; that the respondent did not represent the executrix in the probating of the estate; that without notice to or knowledge on the part of respondent, the executrix procured a decree of the probate court settling her final account in the estate of her husband, representing to the court that all debts and expenses of administration had been paid, and procured final distribution to herself of the residue of the estate valued at $200,000; that the executrix was thereupon discharged; that at the time of distribution the pending litigation had not been completed, as the executrix well knew; that she procured distribution of the estate and her discharge as executrix to defeat respondent's claim for services against the estate, and that his legal services were reasonably worth the sum of $2,000. No demurrer to this complaint was filed.

These facts, in the absence of a demurrer, constitute a good equitable cause of action,

establishing a resulting trust which is founded on extrinsic fraud so as to charge the executrix personally with the obligation to pay for the legal services rendered in behalf of the estate.

[2, 3] While it is true the prayer of the complaint fails to ask for an adjudication that a resulting trust founded upon extrinsic fraud was created, the allegations of the pleadings necessarily include that issue, and the cause was tried upon the theory that it was involved in the litigation. The nature of an action must be determined from a consideration of the pleadings as a whole. While the prayer should be considered, together with the allegations of the pleadings in determining the nature of an action, it is not necessarily controlling. The theory upon which an action is mutually tried by respective litigants may determine the nature of the cause. 15 Cal. Jur. 335, § 12; Woolsey v. Woolsey, 121 Cal. App. 576, 9 P.(2d) 605; Cree v. Lewis, 49 Colo. 186, 112 P. 326.

[4, 5] In the present case it was unnecessary to specifically find that a resulting trust was created by the fraud of the executrix for the reason that the allegations of the complaint were sufficiently clear and unambiguous to present that issue, and the court did find that all the allegations of the complaint were true. Fritz v. Mills, 170 Cal. 449, 459, 150 P. 375; Ferguson v. Koch, 204 Cal. 342, 348, 268 P. 342, 58 A. L. R. 1176; MacMurtry v. Fraties, 84 Cal. App. 401, 258 P. 120; Tabler v. Harlin, 106 Cal. App. 74, 288 P. 823. In the case last cited, it is said: "When the allegations of a pleading are specific and certain, a general finding, by reference to the pleading, that all of the statements are true is sufficient to support the judgment."

[6, 7] When a judgment is fully supported by the findings which are adopted by the court, a failure to specifically find upon a material issue does not necessarily require a reversal of the cause, when it is apparent that the court, in support of the judgment, would be required to adopt a finding adverse to the appellant. 2 Cal. Jur. 1033, § 614; Jianou v. Pickwick Stages System, 111 Cal. App. 754, 296 P. 108. A host of authorities supports this declaration of law. In the present case all of the allegations of the complaint were found to be true. It is apparent that the court would therefore be compelled to adopt findings adverse to the appellant upon this issue in order to support its judgment and general findings. The omitted finding is therefore not prejudicial.

It is ordinarily true, under the statute as it now exists, that an administrator or executor of an estate is not personally liable for the payment of attorney's fees for services performed in behalf of an estate, or for other costs of administration. Upon the contrary, such costs and expenses are a proper charge against an estate, which must be paid in the course of administration. Section 910, Probate Code, formerly section 1619, Code Civ. Proc.; Estate of Kelleher, 205 Cal. 757, 272 P. 1060; Zagoren v. Superior Court, 117 Cal. App. 548, 4 P.(2d) 279. But when the executor employs an attorney to conduct litigation in behalf of the estate and accepts the benefits of his services, and procures a final settlement of accounts by wrongfully representing that all debts and expenses have been paid, and secures distribution of the residue of the estate to himself and obtains a final discharge from his trust before the litigation is terminated in order to defeat a legitimate claim against the estate, he is guilty of fraud which prevents the attorney from presenting his claim for allowance to the probate court, and thereby creates a personal liability against the executor for the payment of the obligation. When the probating of an estate is closed pending the prosecution of litigation in its behalf, and an attorney is thereby prevented from presenting his claim for allowance to the estate through extrinsic fraud of the executor to whom the residue of the property of the estate is distributed, he becomes personally liable for the obligation. Equity has jurisdiction under such circumstances to enforce the claim against the representative of the estate. If this were not true the machinery of the probate court would become an engine for the perpetration of fraud. This does not divest the probate court of its exclusive jurisdiction over the probate proceedings or its province to ascertain and allow all legitimate claims against the estate for costs and expenses of administration. It merely furnishes an equitable remedy for a breach of trust on the part of an executor or an administrator.

[8, 9] The decree of distribution is ordinarily final and conclusive as to the rights of all heirs, devisees and legatees. Section 1021, Probate Code; Wm. Hill Co. v. Lawler, 116 Cal. 359, 48 P. 323. It is not conclusive against a distributee of the property of the estate who procures it by means of extrinsic fraud. Clavey v. Loney, 80 Cal. App. 20, 251 P. 232, Sohler v. Sohler, 135 Cal. 323, 67 P. 282, 87 Am. St. Rep. 98. Where the conduct of an executor prevents an attorney who is conducting litigation in behalf of an estate from presenting his claim for allowance to the probate court, it may be deemed to constitute extrinsic fraud, and an equitable action for compensation against the representative who perpetrates the wrong is not a collateral attack upon the decree of distribution. Clavey v. Loney, supra; Flood v. Templeton, 152 Cal. 148, 92 P. 78, 13 L. R. A. (N. S.) 579; Stille v. Stille, 121 Kan. 591, 249 P. 672; Beatty v. Beatty, 114 Okl. 5, 242 P. 766, 770; Garrett, etc., v. Minard, 82 Kan. 338, 108 P. 80. In the case last cited, it is said extrinsic fraud is such acts or conduct

as prevents the aggrieved party from having an opportunity for a fair submission of the controversy. Moreover, it will be observed that in the present case there is no attack upon the validity of the decree of distribution. An independent equitable remedy is sought against the distributee of an estate for wrongful conduct on her part which prevented the attorney from presenting his claim for allowance to the estate.

The appellants contend that respondent may not complain of his lack of knowledge of the final distribution of the estate because he was negligent in failing to serve upon the executrix, pursuant to the provisions of section 1202 of the Probate Code, formerly section 1380 of the Code of Civil Procedure, a written request for personal notice of the probate proceedings. This section provides in part: "At any time after the issuance of letters testamentary or of administration, any person interested in the estate, whether as heir, devisee, legatee, creditor, beneficiary under a trust, or as otherwise interested, * * * may * * * serve upon the executor or administrator or trustee, or upon the latter's attorney * * * a written request, stating that he desires special notice of the filing of any or all of the petitions, accounts or reports mentioned in section 1200 of this code, and giving the postoffice address of the person making the same, or his attorney. Thereafter such person shall be entitled to notice as provided in said section 1200."

[10, 11] The failure to serve a request for such notice did not constitute negligence on the part of the respondent. He was not a creditor of the estate at the time of distribution. The litigation which he was prosecuting in behalf of the estate was not then concluded. His claim for compensation had not yet accrued. He was not then entitled to present his claim to the probate court for allowance in the estate. An attorney is not ordinarily entitled to a claim for legal services until his work is fully performed and his employment is fulfilled. Hancock v. Pio Pico, 47 Cal. 161; Atchison v. Hulse, 107 Cal. App. 640, 290 P. 916; Cullinan v. McColgan, 87 Cal. App. 684, 263 P. 353.

[12] While there is a conflict of evidence regarding the material issues of the case, there is substantial evidence to support the findings and judgment of the court against the appellant Nettie L. Forni.

[13] The court also rendered judgment against the other defendants, who were merely associate counsel with the respondent in the prosecution of the civil actions, for costs of suit in the sum of $54.65. We are unable to apply any theory of the case upon which the imposition of these costs upon the defendants Bradford, Cross & Prior or the estate of Charles A. Swisler may be lawfully upheld.

The judgment is therefore modified to relieve the defendants Bradford, Cross & Prior and the estate of Charles A. Swisler from the judgment of costs against them in the sum of $54.65. With this modification, the judgment against Nettie L. Forni for the sum of $700 and costs of suit is affirmed, respondent to recover costs on appeal.

We concur: PULLEN, P. J.; PLUMMER, J.

131 Cal.App. 439

HEWITT v. JUSTICE'S COURT OF BROOKLYN TP.

Civ. 8881.

District Court of Appeal, First District, Division 2, California.

April 26, 1933.

Rehearing Denied May 26, 1933.

Hearing Denied by Supreme Court June 23, 1933.

1. Justices of the peace ⇐36(7).

Proceeding to recover possession of real property by purchaser under trust deed against maker of trust deed *held* action of "forcible or unlawful entry or detainer," within jurisdiction of justice court (Code Civ. Proc. § 112, as amended by St. 1929, p. 834, § 1).

[Ed. Note.—For other definitions of "Forcible Entry and Detainer," see Words and Phrases.]

2. Justices of the peace ⇐36(7).

Justice court could try forcible entry and detainer action brought by purchaser under trust deed against maker of trust deed, though title to real property was involved (Code Civ. Proc. § 112, as amended by St. 1929, p. 834. § 1, and §§ 838, 1161a, as added by St. 1929, p. 719).

3. Justices of the peace ⇐36(7).

Questions of title cannot generally be litigated in unlawful detainer action in justice court.

4. Justices of the peace ⇐36(7).

To limited extent of proving deraignment of title in manner expressly provided for in unlawful detainer statutes, question of title may be tried in unlawful detainer actions.

5. Prohibition ⇐28.

Where respondent court had not passed on question of another action pending, District Court of Appeal, in prohibition proceeding, would not consider question.

Application for prohibition by Maud Hewitt against the Justice's Court of Brooklyn Township, Alameda County.

Alternative writ of prohibition discharged, and peremptory writ denied.

A. J. Hennessy, of San Francisco, for petitioner.

Breed, Burpee & Robinson, of Oakland, for respondent.

DOOLING, Justice pro tem.

This is a proceeding by way of prohibition to test the jurisdiction of a justice's court to try an action for the possession of real property under section 1161a of the Code of Civil Procedure. This section was added to the Code in 1929 (St. 1929, p. 719), and, so far as material here, provides:

"In either of the following cases, a person who holds over and continues in possession of real property, after a three day written notice to quit the same, shall have been served upon him, or if there is a subtenant in actual occupation of the premises, also upon such subtenant, as prescribed in section 1162 of the Code of Civil Procedure, may be removed therefrom as prescribed in this chapter. * * *

"3. Where the property has been duly sold in accordance with section 2924 of the Civil Code, under a power of sale contained in a deed of trust executed by him, or a person under whom he claims, and the title under the sale has been duly perfected."

Brooklyn township, Alameda county, in which the respondent justice's court is located, has a population of over 30,000. Section 112 of the Code of Civil Procedure was recast by the Legislature in 1929 (St. 1929, p. 834, § 1) to provide in part:

"The justices' courts shall have jurisdiction as follows:

"1. In cities, cities and counties, towns and judicial townships, having a population of thirty thousand or more, said courts shall have original jurisdiction * * * of all actions of forcible or unlawful entry or detainer where the rental value is one hundred dollars or less per month, and where the whole amount of damages claimed is one thousand dollars or less. * * *"

Prior to the recasting of section 112 in 1929 justices' courts had concurrent jurisdiction with superior courts in certain actions of "forcible entry and detainer" under section 113 of the same Code. Concurrently with the recasting of section 112 in its present form, however, section 113 was repealed (St. 1929, p. 834, § 2).

In the action wherein the respondent court is sought to be prohibited from proceeding, a complaint was filed by San Jose Pacific Building & Loan Association, as plaintiff, against petitioner herein, as defendant, to recover possession of certain real property in Brooklyn township. The complaint counted on a purchase by plaintiff at a trustee's sale under a deed of trust given by petitioner to secure the payment of a promissory note, and alleged the rental value of the property to be $65 per month.

[1] The question thus presented is this: Is a proceeding to recover possession of real property by a purchaser under a deed of trust against the maker of such deed an action "of forcible or unlawful entry or detainer," so as to give a justice's court jurisdiction under section 112 of the Code of Civil Procedure?

In a very well-considered opinion in American National Bank of Santa Monica v. Johnson, 124 Cal. App. (Supp.) 783, 11 P.(2d) 916, the appellate department of the superior court of Los Angeles county answered this question in the affirmative. We are satisfied with the conclusion there arrived at, and refer to that opinion as correctly answering the question here presented, without unduly lengthening this opinion by quoting therefrom.

Petitioner herein attacks the reasoning of that court, however, on the ground that, in order to maintain an action for unlawful detainer, the conventional relation of landlord and tenant must exist. Since the remedy is purely statutory, and no constitutional inhibition intervenes, the question whether unlawful detainer actions shall be extended to cover cases where the conventional relation of landlord and tenant does not exist is a legislative and not a judicial question. Because in their legislative inception such proceedings were limited to cases where that conventional relation existed does not at all prevent the Legislature from extending the remedy to other cases if it sees fit to do so. Indeed, for many years the proceedings in unlawful detainer provided for by section 1161 of the Code of Civil Procedure have been so extended. The original unlawful detainer statute in California gave the right of action only to "the landlord," and in Reay v. Cotter, 29 Cal. 168, the court held that a vendee of the landlord could not maintain such an action unless the tenant had attorned to him, since the right was limited to the conventional landlord alone. The statute was subsequently amended to provide, as section 1161 of the Code of Civil Procedure now does, that the action might be maintained by the landlord "or the successor in estate of his landlord." Under this amendment, the courts found no difficulty in holding that the landlord's successor in estate could maintain the action, although the conventional relation of landlord and tenant did not exist between the tenant and the landlord's successor. Plummer v. Agoure, 20 Cal. App. 319, 128 P. 1014; Wayland v. Latham, 89 Cal. App. 55, 264 P. 766.

[2-4] Petitioner also contends that title to real property is involved in this action, and the justice's court cannot try such title. Section 838 of the Code of Civil Procedure since

1880 has contained the following proviso: "Provided, that in cases of forcible entry and detainer, of which justices' courts have jurisdiction, any evidence, otherwise competent, may be given, and any question properly involved therein may be determined."

In Reay v. Cotter, supra, the court said:

"Where the conventional relation of landlord and tenant exists, the law does not permit the latter to dispute the title of the former. He is estopped by his lease. Hence, in such a case, the landlord is not required to make proof of his title, but he may rest upon the lease and proof of a compliance on his part with the provisions of the act touching a demand for the possession. In such a case, title is not and cannot be made a question. Where, however, the conventional relation of landlord and tenant does not exist, the latter is not so estopped, there being no privity between him and the plaintiff, and he may deny the title of the latter, and put him upon the proof of his reversionary estate. * * *

"In the present case, the plaintiff, by his own showing, is not the conventional landlord. He is an entire stranger to the lease under which, as he alleges, the defendant holds. At the time the lease was executed, he had no estate in the premises, and no interest in the reversion. On the contrary, his estate has come to him since that time by purchase, and the defendant has not since such purchase attorned to him, or in any manner recognized him as his landlord. Hence, before he can recover, he must prove his purchase from the defendant's lessor, by the production of a deed sufficient in law to pass the estate, and must prove its execution and delivery; or, in other words, he must prove his title, which is precisely what he is not allowed to do in this form of action."

Thus it was expressly held at the time when the right to maintain unlawful detainer was limited by statute to "the landlord" that the landlord's successor in estate could not maintain the action because in such a case he must prove his title. But with the extension of the right to maintain such action to the landlord's successor in estate the courts followed the statute even though to the limited extent of proving that the successor had acquired the landlord's title, a question of title was necessarily involved. Plummer v. Agoure, supra; Wayland v. Latham, supra.

In other jurisdictions the right to maintain an unlawful detainer action has long been given to a purchaser under a mortgage or deed of trust against the mortgagor or maker of the deed of trust, despite the fact that the purchaser must prove his acquisition of title by the purchase. Gage v. Sanborn, 106 Mich. 269, 64 N. W. 32; Peters v. Balke, 170 Ill. 304, 48 N. E. 1012. It is clear, of course, that questions of title cannot generally be litigated in an unlawful detainer action. But to the limited extent of proving deraignment of title in the manner expressly provided for in the unlawful detainer statutes themselves the question of title not only may, but must, be tried in such actions if the provisions of the statutes extending the remedy beyond the cases where the conventional relation of landlord and tenant exists are not to be judicially nullified.

[5] The question of another action pending is one not yet passed upon by respondent court. If, after the decision of that question by respondent court, a question of excess of jurisdiction is presented, petitioner will then have her remedy. Before the question is passed upon by respondent court it would be premature for us to consider it.

We conclude that under sections 1161a, 112, and 838 of the Code of Civil Procedure the respondent court has jurisdiction of the action here in question.

The alternative writ of prohibition is discharged, and a peremptory writ denied.

We concur: SPENCE, Acting P. J.; STURTEVANT, J.

131 Cal.App. 365

RIVER FARMS CO. OF CALIFORNIA et al. v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al.

Civ. 8923.

District Court of Appeal, First District, Division 1, California.

April 25, 1933.

Hearing Denied by Supreme Court June 23, 1933.

1. Appeal and error ⇐854(2).

Continuance of hearing on order to show cause why temporary injunction should not issue, on insufficient reason, would not affect validity of order where sufficient grounds for continuance existed (Code Civ. Proc. § 527).

2. Injunction ⇐139.
Mandamus ⇐26.

Court cannot by arbitrary or erroneous order deprive itself of jurisdiction to pass on order to show cause why temporary injunction should not issue and mandamus lies to compel exercise of jurisdiction notwithstanding such order (Code Civ. Proc. § 527).

3. Courts ⇐107.

Language of opinion must be construed with reference to facts presented by case, and positive authority of decision is coextensive only with such facts.

4. Injunction ⇐152.

Plaintiff who has complied with statute, and is ready to proceed with hearing on order to show cause why temporary injunction should not issue, cannot be deprived of his statutory rights by erroneous or arbitrary order continuing the hearing (Code Civ. Proc. § 527).

5. Injunction ⇐148(1).

While good practice requires bond on granting of restraining order, failure to require bond does not render order void (Code Civ. Proc. §§ 527, 529).

6. Injunction ⇐148(1).

Bond is not essential to restraining order pending hearing on order to show cause why temporary injunction should not issue where continuance has been properly granted (Code Civ. Proc. §§ 527, 529).

7. Injunction ⇐148(1).

Failure to require bond on continuance of hearing on order to show cause why temporary injunction should not issue did not deprive court of jurisdiction where plaintiff had complied with statute and continuance was not requested by him (Code Civ. Proc. §§ 527, 529).

Original petition by the River Farms Company of California and another for writ of prohibition to be directed to the Superior Court of the State of California, in and for the City and County of San Francisco, and Hon. John J. Van Nostrand, Judge thereof, and another, to prevent enforcement of temporary injunction, pursuant to which alternative writ was issued, and the matter was heard on petition and demurrer thereto.

Alternative writ discharged.

J. E. Truman, Manson & Allan, John L. McNab, Robert Littler, S. C. Wright, and Chickering & Gregory, all of San Francisco, for petitioners.

Sullivan, Roche, Johnson & Barry, of San Francisco, for respondents.

PER CURIAM.

A petition was filed in this court for a writ of prohibition to prevent the respondent superior court from enforcing a temporary injunction. An alternative writ issued, and the matter was presented on the petition and a demurrer thereto.

On December 9, 1932, Hiram W. Johnson, Jr., individually and as administrator of the estate of Edgar Laurence Dow, deceased, and Minnie L. Johnson (who will be hereafter referred to as the respondents), commenced an action in the superior court in and for the city and county of San Francisco to enjoin petitioners above named from proceeding with the sale of shares of stock of petitioner corporation by reason of the nonpayment of an assessment theretofore levied thereon. Thereafter on the same date respondents obtained without notice or the filing of a bond a restraining order based upon the allegations of the complaint, and therewith an order directing petitioners to show cause before respondent court on December 19, 1932, why a temporary injunction should not issue restraining the threatened sale. On December 17, 1932, respondents' points and authorities and petitioners' affidavits, together with their points and authorities, were duly served. On December 19, 1932, the date on which the order to show cause was made returnable, the respective parties to the action appeared in the department of respondent court in which the matter was pending and announced that they were ready to proceed. The trial judge announced that he would be unable to hear the matter on that day and that the same would be continued until a later date. Petitioners objected to a continuance and requested that the matter be transferred to another department of the same court for hearing on the date fixed in the order to show cause. A transfer was refused as was likewise a request that respondents be required to file a bond pending the hearing of the order to show cause. The hearing was thereupon continued over objection to December 21, 1932.

It is not alleged that respondents were not ready to proceed or had failed to comply with the provisions of section 527 of the Code of Civil Procedure, or that they requested a continuance.

On December 21, 1932, petitioners moved the court to dissolve the restraining order, and objected to the hearing of the order to show cause on the ground that the continuance was in excess of the court's jurisdiction, and that by reason thereof the court had lost jurisdiction to proceed. The motion was denied and the objection overruled. The court proceeded to hear the matter, and on December 28, 1932, made its order for a temporary injunction. Following the filing of the required bond the temporary injunction was issued.

It is urged in the present proceeding that by the continuance the court was divested of jurisdiction other than to dissolve the restraining order, and that by granting a temporary injunction it acted in excess of its jurisdiction.

Section 527 of the Code of Civil Procedure provides, among other things, that: "In case a temporary restraining order shall be granted without notice * * * the matter shall be made returnable on an order requiring cause to be shown why the injunction should not be granted, on the earliest day that the business of the court will admit of, but not later than ten days from the date of such

order. When the matter first comes up for hearing the party who obtained the temporary restraining order must be ready to proceed and must have served upon the opposite party at least two days prior to such hearing, a copy of the complaint and of all affidavits to be used in such application and a copy of his points and authorities in support of such application; if he be not ready, or if he shall fail to serve a copy of his complaint, affidavits and points and authorities, as herein required, the court shall dissolve the temporary restraining order. The defendant, however, shall be entitled, as of course, to one continuance for a reasonable period, if he desire it, to enable him to meet the application for the preliminary injunction. The defendant may, in response to such order to show cause, present affidavits relating to the granting of the preliminary injunction, and if such affidavits are served on the applicant at least two days prior to the hearing, the applicant shall not be entitled to any continuance on account thereof. On the day upon which such order is made returnable, such hearing shall take precedence of all other matters on the calendar of said day, except older matters of the same character, and matters to which special precedence may be given by law."

[1, 2] It is not directly averred in the petition that older matters of the same character or matters to which special precedence was given by law were not upon the calendar for hearing at the hour the order to show cause was made returnable. A copy of the calendar is attached thereto, from which it appears that no matters having precedence were set for hearing at that hour, although it does appear that other orders to show cause were set down for hearing at a later hour on the same day. In the course of the proceedings the court stated that there were two earlier orders to show cause on the calendar for that day, but the order of continuance was not made for that reason. If there were sufficient legal grounds for the order, the fact that the court acted upon insufficient or erroneous reasons would not affect its validity (Kauffman v. Maier, 94 Cal. 269, 29 P. 481, 18 L. R. A. 124; Gordon v. Roberts, 162 Cal. 506, 123 P. 288); nor would the court be permitted by an arbitrary or erroneous order to deprive itself of jurisdiction. In such a case mandamus would lie to compel the exercise of jurisdiction (Golden Gate Tile Co. v. Superior Ct., 159 Cal. 474, 114 P. 978; Steineck v. Coleman, 72 Cal. App. 244, 236 P. 962).

Petitioners cite several cases in support of their claim that the court by its refusal to act on the return day lost jurisdiction. In Kelsey v. Superior Ct., 40 Cal. App. 229, 180 P. 662, it appeared that plaintiff's points and authorities were not served as provided by the Code section, and that due to the illness of one of his attorneys he was unable to proceed, and a continuance was granted at his request. It was held in view of those facts that the court was without power to continue the matter, and by attempting to do so divested itself of jurisdiction to do other than to dissolve the restraining order.

In Smith v. Superior Ct., 64 Cal. App. 722, 222 P. 857, the validity of an order continuing in force a restraining order theretofore issued depended upon the actual consent of an attorney for one of the parties. The appellate court found that contrary to the entry in the minutes of the trial court such consent had not been given, and that consequently the order was in excess of the court's jurisdiction.

Green v. Superior Ct., 65 Cal. App. 237, 223 P. 582, was an application for a writ of prohibition. There the plaintiff had failed to serve in time the affidavits to be used in support of the application for a temporary injunction. Northcutt v. Superior Ct., 66 Cal. App. 350, 226 P. 25, was a proceeding of the same character. There was a like failure to serve plaintiff's points and authorities, and it was held in both instances that the court was without jurisdiction except to dissolve the restraining order.

In addition to a want of readiness to proceed in the first case, in each of the cases cited there was a failure by plaintiff to comply with the code provisions. The opinions in these cases declare in effect that with the exceptions contained in the Code section a continuance of the hearing of the order to show cause deprives the court of jurisdiction to take any further action other than to dissolve the restraining order. The exceptions referred to are that the defendant shall be entitled as a matter of course to one continuance, and that if he shall present affidavits relating to the granting of the preliminary injunction, and the same are served on plaintiff at least two days prior to the hearing, the latter shall not be entitled to a continuance on account thereof. The latter inferentially confers the power to grant a continuance to the plaintiff in case the counter affidavits are not served as provided in the section.

[3, 4] It is the general rule that the language of an opinion must be construed with reference to the facts presented by the case, and the positive authority of a decision is coextensive only with such facts. 15 Cor. Jur., Courts, § 332, p. 941; People v. Winkler, 9 Cal. 234; In re Estate of Whitney, 171 Cal. 750, 154 P. 855. When so construed none of the cases cited or the Code sections compel the conclusion that where there has been a compliance with the statute by plaintiff, who is prepared to proceed and makes no request for a continuance, the court can by an order, whether erroneously or arbitrarily made, divest itself of jurisdiction so as to deprive the

plaintiff of his rights under the statute. Golden Gate Tile Co. v. Superior Ct., supra.

[5-7] As stated, no bond was exacted by the court either at the time the restraining order issued or the order for a continuance was made. Petitioners claim that after the continuance the restraining order for want of a bond became ineffective. Section 527 of the Code of Civil Procedure provides for the issuance of restraining orders and temporary injunctions; and section 529 of the same Code, with certain exceptions, requires a bond upon the issuance of an injunction. It has been held that good practice requires a bond upon the granting of a restraining order, but that the omission does not render the order void. Biasca v. Superior Ct., 194 Cal. 366, 228 P. 861. Nor does section 527 in terms require a bond to support a restraining order pending a hearing upon an order to show cause where a continuance has been properly granted. We are satisfied that such an omission, if erroneous, does not affect the power of the court to consider the questions presented by the order to show cause and to determine whether a temporary order should issue. Los Angeles v. Superior Ct., 196 Cal. 445, 238 P. 670. See, also, Houser v. Superior Ct., 121 Cal. App. 31, 8 P.(2d) 483, as to the effect upon a restraining order of delay in making a formal order of injunction pendente lite after the hearing on the order to show cause.

As we have seen, the course followed by the court was due to no act or omission by respondents. If the facts in connection with the court's calendar justified its order, then petitioners have no complaint. If, on the other hand, the facts were not sufficient, then the action of the court was erroneous if not arbitrary; and under the cases cited it was not thereby divested of jurisdiction to hear the application.

For these reasons the alternative writ should be discharged, and it is so ordered.

131 Cal.App. 551

TOSHI TAKETA v. POLICY HOLDERS' LIFE INS. ASS'N.

Civ. 8792.

District Court of Appeal, First District, Division 1, California.

May 1, 1933.

Hearing Denied by Supreme Court June 29, 1933.

1. Insurance ⇐146(1).

Insurer's liability depends upon wording of contract.

2. Insurance ⇐518.

Under contracts obligating insurer to collect assessment and pay proceeds within limited amount to beneficiary, judgment for specified amount is erroneous as beneficiary is limited to equitable action compelling levy and collection of assessment.

3. Insurance ⇐518.

Under contracts obligating insurer to pay absolutely within limit determined by number of assessments collected, money judgment may be obtained.

4. Insurance ⇐518.

Beneficiary of two mutual life insurance association policies obligating association to pay definite sum, amount conditioned upon number of members paying assessment, was entitled to money judgment, and was not limited to specified fund created by assessment.

5. Insurance ⇐518.

Lack of requisite number of members in good standing in association to be assessed, required by policy at time of death, was defense to be proved by insurer, since peculiarly within insurer's knowledge.

6. Pleading ⇐129(2).

Answer by not denying admitted beneficiary's allegation that there was sufficient number of members in good standing in benefit association to be assessed.

Appeal from Superior Court, Santa Clara County; D. M. Burnett, Judge pro tem.

Suit by Toshi Taketa against Policy Holders' Life Insurance Association. From judgment for plaintiff, defendant appeals.

Affirmed.

Hugh Martin Young, of Los Angeles, for appellant.

Edward M. Fellows, of San Jose, for respondent.

GRAY, Justice pro tem.

A mutual life insurance association appeals, upon the judgment roll, from the court's judgment, awarding to the beneficiary two sums of $1,500 each, specified in two policies, issued upon the life of his mother. The insurer's obligation and the beneficiary's right are fixed by the following portion of the policy, which is attached to the complaint: "The Association hereby agrees to pay to the beneficiary Fifteen Hundred Dollars following the receipt of due proof of the death of the member conditioned however, that there be a sufficient number in good standing, of members in the Association at the time of the death of said member, to pay said sum upon said death assessment when collected in full, would produce at least the full sum of Fifteen

Hundred Dollars should there not be a sufficient number of members in good standing at such date to produce the full sum herein specified, then the amount payable hereunder shall be amount collected upon said death assessment, not to exceed, in any event the amount of Fifteen Hundred Dollars should more than the amount necessary to pay a claim be collected from an assessment, the excess above the amount required to pay the death claim for which the assessment was made, shall remain in the Benefit Fund and there accumulate to be used in the payment of further or other death claims for which no assessment shall be made." Appellant contends that, as this provision obligated the insurer not to pay an absolute sum but only the proceeds of an assessment, a money judgment, instead of an equitable decree to compel the levy and collection of an assessment, is erroneous.

[1-4] The insurer's liability depends upon the wording of its contract. Some contracts obligate the insurer to levy and collect an assessment and pay the proceeds, within a limited amount, to the beneficiary. Under such contracts a judgment for the specified amount is erroneous, as the beneficiary, by the contract, is limited to an equitable action to compel the levy and collection of an assessment. Other contracts obligate the insurer absolutely to pay, but measure the amount, within a specified limit, by the number of members or assessments collected. A money judgment may be obtained under the latter form of contracts. The cases as to the two forms of contracts may be found in 37 C. J. 412 and 45 C. J. 232. If the present contract is, as appellant claims, of the first class, the judgment is erroneous, but if of the second class, as respondent argues, the judgment is correct. In the first clause the insurer agrees to pay a definite sum. The amount, not payment, is then conditioned upon the existence of a sufficient number of members to pay the assessment and not that a sufficient amount be collected from an assessment. The beneficiary is not required to look to any special fund created by an assessment. Indeed, the last sentence shows that the parties contemplated that a surplus might arise from an assessment, which would obviate an assessment to pay a subsequent claim. Other parts of the policy obligated a member to pay semiannual dues of $2.50, which was to be placed in the benefit fund for use only in payment of death claims and allowed assessments only when such fund was insufficient to pay claims. The wording of the present contract is analogous to those of the second class and therefore falls within that group.

[5, 6] Appellant also claims that the burden of proving the existence of the requisite number of members at the time of death rested upon respondent and that he failed to meet such burden. Since evidence as to this issue was peculiarly within appellant's knowledge, the lack of the requisite number of members was a matter of defense, the burden of proving which rested upon appellant. Wood v. Farmers' Life Assoc., 121 Iowa, 44, 95 N. W. 226. However, the complaint alleged that there was a sufficient number of members, which the answer, by failure to deny, admitted.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

131 Cal.App. 541

DUNN et al. v. SECURITY-FIRST NAT. BANK OF LOS ANGELES et al.

Civ. 8755.

District Court of Appeal, First District, Division 1, California.

April 29, 1933.

1. Estoppel ⇐83(1).

That purchasers suing to rescind purchase contract for fraudulent misrepresentations of selling agents, had in their employment by vendors represented to others same facts which they used as basis for action to rescind, *held* not to estop them denying truth of such representations.

2. Vendor and purchaser ⇐119.

Purchasers *held* not barred by laches because they waited for over two years after purchase before suing to rescind contract to purchase on ground of fraudulent misrepresentations of selling agents.

The facts disclosed that among representations made to induce the purchase of lots were representations that entire block immediately across the street from such lots had already been sold and full purchase price paid therefor; that hotel building was to be built thereon in near future; that plans had been drawn, financing completed and contract let; that within short time ground would be broken to start construction; and that portions of hotel already had been leased. The purchasers' action to rescind was not barred by laches in view of fact that purchasers were compelled to wait some time before they could safely assert that representations were false, and that, on inquiry, they had been reassured and told not to worry, and that hotel would be built.

3. Vendor and purchaser ⇐119.

Purchasers' right to rescind contract for fraudulent misrepresentations of selling

agents *held* unaffected by fact that one of selling agents had died, in absence of showing that deceased agent possessed facts not within knowledge of other selling agents who testified.

4. Vendor and purchaser ⇐120.

Purchasers' notice of rescission of contract for fraudulent misrepresentations of selling agents *held* not defective.

The notice of rescission offered to reconvey any interest purchasers may have acquired in lots involved and demanded return to them of moneys theretofore paid by them on contract, together with interest thereon at 7 per cent. per annum, from date of payments. Though in a few instances specific amounts of payments set forth in such notice were incorrect, vendors conceded that judgment was rendered for correct amount.

5. Appeal and error ⇐1041(3).

Trial court's refusal to permit defendant to amend answer to plead laches as defense *held* unimportant where ground of refusal was that laches could be shown without pleading it, and thereafter both parties introduced evidence on that issue.

Appeal from Superior Court, Los Angeles County; Percy Hight, Judge.

Action by Mabel T. Dunn and another against the Security-First National Bank of Los Angeles, formerly the Pacific-Southwest Trust & Savings Bank, George O. Flint and another, individually and as surviving partners of the Flint Land Company. Judgment for plaintiffs, and defendants Flint and another, individually and as surviving partners of the Flint Land Company, appeal.

Affirmed.

O'Melveny, Tuller & Myers, Albert Parker, and A. Maxson Smith, all of Los Angeles, for appellants.

Cameron & Perkins, of Long Beach, for respondents.

PER CURIAM.

The action herein is one to rescind two contracts for the purchase of two lots from the defendant Security-First National Bank of Los Angeles, as trustee, and to recover from the defendants Flint, Jackstadt, and others, as beneficiaries under the trust, the amounts paid by plaintiffs on said contracts, upon the ground that the defendants last named and their agents induced plaintiffs to purchase said lots by means of false and fraudulent representations. The trial court found in favor of plaintiffs on all issues, except the amount claimed to be due; and judgment was entered accordingly for the repayment to plaintiffs of the sum of $1,966.30, interest and costs. From such judgments the defendants Flint and Jackstadt prosecute this appeal.

The lots were part of a subdivision situate near Point Fermin, Los Angeles county, and sales were being promoted through selling agents and lectures delivered in a tent near the subdivision. The respondents, Mrs. Dunn and Miss Marshall, formerly resided in Mississippi. They were in moderate financial circumstances and inexperienced in business. They arrived in Long Beach on June 10, 1927, and took accommodations at an apartment house. Within a few days after their arrival they met some of the selling agents of appellants' subdivision, who were staying at the same apartment house, and said agents sought immediately to interest respondents in the purchase of some of the lots. After several interviews and during the latter part of the same month, Mrs. Dunn was given employment by said agents to solicit prospective buyers to visit the subdivision and hear the addresses which were being delivered in the tent as to the future prospects of the property; and soon thereafter respondents were induced to enter into contracts for the purchase of two lots, one contract being executed on July 1, 1927, and the other on July 12, 1927. Among the representations made to them, and which the court found were false and fraudulent, were that the entire block immediately across the street from the lots which respondents were induced to purchase had already been sold, and the full purchase price paid therefor; that a hotel building was going to be built thereon in the near future; that the plans had been drawn, the financing had been completed, and the contract let, and that within a short time the ground would be broken to start construction; furthermore, that certain portions of the hotel building had already been leased, and that whole floors had been leased to naval officers. In this regard the evidence shows that as part of and in furtherance of said representations respondents were shown colored drawings of the proposed hotel, which was to be six stories high; and they were told two floors thereof had already been leased to naval officers, some of high rank being mentioned; that the city of Los Angeles "had purchased the frontage of all along up to where the hotel was to be" and was negotiating to purchase more of the property; and they were assured that the value of the lots would enhance so rapidly that respondents would be able to dispose of them at any time for a greatly increased price. Mrs. Dunn continued to work for appellants off and on until the spring of 1928, and Miss Marshall was also so employed during part of that time. At that time the construction of the hotel had not started, and being hard pressed for

money, Mrs. Dunn having been compelled to pledge her diamond ring to keep up payments, respondents complained to the sellers about the matter, and were told "not to get worried and upset about it," that the hotel would be built, that although it had been delayed it would be built and that respondents would "get out of this all right." Respondents waited until November, 1929, and there being no indication at that time of an intention to construct the hotel, respondents sought legal advice, as a result of which they caused to be served notice of rescission of the contracts. About two months prior to the service of such notice, however, the sellers declared a forfeiture of the contracts for failure to make the installment payments thereon.

[1] As one ground of reversal appellants urge that since respondents, in pursuance of their employment with appellants, represented to other purchasers the same facts which they use as a basis for their action in rescinding their contracts, they are estopped from denying the truth of said representations. The two cases of McMahon v. Grimes, 206 Cal. 526, 275 P. 440, and Stirnus v. Adams, 50 Cal. App. 730, 195 P. 955, cited by appellants in support of such contention, are not in point. There the selling agents were made parties defendant to the actions for rescission and the point decided was that contrary to their contention the agents could not escape liability for the misrepresentations they had made simply because they believed at the time of making the same that the representations were true.

[2, 3] Appellants contended also that respondents were barred by laches from rescinding. There would be more force in the contention if the representations made related to facts which respondents could have readily and definitely ascertained were false; but such is not the case. On account of the nature of the representations respondents were compelled necessarily to wait a considerable period of time before they could safely assert that the same were false; and as already shown during that period of time respondents made inquiry as to the intentions of the sellers, and were reassured and told "not to get worried," that as represented the hotel would be built and that everything would be all right. In view of such reassurance we are not prepared to hold, contrary to the implied finding of the trial court, that the lapse of time before rescinding was unreasonable. Appellants call attention to the fact that one of the selling agents died shortly before respondents rescinded and that consequently appellants were deprived of his testimony at the trial. It does not appear, however, that the deceased agent was in possession of any facts not within the knowledge of the other selling agents who did testify; and consequently it has not been shown that the absence of such testimony operated to appellants' prejudice.

[4] Nor do we find any fatal defect in respondents' notice of rescission. They offered therein to reconvey any interest they may have acquired in said lots, and demanded the return to them of the moneys theretofore paid by them on said contracts, together with interest thereon at 7 per cent. per annum from the dates of said payments; and regardless of the fact that in a few instances the specific amounts of said payments set forth therein were incorrect, appellants concede that judgment was rendered for the correct amount.

[5] The remaining point, as to whether the trial court erred in refusing appellants' request for permission to amend their answer so as to plead laches as a defense, is unimportant for the reason that the ground of such refusal was that laches could be shown without pleading it as a defense; and following such theory the trial court permitted both sides to introduce evidence on that issue.

After considering all points urged, it is our conclusion that no such error has been shown as demands a reversal; and accordingly the judgment is affirmed.

Associate Justice CASHIN, deeming himself disqualified, does not participate in this decision.

131 Cal.App. 554

HOLOPOFF v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 8578.

District Court of Appeal, Second District, Division 2, California.

May 1, 1933.

Hearing Denied by Supreme Court June 29, 1933.

Master and servant ⇐405(4).

Evidence justified Industrial Commission's finding that delivery boy buying goods at wholesale price from employer for friend and deviating from regular route to work to deliver goods was not acting "in course of his employment" when injured.

[Ed. Note.—For other definitions of "Course of Employment," see Words and Phrases.]

Proceeding under the Workmen's Compensation Law by William Holopoff, claimant, for injuries, opposed by the Standard Parts Company, employer, and the Columbia Casualty Company, insurance carrier. The Industrial Accident Commission denied compen-

sation to claimant, and claimant applies for certiorari.

Award affirmed.

A. P. G. Steffes, of Los Angeles, for petitioner.

A. I. Townsend and Everett A. Corten, both of San Francisco, for respondent Industrial Accident Commission.

Redman, Alexander & Bacon, and R. P. Wisecarver, all of San Francisco, for respondent Columbia Casualty Co.

WORKS, Presiding Justice.

The Industrial Accident Commission rendered its award denying adjustment of industrial compensation to petitioner for personal injuries suffered by him. Petitioner was a "delivery boy" for respondent corporation, using in the performance of his duties what is known as a "sidecar" motorcycle which was his own property. He was compensated for his work by the payment of a fixed sum the week, out of which he furnished the gasoline for the motorcycle and paid for its upkeep. In going to and from the place of business of his employer at morn and at eve he chose any route he pleased, and from the time he left the place at night until he reached it again in the morning his time and the motorcycle were his to employ as suited his whim or convenience. The casualty out of which petitioner's injuries arose was a collision between his cycle and an automobile. It occurred on a morning, when he was on a direct way toward the place of business of his employer, along a route which he often traveled. It is plain, from the facts above stated, that, unless petitioner, before the accident and after he left his home, had been diverted from his usual course because of some errand in the course of his employment, he was within what is known familiarly as the "going and coming" rule in industrial compensation cases. Whether he was so diverted is really the focal question in the proceeding.

The employer was a wholesaler of automobile "parts," although apparently sales at retail were sometimes made by it. The point just mentioned turns upon the question whether the commission had before it evidence sufficient to support a finding that petitioner, upon the journey from his home to the place of the accident and during a halt in his intended trip to work, was engaged upon a business private to himself and outside the course of his employment. There was evidence that petitioner had a friend whose automobile required some new spark plugs. This friend lived a block away from the home of petitioner. The latter had offered to procure and to deliver to his friend the required "parts." Petitioner procured the plugs from his employer, had them charged to himself, and did not disclose the fact that they were gotten for another. They were charged to petitioner at the wholesale rate of 53 cents each, which prevailed in the case of sales to public garages, instead of at the retail rate of 75 cents, which was current when sales were made to others. Petitioner, on the evening before his accident, stopped at his friend's place to deliver the spark plugs, but the friend was not at home. Petitioner then went to his own abode for the night and delivered the parts the next morning. It was after this delivery that the catastrophe to petitioner occurred.

Petitioner testified that it was in the regular course of the business to charge to delivery boys articles sold on orders procured by them; the charges being canceled when the boys brought back the cash to pay for such sales. This testimony was disputed by other witnesses, including the manager of respondent corporation.

We think the commission was justified in finding from the evidence that, at the time of the deviation from his regular course to his employer's place of business, on the morning of the accident, petitioner was engaged in a private matter for the purpose of obliging a friend, and that, consequently, he was not acting in the course of his employment.

Award affirmed.

We concur: STEPHENS, J.; CRAIG, J.

131 Cal.App. 337

BARNETT et al. v. MARSILI.

Civ. 781.

District Court of Appeal, Fourth District, California.

April 24, 1933.

1. Evidence ⇐65.

One is charged with knowledge of the law.

2. Liens ⇐7.

Lender loaning money on seller's certificate of ownership, and taking new certificate of registration showing lender as legal owner, had equitable lien on automobile as against buyer not registering transfer for four months and seven days after purchase (Civ. Code, § 3543).

Appeal from Superior Court, Kern County; Allan B. Campbell, Judge.

Action by R. F. Barnett and another, copartners, transacting business under the fictitious name and style of the National Invest-

ment Company, against Dr. C. Marsili. From a judgment for plaintiffs, defendant appeals.

Affirmed.

See, also, 122 Cal. App. 609, 10 P.(2d) 472.

Borton & Petrini and W. L. Bradshaw, all of Bakersfield, for appellant.

Conron & Conron, of Bakersfield, for respondents.

MARKS, Justice.

This is an action of claim and delivery to recover possession of an automobile. Respondents alleged title and right of possession, and appellant denied their title and right of possession, and alleged ownership in himself. The trial court found respondents had a lien upon the automobile to secure a loan of $300, and interest. They secured judgment for the possession of the car, or, in case delivery cannot be had, for the sum of $300, and interest.

On September 22, 1930, Bert Watson was a dealer in used automobiles in the city of Bakersfield. He had the automobile in question in his place of business and had possession of the "pink slip," which showed Ed Keeler as the legal and registered owner. On that day, Watson sold the car to appellant for $595, which was paid in full, together with $1 to pay for the transfer of the registration to the new owner. On the same day, appellant received possession of the car and a bill of sale to it. No transfer of the registration was ever made to him. He testified that he had possession of the car at all times thereafter.

On January 29, 1931, Watson applied to respondents for a loan of $300 on the car. This loan was made the following day, and a new certificate of registration issued showing respondents as the legal owners of the automobile. George H. Barnett testified that he saw the automobile in the place of business of Watson at the time the loan was made. The trial court found that respondents had no notice of any interest in, or claim to, the car by appellant until after Watson had disappeared, which was a short time after the loan was made.

The only conflict in the evidence is presented by the testimony of appellant, that the car did not leave his possession, and that of Barnett, that he saw it in Watson's place of business at the time the loan was made.

[1] The case must be decided under the familiar rule that, where one of two innocent persons must suffer by the act of a third, he whose negligence caused the loss must be the sufferer. Section 3543, Civ. Code. Appellant permitted four months and seven days to elapse between his purchase of the automobile and the fraud of Watson, without making any effort to ascertain why the change in registration had not been effected and the new registration certificate delivered to him. The law required the old certificate to be delivered to the motor vehicle department within ten days after the sale. Appellant is charged with knowledge of the law. If he had used any diligence in protecting his rights and in seeing that the new registration certificate was issued within a reasonable time, with himself named as legal and registered owner, Watson would not have had possession of the "pink slip" on January 29, 1931, and could not have secured the loan from respondents.

[2] Having determined that the negligence of appellant occasioned the loss, the legal questions at issue are settled by the case of Washington Lumber & Millwork Co. v. McGuire, 213 Cal. 13, 1 P.(2d) 437. Under this authority, respondents had an equitable lien upon the property as security for the money loaned.

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

In re HERRIOTT'S ESTATE.*

Civ. 8641.

District Court of Appeal, First District, Division 2, California.

April 25, 1933.

Hearing Granted by Supreme Court June 23, 1933.

1. Courts ⇐97(5).

United States Supreme Court's construction of federal statute is controlling on state courts.

2. Executors and administrators ⇐17(2).

Where father and mother became heirs of son dying intestate, and thereafter both died intestate, son's brothers and sisters became heirs of father and mother and were not "entitled to succeed" to son's estate as regards appointment of administrator for son's estate (Civ. Code, § 1386, subd. 2; Code Civ. Proc. §§ 1665, 1666, 1678, and 1671 as added by St. 1923, p. 752).

3. Executors and administrators ⇐17(2).

Where entire estate consisted of unpaid installments of war risk insurance decedent's sister not entitled to succeed to estate at time of decedent's death *held* not entitled to letters of administration, as against public administrator (Civ. Code, § 1386, subd. 2; Code Civ. Proc. §§ 1665, 1666, 1678, and 1671, as added by St. 1923, p. 752; Probate Code, § 1020 et seq.; World War Veterans' Act 1924, § 303, as amended [38 USCA § 514]).

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes
*For subsequent opinion see 28 P.2d 355.

Appeal from Superior Court, Alameda County; E. C. Robinson, Judge.

Proceedings by Anna Grace Herriott, and by Albert E. Hill, as Public Administrator, for letters of administration upon the estate of Paul Herriott, deceased. From an order appointing petitioner first named as administratrix of the estate, the Public Administrator appeals.

Reversed.

Earl Warren, Dist. Atty., and Nathan Harry Miller, Deputy Dist. Atty., both of Oakland, for appellant.

Roscoe D. Jones, of Oakland, for respondent.

STURTEVANT, Justice.

Paul Herriott died intestate on May 2, 1918, in France, while in the military service of the United States, and was a resident of the county of Alameda at the time of his death. He was never married and left no child nor children surviving him, nor any adopted child.

The decedent's father, Calvin C. Herriott, his mother, Mary D. Herriott, and his brothers, Charles C. Herriott and Clarence D. Herriott, and his sisters, Mary E. March and Anna Grace Herriott, survived him. His father died intestate on December 18, 1923, and left surviving him only his wife, Mary D. Herriott, and his children, the said foregoing named brothers and sisters of said Paul Herriott, deceased, and left surviving him no descendant of any deceased child nor any adopted child nor any descendant of any adopted child. The mother of said Paul Herriott, deceased, died intestate on February 13, 1931. Mary D. Herriott left surviving only her children, the foregoing named brothers and sisters of Paul Herriott, deceased. She left surviving her no descendant of any deceased child nor any adopted child nor any descendant of any adopted child. Each of said brothers and sisters of Paul Herriott, deceased, are now alive. Said Paul Herriott, deceased, never had any other brother or sister.

Paul Herriott, while in the service of the United States government, applied for and obtained a policy of United States war risk insurance in the sum of $10,000. This insurance was granted and issued by the United States of America under the authority of an act of Congress (38 USCA).

This policy was payable in case of his death to his mother as beneficiary in monthly installments while she lived. Installments were paid to said beneficiary until she died, and there is now unpaid the remainder of the uncollected insurance, amounting to approximately the sum of $4,389.

At the time of Paul Herriott's death he had no property or estate except such interest, if any, his estate has in said unpaid portion of said war risk insurance, and it was not stipulated between the parties to this proceeding as to whether or not the balance unpaid on said war risk insurance is or is not a part of said estate.

No proceedings were ever had to probate the estates of either the father or mother of Paul Herriott, and neither the estate of Paul Herriott nor of his mother nor of his father is indebted. All expenses of the last illness and funeral of said Paul Herriott and of his father and mother have been paid, and neither the father nor mother left any property or estate and no inheritance tax will be payable in any of said estates.

Subsequent to the death of Mary D. Herriott, Anna Grace Herriott, one of the sisters of Paul Herriott, deceased, filed her petition in the superior court of the county of Alameda for letters of administration upon the estate of her deceased brother, and Albert E. Hill, as public administrator of Alameda county, likewise filed a petition for letters of administration on said estate. Upon the hearing of said petition the court made an order appointing Anna Grace Herriott as the administratrix of the estate of Paul Herriott, deceased, and denied the petition of Albert E. Hill as public administrator. From said order the public administrator has appealed.

The public administrator contends that the question as to who was entitled to letters is primarily divided into two questions. The first one is: Are the persons who are entitled to succeed to the estate of a decedent determined as of the date of death of the decedent or as of the date of application for letters of administration? A part of the federal statute of primary importance in the instant case is as follows: "If no person within the permitted class be designated as beneficiary for yearly renewable term insurance by the insured either in his lifetime or by his last will and testament or if the designated beneficiary does not survive the insured or survives the insured and dies prior to receiving all of the two hundred and forty installments or all such as are payable and applicable, there shall be paid to the estate of the insured the present value of the monthly installments thereafter payable, said value to be computed as of date of last payment made under any existing award." 38 USCA § 514.

On the main question, the state courts are not agreed. There are decisions for and against the appellant. 55 A. L. R. 594 et seq. But in Singleton v. Cheek, 284 U. S. 493, 52 S. Ct. 257, 259, 76 L. Ed. 419, 81 A. L. R. 923, the court quoted the above provision. It then said: "By that amendment, the rule, which, upon the happening of the contingencies named in the prior acts, limited the benefit of the unpaid installments to persons within the designated class of permittees, was abandoned, and 'the estate of the in-

sured' was wholly substituted as the payee. All installments, whether accruing before the death of the insured or after the death of the beneficiary named in the certificate of insurance, as a result, became assets of the estate of the insured upon the instant of his death, to be distributed to the heirs of the insured in accordance with the intestacy laws of the state of his residence, such heirs to be determined as of the date of his death, and not as of the date of the death of the beneficiary. The state courts, with almost entire unanimity, have reached the same conclusion."

[1, 2] As that court was construing a federal statute, that construction is controlling on the state courts. 5 Cal. Jur. 424; United Land Ass'n v. Pacific Imp. Co., 139 Cal. 370, 376, 69 P. 1064, 72 P. 988; Moon v. Martin, 185 Cal. 361, 366, 197 P. 77. Applying the rule to the instant case it is clear that the father and mother both survived the death of their son. They became his heirs and the brothers and sisters of Paul did not become his heirs. Civ. Code, § 1386, subd. 2. As the father and mother died intestate, the brothers and sisters did not succeed to their brother's estate. They were heirs at law of their father and mother, not heirs at law of their brother. In re Estate of Wakefield, 136 Cal. 110, 111, 68 P. 499.

[3] The appellant then asks: "Under section 422 of the Probate Code is the public administrator preferred over brothers and sisters who were not heirs of the decedent at the time of his death?" That section provides: "Administration of the estate of a person dying intestate must be granted to one or more of the following persons, who are entitled to letters in the following order, the relatives of the decedent being entitled to priority only when they are entitled to succeed to the estate or some portion thereof: * * * (5) The brothers and sisters * * * (8) The public administrator. * * *" In Re Estate of Wakefield, 136 Cal. 110, 68 P. 499, the facts showed that Naomi Wakefield and her mother died in the wreck of an ocean-going vessel. Naomi died first, leaving no will. Her mother left a will. A contest arose over applications for letters. On page 112 of 136 Cal., 68 P. 499, 500, the court said: "The estate of Naomi could not be distributed directly to her brothers, for they are not her heirs at law; and, if it could not be distributed to them, she dying intestate, they do not succeed to it. It would be a vain search if we should look in the Civil Code, under the law of succession and descents, to find a provision authorizing Naomi's estate to be distributed to her brothers. Her estate forms a part of the estate of her mother, and, as part of her mother's estate, is liable for the mother's debts, and the expenses of administration therein incurred. It is through the decree of distribution in the administration of the estate of the mother that the sons take the property left by the daughter. If it is eaten up by the debts of the mother, and the expenses of administration accruing in her estate, then they take nothing at all." If in the instant case we examine the right of the respondent to a decree of distribution, it will therefore be helpful. If the right exists as to any part of Paul's estate, it exists by virtue of sections 1665, 1666, 1671, and 1678 of the Code of Civil Procedure. In re Estate of Ryder, 141 Cal. 366, 369, 74 P. 993. No one of those sections gives it. On the other hand, section 1671 (St. 1923, p. 752) provides as follows: "If any heir, legatee or devisee of an estate shall die before the distribution to him of any part thereof, then the property to which he might be entitled, if living, shall be and become a part of his estate and the same may be distributed to the representative of his estate for the purpose of administration therein, with the same effect as if distributed to him if living." That section clearly indicates that the rule in Re Estate of Ryder, supra, is not to be departed from.

In what we have just said we have assumed that as to the right of distribution the provisions of the Code of Civil Procedure were controlling. However, it is not necessary to decide the point because the provisions of that code which we have cited were carried into the Probate Code, § 1020 et seq.

In connection with the point just discussed as to the right of distribution, the respondent cites and relies on McClellan v. Downey, 63 Cal. 520; In re Estate of Horman, 167 Cal. 473, 140 P. 11; and In re Estate of Singer, 192 Wis. 524, 213 N. W. 479. No one of those authorities rested on similar facts. We find nothing in any one of them that is contrary to anything we have said. It follows that under the statute the respondent was not "entitled to succeed" and therefore was not entitled to letters.

The order appealed from is reversed.

We concur: SPENCE, Acting P. J.; GOODELL, Justice pro tem.

131 Cal.App. 482

PEOPLE v. ELI et al.

Cr. 80.

District Court of Appeal, Fourth District, California.

April 27, 1933.

1. Criminal law ⇐736(2).

Question of admissibility of confession as voluntary act of accused is for trial court (Code Civ. Proc. §§ 2101, 2102).

2. Criminal law ⇐531(4).

Refusal to permit defendant, before confession was read to jury as evidence, to introduce evidence of circumstances under which it was made, *held* error.

3. Criminal law ⇐1186(4).

Where error is shown, court must examine evidence and ascertain whether error worked any injury (Const. art. 6, § 4½).

4. Criminal law ⇐1186(4).

Mere fact of error does not make out prima facie case for reversal (Const. art. 6, § 4½).

5. Criminal law ⇐531(3).

In arson prosecution, evidence showed that confession of one of defendants was freely and voluntarily given.

6. Criminal law ⇐1186(4).

In arson prosecution, error in excluding evidence of circumstances under which confession was made *held* harmless where evidence showed that confession was freely given and record strongly indicated guilt of defendants (Code Civ. Proc. § 2102; Const. art. 6, § 4½).

Appeal from Superior Court, Orange County; H. G. Ames, Judge.

Henry Eli and another were convicted of arson, and they appeal.

Affirmed.

Chandos E. Bush, of Los Angeles, and D. G. Wettlin, of Santa Ana, for appellants.

U. S. Webb, Atty. Gen., and John D. Richer, Deputy Atty. Gen., for the People.

CAMPBELL, Justice pro tem.

The defendants were convicted of the crime of arson upon an information charging them jointly with having, on or about June 7, 1932, feloniously set fire to an apartment house located at Huntington Beach, Cal., then and there kept by one Jess Sibley. This appeal is taken by both defendants from the judgments and orders denying their motions for new trial.

[1-6] The only error assigned consists of a certain ruling admitting evidence over the objection of the defendants. During the trial of the case one of the principal witnesses for the people was the deputy district attorney of Orange county, who testified to a conversation with defendant Eli, wherein the defendant made statements amounting to a confession. This statement or confession had been previously reduced to writing by a reporter. The people, during the trial, offered this statement or confession of defendant Eli, to which counsel for defendants objected on the ground that it was not free and voluntary, and offered to introduce testimony in support of this contention. The court overruled the objection, declined the offer, and the confession was read in evidence. Was this prejudicial error?

In People v. Gibson, 28 Cal. App. 334, 152 P. 316, the court said:

"The confession of the defendant, testified to by police officers, contributed to the conviction of the defendant, and the error of the court, therefore, in refusing to permit the defendant to introduce testimony tending to prove that the confession was involuntary and induced by improper influences, was clearly prejudicial. In the case of People v. Cahill, 11 Cal. App. 685, 691, 106 P. 115, it was held that testimony on the question whether the confession was voluntary or not should be presented before the confession is admitted in evidence; that it is purely one of law, the determination of which is committed exclusively to the court. People v. Soto, 49 Cal. 67, 70.

"When a confession is offered against a defendant on trial, and he objects to it, and offers to prove that it was procured by threats or promises, or under such circumstances as would render it incompetent, it is error to receive the confession without first hearing the proof offered and ruling upon the competency of the confession as evidence against the party making it." (Citing cases.)

Sections 2101 and 2102 of the Code of Civil Procedure read as follows:

"2101. All questions of fact, where the trial is by jury, other than those mentioned in the next section, are to be decided by the jury, and all evidence thereon is to be addressed to them, except when otherwise provided by this code.

"2102. All questions of law, including the admissibility of testimony, the facts preliminary to such admission, and the construction of statutes and other writings, and other rules of evidence, are to be decided by the court, and all discussions of law addressed to it. Whenever the knowledge of the court is, by this code, made evidence of a fact, the court is to declare such knowledge to the jury, who are bound to accept it."

By the section last above quoted, it is expressly made the duty of the trial court to pass upon all questions of fact, the deter-

mination of which is a necessary preliminary to the admissibility of any testimony. It follows that the question of the admissibility of the confession as the free and voluntary act of the accused was one for the determination of the trial court only. We are satisfied that the refusal to permit the defendant, before the confession was read to the jurors as evidence in the case, to introduce his evidence of the circumstances under which it was made, was error. People v. Columbus, 49 Cal. App. 761, 194 P. 288; People v. Gibson, supra; People v. Cahill, supra.

Although appellant Rose did not make a statement, there is testimony to show that he heard appellant Eli's confession read and that it contained incriminatory matters against him, to which he made no objection.

In discussing section 4½ of article 6 of our Constitution, the court, in the case of People v. O'Bryan, 165 Cal. 55, 65, 130 P. 1042, 1046, states: "Section 4½ of article 6 of our Constitution must be given at least the effect of abrogating the old rule that prejudice is presumed from any error of law. Where error is shown, it is the duty of the court to examine the evidence and ascertain from such examination whether the error did or did not in fact work any injury. The mere fact of error does not make out a prima facie case for reversal which must be overcome by a clear showing that no injury could have resulted."

It appears that appellant Eli, testifying in his own behalf, was permitted to testify at considerable length concerning the circumstances under which he made the statement in question. The substance of his contention that the statement was not freely and voluntarily made was apparently based on his subsequent testimony that he was told it would be better for him to plead guilty and that he was continually questioned for a considerable period of time.

He testified further in regard to the statement, that only a portion of it was true and that the statement which he made admitting his connection with the fire was made only after a long course of questioning. Appellant Eli stated: "Yes, they said they would help me all they could, and I was arrested and made statements naturally of things that wasn't a fact, and I didn't know anything about how to get out of it." However, on cross-examination defendant Eli admitted that the following question had been asked him during the course of making his statement heretofore referred to: "Q. Now with that in mind and understanding there is absolutely no promises of immunity or reward either by myself or anyone else, do you want to tell me what happened?" To which appellant Eli answered: "Can you fix it up some way so I can get away by Monday evening to fix things up?"

It appears from the record that the deputy district attorney, to whom appellant Eli made the statements, took every available precaution to inform appellant of his rights, and although appellant was questioned several hours in the office of the district attorney, his own testimony, taken as a whole, clearly indicates that the statement was made freely and voluntarily on his part. The appellant Eli's testimony above quoted, "Yes, they said they would help me all they could * * *" is the only testimony in the record touching upon the subject of whether or not the confession was free and voluntary. Certainly there is nothing in it to indicate in the slightest degree that it could be construed as a threat or regarded as a promise. In fact it held out no inducement of any kind. We are fully satisfied, after consideration of the entire record, that the statement of appellant Eli was freely and voluntarily given.

After thorough examination of the case, including the evidence, and particularly appellant Eli's explanation of the circumstances under which his statement was given, we are of the opinion that no trial judge would have excluded the statement or confession had he heard appellant's testimony before ruling upon its admissibility.

The appellants had the benefit of the appellant Eli's version of the circumstances under which the statement or confession was given and his testimony on the subject fails utterly to show that his statement was not given voluntarily, and in itself shows conclusively that he was not prejudiced by the error. The record as a whole so strongly indicates the guilt of the defendants, even without considering the alleged confession, that a reversal cannot reasonably be had on account of such error.

There being ample evidence pointing to the guilt of the defendants and the error complained of not prejudicing the substantial rights of the defendants, it follows that the judgments must be affirmed. Section 4½, art. 6, Const.

The judgments and orders appealed from are affirmed.

We concur: BARNARD, P. J.; MARKS, J.

131 Cal.App. 457

FITZGERALD v. QUINN et al.

INDEMNITY INS. CO. OF NORTH AMERICA v. SAME.

Civ. 8508.

District Court of Appeal, First District, Division 2, California.

April 27, 1933.

1. Appeal and error ⇐901.

Reviewing court will not search record on appeal to find material to reverse judgment.

2. Master and servant ⇐389.

In actions by deceased employee's heir and by employer's insurance carrier against party causing injuries, evidence of compensation insurance paid to decedent *held* properly admitted (St. 1917, p. 858, § 30 (f), as amended by St. 1929, p. 1167).

Such evidence was properly admitted, since St. 1917, p. 858, § 30 (f), as amended by St. 1929, p. 1167, provides that insurance carrier is subrogated to rights of employer and may enforce such rights in its own name, and provides that, if suit is prosecuted by employer alone, evidence of any expenditure employer has paid shall be admissible, and fact that another action was being tried at same time merely called forth proper rulings regarding applicability of evidence, and did not create question as to admissibility.

3. Judgment ⇐202.

Where actions by deceased employee's heir and by employer's insurance carrier were consolidated, court properly rendered separate judgments in favor of plaintiffs in each action, insurance carrier not being limited to lien on judgment in favor of employee's heir (St. 1917, p. 854, § 26, as amended by St. 1927, p. 1213).

4. Death ⇐84.

Expenditures made by or for injured person because of injury are not recoverable by heirs suing for death.

5. Master and servant ⇐389.

Employer and his insurance carrier may recover from person causing injury for expenditures legally paid because of employee's injury, and, where employee dies, recovery is not limited to expenditures on account of death (St. 1917, p. 854, § 26, as amended by St. 1927, p. 1213).

6. Master and servant ⇐389.

Statute providing that evidence of amount of disability indemnity or death benefit paid by employer is inadmissible in action against third party for employee's injuries is rule of evidence, not limitation on amount of recovery (St. 1917, p. 854, § 26, as amended by St. 1927, p. 1213).

7. Master and servant ⇐389.

In action by employer's insurance carrier against third party causing employee's injuries, evidence supported verdict in favor of carrier for amount representing disability indemnity and medical, hospital, and nursing expenses (St. 1917, p. 854, § 26, as amended by St. 1927, p. 1213).

Transcript disclosed that attorneys for both parties stipulated that agents of insurance carrier would testify that it had made payments of disability indemnity of certain amount and for medical, hospital, and nursing expenses a certain amount, and, although there was no evidence that such sums were reasonable value of such services, there was no objection that foundation had not been laid, and payment of sums was some evidence of reasonable value.

8. Death ⇐99(5).
Master and servant ⇐389.

$5,000 to mother for death of son contributing $20 weekly to her support, her expectancy being 12 years, and $4,455.28 to employer's insurance carrier, which did not exceed sums paid by it, *held* not excessive.

9. Appeal and error ⇐928(4).

On appeal and in support of judgment, it would be assumed that, if any instruction was erroneous, it was given at request of appellants, where not shown otherwise.

Appeals from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Actions by Josephine Fitzgerald and by the Indemnity Insurance Company of North America against John E. Quinn and others, which were consolidated and tried together. From a judgment for plaintiffs, defendants appeal.

Affirmed.

Charles W. Haswell, of San Francisco (Philander B. Beadle, of San Francisco, of counsel), for appellants.

James F. Brennan, Bronson, Bronson & Slaven, and Harold R. McKinnon, all of San Francisco, for respondents.

STURTEVANT, Justice.

On December 23, 1929, a truck owned by the defendant Heatley and a truck owned by one Sigmond Eckstein, collided at Gough and Broadway in San Francisco. Charles Fitzgerald, now deceased, was the employee of Eckstein, and the latter was insured by the Indemnity Insurance Company. John Quinn was the employee of the defendant Heatley

and was operating the truck owned by the latter. As a result of the collision, Fitzgerald was injured, he was taken to the hospital, where he lingered for some time and then died. Before his death he was treated at the hospital and the expenses were paid by the insurance carrier, and the latter also paid to him disability indemnity charges. After his death the insurance carrier also paid to the surviving mother of the deceased the amount of the death benefit. Thereafter the plaintiff, as the heir of the deceased, commenced the action, appearing as the first one in the title, against Heatley, the owner of the other truck, and John Quinn, the driver. Later Indemnity Insurance Company also commenced an action to recover its damages. The two actions were consolidated and tried together. The jury returned a verdict in favor of the mother in the sum of $5,000, and in favor of the Indemnity Insurance Company in the sum of $4,455.28. From the judgment the defendants have appealed under section 953a of the Code of Civil Procedure.

[1] The defendants state eleven questions intimating error. They print as an appendix about twenty-four folios of the record. They attack six instructions which are set forth in the briefs, but they do not print any others nor give any references thereto. It has been stated frequently that a court of review will not undertake to search a record on appeal for the purpose of finding material to reverse the judgment appealed from. In what follows, this court will attempt not to depart from that well-settled rule.

[2] 1. The defendants claim the court erred in admitting evidence of payments of compensation insurance to the decedent. We think not, because the statute provides that the insurance carrier is subrogated to the rights of the employer and may enforce such rights in its own name. Section 30, subd. (f), as amended, by St. 1929, p. 1167. And, as to the employer, the statute provides: "Sec. 26 * * * If the suit be prosecuted by the employer alone evidence of any expenditure which the employer has paid or become obligated to pay by reason of said injury or death shall be admissible, and such expenditures shall be deemed a part of the damages. * * *" Stats. 1927, p. 1213. The fact that on the trial another action was being tried at the same time did not give support to the contention. That fact merely called forth proper rulings as to the applicability of the evidence. It did not create a question as to the admissibility of it. 10 Cal. Jur. 816.

[3, 4] 2. The defendants contend that it was improper to render a separate judgment in favor of the plaintiffs in each action, and that the Indemnity Insurance Company was limited to a lien on the judgment in favor of the plaintiff. The statute clearly provides that the heirs of the decedent may maintain an action. It follows that in some cases a judgment may be rendered in their favor. It also provides clearly that the insurance carrier may maintain an action. From that fact it follows that in some cases a judgment may be rendered in its favor. Because the two actions were consolidated and the plaintiffs in both actions were successful, it does not follow that the judgment, as in this case, should not state separately the amount due each plaintiff, or set of plaintiffs. True, the statute provides that "the court shall, on application, allow as a first lien against any judgment recovered by the employee the amount of the employer's expenditures for compensation." That passage is addressed to judgments in favor of the employee personally and, also, to judgments in favor of his heirs. As applied to the instant case, that passage was applicable to the death benefits paid by the employer. But, as stated above, no erroneous ruling was assigned as to death benefits. As to the point presented and which we are now considering, the passage quoted is not relevant. Expenditures made by or for the injured person because of the injury are not, in an action brought by his heirs, elements of their damage. Bond v. United Railroads, 159 Cal. 270, 113 P. 366, 48 L. R. A. (N. S.) 687, Ann. Cas. 1912C, 50. In such an action, when such expenditures are not in issue, why should the payor have a lien against the judgment of the plaintiff? No reason for such a rule appears, and there is no language contained in the statute necessarily to the contrary. However, when the injured employee is himself one of the plaintiffs, the lien extends to his expenditures as these defendants contend. But the injured employee was not personally a party to the instant case.

[5, 6] 3. It is next asserted that, if the employee dies, the recovery of the employer is limited to expenditures on account of death. The statute does not so provide. It is addressed to many different possible cases; but, the clear import is to provide that the law-abiding employer and his carrier may be reimbursed for expenditures legally paid because of the injury suffered. The defendants quote from the statute as follows: "* * * If the employee joins in or prosecutes such suit, evidence of the amount of disability indemnity or death benefit paid by the employer shall not be admissible [and shall not be deemed part of the damages], but proof of all other expenditures on account of said injury or death shall be admissible and shall be deemed part of the damages. * * *" That is a rule of evidence, not a limitation on the amount of the recovery. That it is a rule of evidence appears on its face. That it was not intended as a limitation on the amount of the recovery is made clear by other passages contained in the same section. We quote: "The death of

the employee, or of any other person, shall not abate any right of action established by this section. The claim of an employee for compensation shall not affect his right of action for damages arising out of injury or death against any person other than the employer; and any employer having paid, or having become obligated to pay compensation, may likewise bring an action against such other person to recover said damages." Then further down it is provided: "If the suit be prosecuted by the employer alone, evidence of any expenditure which the employer has paid or become obligated to pay by reason of said injury or death shall be admissible, and such expenditures shall be deemed a part of the damages, including a reasonable attorney's fee to be fixed by the court; and if in such suit the employer shall recover more than the amount he has paid or become obligated to pay as compensation he shall pay the excess to the injured employee or other person entitled." To hold otherwise is to hold that the Legislature has said to the employer that he may sue for complete relief, but that he may not prove the facts. As a rule of evidence the passage relied on by the defendants is only what might have been expected. The effect is that the employee and the employer must prove the facts in the same manner as before the enactment of section 26.

[7] 4. The defendants ask: "Is there any competent evidence in the record to support the verdict in favor of plaintiff Indemnity Insurance Company of North America?" They then refer to a page of the transcript. Turning to that page it appears that the attorneys for both parties stipulated that, if the agents of the company were in court, they would testify it had made payments of disability indemnity $577.98, and for medical, hospital, and nursing $3,877.30, total $4,455.28. It is now said there was no evidence that such sums were the reasonable value of such services. But there was no objection that a foundation had not been laid. Again the payment of the sums was some evidence of the reasonable value. Dewhirst v. Leopold, 194 Cal. 424, 433, 229 P. 30.

[8] 5. It is intimated the verdict was excessive, but it was not. There was evidence the deceased contributed to the support of his mother $20 per week. Her expectancy was twelve years. Such evidence would have supported a verdict for more than $5,000 in favor of his surviving mother. The verdict in favor of the Indemnity Insurance Company was not in excess of the sums paid by it. There is nothing in the intimation.

[9] 6. The defendants ask the question whether the trial court erred in giving six several instructions. They print them and give the line and page of the transcript. An examination of each discloses that it was not a prejudicially erroneous statement of the law. But the record does not show that any one of the instructions under attack was given by the court of its own motion, nor that it was given at the request of one of the plaintiffs. On appeal and in support of the judgment, it will be assumed that, if any one of the instructions was erroneous, it was given at the request of the defendants. 2 Cal. Jur. 699.

The judgment is affirmed.

We concur: SPENCE, Acting P. J.; GOODELL, Justice pro tem.

131 Cal.App. 493

SKILLMAN v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 8866.

District Court of Appeal, First District, Division 2, California.

April 28, 1933.

1. Master and servant ⇐403.

Employer has burden to prove that alleged employee was either independent contractor or was expressly excluded under Workmen's Compensation Act (St. 1917, p. 835, § 8(a, b), as amended by St. 1931, p. 2068).

2. Master and servant ⇐361.

Whether alleged employee was expressly excluded under Workmen's Compensation Act is mixed question of law and fact (St. 1917, p. 835, § 8(a, b), as amended by St. 1931, p. 2068).

3. Master and servant ⇐417(7).

Court may set aside finding of Industrial Accident Commission only where evidence in record renders finding unreasonable, or in excess of commission's powers.

4. Master and servant ⇐405(4).

Finding of Industrial Accident Commission that work of employee, injured while wrecking wooden shed, was in course of trade, business, or occupation of employer, *held* supported by evidence (St. 1917, p. 835, § 8(a, b), as amended by St. 1931, p. 2068).

Main occupation of employer was that of constructing water tanks. In the course of that occupation he frequently wrecked and removed old water tanks and other buildings. At the time the employee sustained the injury for which compensation was sought, the work of constructing water tanks was slack, and the employer

was having an old wooden shed wrecked for the purpose of selling some of the lumber.

Proceedings under the Workmen's Compensation Act by Martin A. Neilson, employee, against Lambert Skillman, employer. To review an order of the Industrial Accident Commission awarding compensation to the employee, the employer brings certiorari.

Award affirmed.

Tompkins & Tompkins, of San Jose, for petitioner.

A. I. Townsend, of San Francisco, for respondents.

NOURSE, Presiding Justice.

Petitioner seeks an annulment of the award for compensation in favor of Martin Neilson, who was employed by petitioner in the wrecking of a wooden shed. Petitioner's main occupation was that of constructing water tanks and in the course of this occupation he frequently wrecked and removed old water tanks and other buildings. The petitioner testified that at the time of the injury the work of constructing water tanks was slack and that he was having the old shed wrecked for the purpose of selling some of the lumber. The commission found that this work was "in the course of the trade, business, profession or occupation of his employer" within the terms of section 8(a) of the Workmen's Compensation Act. St. 1917, p. 835 (as amended by St. 1931, p. 2068).

[1, 2] The single question presented in this proceeding is whether this finding is supported by the evidence. "Any person rendering service for another, other than as an independent contractor, or as expressly excluded herein, is presumed to be an employee within the meaning of this act." Section 8(b). Hence the burden of proof is cast upon the petitioner to show that Neilson was either an independent contractor or was expressly excluded under the terms of the act. Hillen v. Ind. Acc. Comm., 199 Cal. 577, 250 P. 570. It is conceded that he was not an independent contractor. Whether he was "excluded" (i. e., under section 8a) is a mixed question of law and fact to be proved like any other question. Pacific Gas & Elec. Co. v. Ind. Acc. Comm., 180 Cal. 497, 499, 181 P. 788; Murray v. Ind. Acc. Comm., 216 Cal. 340, 14 P.(2d) 301.

[3, 4] In support of his contention that he was not engaged in the business of wrecking buildings other than water tanks, the petition points to his direct testimony to that effect. On the other hand, the respondents point out that his testimony throughout was equivocal and unconvincing and it is argued that the commission was not bound to accept petitioner's testimony as overcoming the presumption of employment found in the act. It is only where there is such an entire absence of evidence in the record as to render the finding unreasonable, or in excess of the powers of the commission, that the court may set aside the finding. Eastman Co. v. Ind. Acc. Comm., 186 Cal. 587, 598, 200 P. 17. In view of the presumption of employment and the inferences which might be drawn from all the evidence we cannot say that petitioner sustained the burden of proof or that the finding is unreasonable.

The award is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

131 Cal.App. 217

MILLER v. SECURITY INS. CO. OF NEW HAVEN, CONN.

Civ. 7756.

District Court of Appeal, Second District, Division 2, California.

April 14, 1933.

Rehearing Denied May 12, 1933.

Hearing Denied by Supreme Court June 12, 1933.

1. Insurance ⇐665(4).

Evidence in action on fire policy sustained finding that insured did not burn tavern covered by policy.

2. Insurance ⇐278.

Insured's failure to inform insurer that tavern covered, could not be used as hospital or sanitarium when fire policy was issued and as boarding house or hotel when rider was attached *held* "fraudulent concealment of material matters," rendering void policy providing property was insured while used for hospital, sanitarium, and boarding house purposes (Civ. Code, §§ 2561, 2563, 2565).

[Ed. Note.—For other definitions of "Fraudulent Concealment," see Words and Phrases.]

3. Insurance ⇐278.

Character of occupation carried on in building to be insured is material part of fire insurance contract (Civ. Code, §§ 2561, 2563, 2565).

4. Insurance ⇐278.

That fire policy permitted tavern to remain vacant without limit of time, and that hazard was greater with tavern vacant than occupied for lodging or boarding purposes was immaterial, as regards insured's concealment of material matters where tavern was never vacant and never used for boarding house or other purposes allowed by policy (Civ. Code §§ 2561, 2563, 2565).

5. Insurance ⇐278.

Presence of insured and her personal guest without payment of board or lodging *held* not use of tavern for "lodging or boarding purposes," within terms of fire policy.

[Ed. Note.—For other definitions of "Boarding House" and "Lodging House," see Words and Phrases.]

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action by Anna Miller against the Security Insurance Company of New Haven, Conn. From a judgment for plaintiff, defendant appeals.

Reversed.

Hindman & Davis, of Los Angeles, for appellant.

Craig & Weller, W. W. Wallace, and Thomas S. Tobin, all of Los Angeles, for respondent.

WORKS, Presiding Justice.

This is an action to recover on a policy of fire insurance. Plaintiff had judgment, and defendant appeals.

The action resulted from a fire in which several buildings, the property of respondent, were destroyed. This group of structures was located at Elizabeth Lake, not far from the highway known as the Ridge route, in the county of Los Angeles. Harvey Eshelman, the fire warden in charge of the district, and Robert Reep, one of his men, testified that when they arrived on the scene there were two separate or "non-communicable" fires burning in the group. A building known as the tavern and a garage adjacent to it were burning briskly, while inside a dance hall, a structure somewhat removed from the other two, a blaze was evident. All the testimony in the record shows that the doors and windows of the dance hall were closed at the time. Eshelman and Reep said the roof and outside of the dance hall were not burning. Eshelman testified also that a part of the inside walls and floor of the latter building were wet from the sprinkling of some petroleum product which smelled like kerosene. The evidence shows also that some years before the fire at Elizabeth Lake respondent had been paid $4,000 by an insurance company for a fire loss at Redlands, although no further particulars of this occurrence appear in the record. The chief of the fire department of Monrovia testified that a fire had occurred at the home of respondent and her husband in that city in 1921, and that it was extinguished before great damage had been done. He swore that a line of kerosene had been sprinkled through three rooms of the house, and that the fire had run and burned the floor along this line in all three rooms. Respondent did not testify that she had not sprinkled kerosene in the dance hall at Elizabeth Lake, nor did she dispute the story of the Monrovia fire chief. In addition to these circumstances, Eshelman testified concerning two somewhat damaging conversations between him and respondent. These she did not deny.

[1] Despite these strong circumstances the trial judge found that respondent did not burn, or cause to be burned, the single building covered by the insurance policy involved in the present action, which building was the tavern. Without going further into the matter, we state, for the benefit of counsel, that the testimony of Eshelman and Reep was, we think, substantially disputed in part by each of the witnesses named below, whose testimony we have read in full, as well as that of Eshelman and Reep. We list the witnesses as their names appear in succession in the transcript of the record: Beatrice Smith, Ray Seiger, Mary Nollenberger, Charles A. Downing, Gerson Seiger, Donald M. Thomson, Frank Frakes, and F. J. Talmantes. Most of these witnesses disputed Eshelman and Reep in particulars not mentioned above, but we think the testimony of all of them taken together was sufficient to support the finding of the trial court which is now in question.

The policy covering the tavern was dated March 19, 1927. The document recited that the property was insured "while occupied for hospital and/or sanitarium purposes." On July 7 of the same year a rider was attached to the instrument which read that "permission is hereby granted to the assured to use the within described property for lodging and boarding purposes, as well as hospital and/or sanitarium." The policy contained the usual provision: "This entire policy shall be void if the insured has concealed or misrepresented any material fact or circumstances concerning the insurance or the subject thereof." The answer alleged that at the time the policy was executed respondent fraudulently concealed certain material matters hereafter to be mentioned. It was also alleged that at the time the rider was attached to the policy she fraudulently concealed certain matters material thereto. The trial court found against appellant under each of these allegations, and it is contended that the findings were not supported by the evidence. The two findings will be considered together, as they present the same legal question.

Respondent having made application to the authorities for leave to use the tavern as a sanitarium, Robert L. Dunlap, fire prevention engineer for the county, visited the place on November 21, 1926, for the purpose of inspecting it. This visit and inspection were made at the request of the public welfare

commission. Dunlap testified that the tavern was a "two story frame building, doors opening in. * * * Lighted by what is known as a Coleman gasoline light, under pressure, and small tubing which leaked in many places. Insufficient exits from the second floor. Surrounding exposures very close to the main structure." He also testified that these conditions "would disqualify this building and prevent it from being used for a sanitarium and hospital purposes." He told respondent, as he said, "that I would not approve of the building to be used for that purpose, and that she would receive a written report within a few days." Dunlap again visited the tavern on January 17, 1927, in company with another man, but then made only what he called a reinspection. He was there again on May 24 with "Mr. Mott of the State Housing Commission," and testified that he found no "changes sufficient to qualify" the house for use as a sanitarium. He visited the place again on July 13, when Mrs. Florence Edwards, housing inspector for the county health department, was with him. He testified as to what he found on that occasion: "There had been an emergency stairway provided from a rear bedroom window on the second floor along the porch where steps led to the ground. That was the only change of any material difference." The fire occurred on July 21 of the year of the January, May, and July 13 visits, that is, the year 1927.

On the visit of May 24, when Mr. Mott was with him, Dunlap first inspected the tavern with a view to ascertaining its availability for lodging and boarding purposes. He testified that after the inspection of that date, speaking to respondent: "I said we would not at any time permit that building in its present condition to be used for a sanitarium, hospital, hotel or other place of public assemblage." On the visit of July 13, eight days before the fire, after making his inspection, he testified he told "both Mr. and Mrs. Miller * * * substantially the same as I have said before." He then went on: "They were very much put out and were quite—I will put it, mad, and sort of resented both or all of the suggestions that I had made, and, in turn, in the presence of Mrs. Edwards, Mr. Miller stated that he was sick and tired of the whole mess, and that he was going to get his money out of the place some way."

There is other testimony as to the unfit condition of the tavern from the latter part of December, 1926, until immediately after May 20, 1927, that of Alice Laib and Dr. F. B. Brockett. These two held the tavern under lease from respondent between the two dates, having taken it for the purpose of operating a sanitarium. They finally surrendered possession because a permit could not be obtained to employ the property for their intended uses, and the Millers at once reoccupied the place. It is not necessary further to refer to specific testimony of Mrs. Laib and Dr. Brockett. It is enough to say that from November 21, 1926, forward, no permit was ever issued by the public authorities for the use of the tavern either as a sanitarium or for lodging and boarding purposes. Moreover, respondent knew before she procured the policy in question that the property could not be used as a sanitarium; she knew before the rider was attached to it that the house could not be used as a hotel—for "lodging and boarding purposes," as the rider expressed it —without radical changes in the structure. These changes were never made.

[2, 3] From before March 19, 1927, the date of the policy, to the day of the fire, respondent was under a continuing duty to inform appellant that the tavern could not be employed as a sanitarium. From May 24, 1927, to the date of the fire she was under a continuing duty to inform the company that the property could not be used as a hotel. In withholding this information we think she practiced a fraudulent concealment upon appellant. Can it be logically believed that appellant, if it had known the true conditions at the respective dates, would have issued the policy, or would have attached the rider to it? And this is a very material consideration in discussing the question presented. Civ. Code, §§ 2561, 2563, 2565; General Acc., etc., Corp. v. Industrial Acc. Comm., 196 Cal. 179, 237 P. 33; Solomon v. Federal Ins. Co., 176 Cal. 133, 167 P. 859. Appellant very justly says in its brief: "The character of the business or occupation to be carried on in the building to be insured is, of course, the most material part of the contract, and as the policy allowed her to carry on only certain business in the building insured, and as she was prohibited from doing so, and knew that she was, it would seem hardly necessary to say that her failure to communicate this to the insurance company was a concealment of material facts and would void the policy."

[4] In dealing with this question of concealment respondent quotes thus from the policy: "Vacancy. Permission is hereby granted for the within described building to be or remain vacant or unoccupied without limit of time." The only argument advanced in support of the proposition that the vacancy clause can affect this question as to concealment is contained in the following statement in the brief: "That the hazard or risk was greater with the building vacant than occupied for lodging and/or boarding purposes was admitted by the special agent for the insurance company." We fail to see what this testimony can have to do with the question. The real point is this: If, before the rider was attached to the policy, respondent was not limited to a use of the tavern when occupied, as a sanitarium, or if, after the rider was attached, she was not limited to its use when occupied, as either a sanitarium or a hotel, then at any

time after the issuance of the policy, so far as its validity against appellant is concerned, she could have used it for any purpose she pleased. She could have turned it into a manufactory for the purpose of making powder or fireworks. As appellant says, she could have used it as a bootlegging headquarters or as a bawdyhouse. To return more directly to the vacancy clause: The tavern was never vacant, but, although always occupied, it was never used as allowed by the policy, either as it originally stood or as modified by the rider. While Mrs. Laib and Dr. Brockett occupied the house they had two boarders for a very short time—one was there less than a week, the other two weeks—but never a patient. The Millers never used the tavern as either a hotel or a sanitarium. The only persons ever in the house, besides themselves, were friends who visited them. The material point, however, is that the house never could have been used lawfully as either a sanitarium or a hotel, and that this state of affairs was concealed from appellant. The two findings now under consideration were without support in the evidence.

[5] The trial court found that the tavern, "on the date and at the time of the fire * * * was being used for lodging and boarding purposes in accordance with the terms" of the policy. It is contended that this finding was unsupported by the evidence, and the contention must be upheld. At the time of the fire the building, which consisted of fifteen rooms, was occupied only by respondent and by a young woman named Ray Seiger. They evidently occupied the same room, as Miss Seiger testified that on the night of the fire they had retired to rest in the same bed. Moreover, the young woman said that she was visiting respondent, whom she had known about seven years, at the time. She was there to recuperate after an operation for appendicitis. It is plain from the entire testimony of Miss Seiger that she was not a boarder at the house. From a remark in respondent's brief it appears that counsel's theory is that any house in which people eat and sleep is being used for "lodging and boarding purposes," and the trial judge, from two observations made by him at the trial, seemed to entertain a similar view. At any rate, the trial judge said specifically in these observations that to use a building for "lodging and boarding purposes" was very different from using it as a lodging and boarding house. The finding of the court was probably based on this erroneous view. We think the rider attached to the insurance policy was intended to allow the use of the tavern as a lodging and boarding house, or as its equivalent, a hotel. Certainly, the mere presence of respondent and her personal guest, who was there without the payment of board or lodging, could not make the building a hotel. All this is aside from the fact that, as we have already shown, respondent could not lawfully have operated a hotel at the place on the day of the fire. Appellant cites in its brief various legal definitions of the terms "boarding" and "lodging," but the meaning of the words is so generally understood that it is unnecessary to cite the authorities here.

Appellant makes other points but it is useless to discuss them.

Judgment reversed.

We concur: CRAIG, J.; STEPHENS, J.

131 Cal.App. 427

HILSON v. PACIFIC GAS & ELECTRIC CO.

Civ. 8629.

District Court of Appeal, First District, Division 2, California.

April 26, 1933.

Rehearing Denied May 26, 1933.

Hearing Denied by Supreme Court June 23, 1933.

1. Gas ⇐20(2).

Evidence *held* to justify verdict against gas company for damage to building by gas explosion without recourse to res ipsa loquitur rule.

2. Evidence ⇐587.

Circumstantial evidence, to sustain verdict, need not exclude every other reasonable conclusion.

3. Gas ⇐20(1).

Evidence in action for damage to building by gas explosion that gas furnished by defendant was odorless *held* relevant on question of tenant's negligence in attempting to relight extinguished oven burners, though such fact was not pleaded by plaintiff.

4. Gas ⇐20(4).

Tenant's negligence in attempting to relight extinguished oven burners *held* for jury in landlord's action against gas company for damage to building by gas explosion.

5. Gas ⇐16.

Tenant's negligence, if any, in attempting to relight extinguished oven burners, being concurrent with that of gas company in failing properly to adjust burners or supply adequate gas pressure, either or both would be liable for damage to building by resulting gas explosion, at owner's election.

6. Negligence ⇐59.

Defendant's original negligence, followed by another's independent act directly causing injury to plaintiff, constitutes proximate cause thereof, if defendant should have known that intervening act was likely to happen.

7. Gas ⇐18.

Gas company's negligence in failing properly to adjust oven burners or furnish adequate gas pressure *held* proximate cause of explosion immediately caused by tenant's attempt to relight extinguished burners, particularly where gas was odorless.

8. Negligence ⇐121(1).

Res ipsa loquitur doctrine applies only when defendant had exclusive control of instrumentality causing injury to plaintiff, not when accident may have been due to causes over which defendant had no control.

9. Gas ⇐20(2).

Res ipsa loquitur doctrine applies in action against gas company for damages by explosion resulting from attempt to relight oven burners, extinguished because of insufficient gas pressure.

10. Trial ⇐296(3).

Instruction that explosion of gas, flow, supply, and distribution of which was admittedly controlled by defendant gas company, raised presumption of its negligence, *held* correct when read with instruction given at defendant's request.

The instruction given at defendant's request was that defendant was not bound to inspect or maintain gas appliances used by plaintiff or his tenants or gas pipes in building beyond point where they connected with outlet to gas meter and that verdict must be for defendant if explosion was caused by leaks or accumulations of gas in oven or other appliance or pipes leading through premises from meter outlet, without negligence on defendant's part.

11. Negligence ⇐138(2).

Use of words "proper care," instead of "ordinary care," in instruction on res ipsa loquitur doctrine, *held* not erroneous or misleading.

The instruction was that if explosion of gas, supplied and controlled by defendant company would not have occurred in ordinary course of things had it used "proper care" in managing, supplying and controlling gas, such facts raised presumption of defendant's negligence.

12. Negligence ⇐121(1).

Res ipsa loquitur doctrine justifies "inference" rather than creating presumption.

13. Appeal and error ⇐1064(4).

Use of word "presumption," instead of "inference," in instruction on res ipsa loquitur doctrine, *held* not prejudicial to defendant, though technically erroneous.

14. Damages ⇐138.

$7,000 damages for injury to building, partly repaired at cost of $3,000, but incapable of being fully repaired without practically tearing it down and reconstructing it, and resulting in loss of rentals, *held* not excessive.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Action by D. L. Hilson against the Pacific Gas & Electric Company. Judgment for plaintiff, and defendant appeals.

Affirmed.

Thomas J. Straub, of San Francisco, W. R. Dunn, of Sacramento, and Clinton F. Stanley, of San Francisco, for appellant.

Ford & Johnson, of San Francisco, for respondent.

DOOLING, Justice pro tem.

This is an appeal by the defendant from a judgment entered upon a jury verdict. The evidence most favorable to the plaintiff may be summarized as follows:

The plaintiff on April 7, 1930, was the owner of a building, a portion of which was occupied and used as a bakery by a tenant named Joachim. In the bakery was a bake oven operated by gas supplied by the defendant. The defendant supplied this gas to a meter at the side of the building, and from the meter the gas was conveyed through pipes owned by the baker to the oven. There were four burners on the oven, and in lighting them the baker used a torch consisting of an iron pipe attached to a rubber hose and furnishing a small flame. Some time before the date in question the defendant had substituted natural gas for artificial gas in its system. At the outset this natural gas was reformed before distribution to approximate the artificial gas previously supplied, but on March 13, 1930, the defendant commenced to furnish through its pipes straight natural gas. This change in the character of gas served made it necessary to adjust the burners on gas equipment so as to reduce the quantity of gas passing through the burners approximately one-half and thereby also double the proportion of air passing through the burners. The defendant assumed to make such adjustment upon the burners in Joachim's bake oven. Nevertheless, from about the time of the change from reformed natural gas to straight natural gas Joachim had trouble with the burners of his gas oven flaring up and going out. He complained of this to the defendant, and on at least two occasions an employee of defendant visited his bakery and examined the burners, but made no further adjustment, and the employee making the last visit stated to Joachim that the pipes still contained a mixture of the old and new gases and when they were cleared of the old gas the burners would give no fur-

ther trouble. On the morning of April 7, 1930, Joachim lighted the four burners of his oven at about 8 o'clock and started to mix his doughs. About twenty minutes thereafter he looked at the oven and found the burners all extinguished. He opened the doors and turned off the cocks on the burners. Though he smelled no odor of gas he let the oven and the room ventilate for at least ten minutes. At the end of that time he went back and still smelling no odor of gas he lighted the torch to rekindle the burners, and a violent gas explosion occurred which did considerable damage to the building. It was further in evidence that natural gas is odorless, and that, when properly served, an odorant is added to it, but that none had been added by defendant to the gas being served to Joachim. Mr. Britton, division superintendent of defendant's gas department, testified that the gas in this oven might have gone out for any one of three reasons: A down draft in the flue, an inadequate gas pressure, or a faulty adjustment of the burners causing a lack of oxygen in the gas emitted from the burners. He further testified that the type of burner here involved would not be likely to be extinguished by a down draft in the flue. The testimony was that prior to the serving of straight natural gas Joachim had had no trouble with the burners.

[1, 2] Defendant made a motion for nonsuit which was denied. This is urged as error on several grounds. On the theory that no specific act of negligence proximately causing the explosion was shown, appellant argues that it could be liable only if the doctrine of res ipsa loquitur is applied, and then proceeds to urge that that doctrine can have no application under the facts of this case. We will defer a consideration of the application of res ipsa loquitur until we come to discuss the instructions, for the reason that we are satisfied that under the evidence above detailed the jury would have been justified in bringing in a verdict against defendant without having recourse to the res ipsa loquitur rule. While the evidence is entirely circumstantial as to the cause of the burners being extinguished, nevertheless the jury could properly draw an inference that this was due to a faulty adjustment of the burners by defendant, to a lack of proper pressure in the gas supplied by it, or to a combination of both. They could also properly infer from the fact that no explosion occurred when the burners were lighted the first time on the morning of April 7 that the gas which was exploded accumulated from the extinguished burners before they were turned off, and was not dissipated by the efforts of Joachim to ventilate. Appellant apparently would have us apply to plaintiff's evidence the rule laid down in Wilbur v. Emergency Hospital Ass'n, 27 Cal. App. 751, 151 P. 155, wherein it was held that a theory cannot be established by circumstantial evidence unless the facts are such and so related to each other that it is the only conclusion that can fairly or reasonably be drawn therefrom. But the rule is now settled otherwise so that "circumstantial evidence in civil cases, in order to be sufficient to sustain the verdict, need not rise to that degree of certainty which will exclude every reasonable conclusion other than that arrived at by the jury." Chalmers v. Hawkins, 78 Cal. App. 733, 739, 248 P. 727, 730; opinion of Supreme Court in denying a hearing in Estate of Wallace, 64 Cal. App. 116, 220 P. 682; Tietke v. Forrest, 64 Cal. App. 364, 368, 221 P. 681; Mah See v. North Amer. Acc. Ins. Co., 190 Cal. 421, 426, 213 P. 42, 26 A. L. R. 123; Ley v. Bishopp, 88 Cal. App. 313, 315, 316, 263 P. 369; Barham v. Widing, 210 Cal. 206, 214, 215, 291 P. 173; Peters v. McKay & Co., 136 Cal. 73, 75, 76, 68 P. 478. In Barham v. Widing, supra, the Supreme Court upheld a judgment based upon an inference drawn from circumstantial evidence, although the inference was opposed to the direct testimony of defendant and another witness, the court saying at page 215 of 210 Cal., 291, P. 173, 177: "The jurors were entitled to accept the solution to which these circumstances led them in preference, even, to the positive statements of the defendant and his nurse to the contrary." In Mah See v. North Am. Acc. Ins. Co., supra, at page 426 of 190 Cal., 213 P. 42, 44, 26 A. L. R. 123, the court announced the rule as follows: "Even though all the facts are admitted or uncontradicted, nevertheless, if it appears that either one of two inferences may fairly and reasonably be deduced from those facts, there still remains in the case a question of fact to be determined by the jury * * * and * * * the verdict of the jury * * * cannot be set aside by this court on the ground that it is not sustained by the evidence."

[3-7] Appellant further argues in support of its claim of error that the explosion was solely due to the negligence of Joachim as an independent intervening agency. Joachim smelled no gas, he ventilated for ten minutes, and the gas furnished by defendant was odorless; no odorant having been added by defendant. It is true, as appellant points out, that the fact that the gas was without odor is not pleaded by plaintiff to support his cause of action, but the fact was none the less relevant to a determination of the question whether Joachim was guilty of any negligence in attempting to relight the burners after ventilating for ten minutes. We think that the question whether Joachim was guilty of negligence was a question of fact to be resolved by the jury. Even if Joachim was negligent, however, his negligence would not break the chain of causation, but would be concurrent with that of defendant and

either or both would be liable at the plaintiff's election. The facts are similar on this point to those involved in Merrill v. Los Angeles Gas & Elec. Co., 158 Cal. 499, 111 P. 534, 31 L. R. A. (N. S.) 559, 139 Am. St. Rep. 134. The rule announced in that case is controlling upon the facts here presented, and Catlin v. Union Oil Co., 31 Cal. App. 597, 161 P. 29, is clearly distinguishable on its facts. The correct rule was recently reiterated in Sawyer v. Southern Cal. Gas Co., 206 Cal. 366, 375, 274 P. 544, 547: "The rule, as we understand it, applicable to such cases, is that where the original negligence of a defendant is followed by an independent act of a third person which results in a direct injury to a plaintiff, the negligence of such defendant may, nevertheless, constitute the proximate cause thereof if, in the ordinary and natural course of events, the defendant should have known the intervening act was likely to happen; but if the intervening act constituting the immediate cause of the injury was one which it was not incumbent upon the defendant to have anticipated as reasonably likely to happen, then, since the chain of causation is broken, he owes no duty to the plaintiff to anticipate such further acts, and the original negligence cannot be said to be the proximate cause of the final injury." The facts of this case in our judgment bring it well within the rule first above stated. The defendant, particularly while serving an odorless gas, should reasonably foresee the probability of an explosion from a person attempting to relight the burners where they had become extinguished through its negligence. See, also, Katz v. Helbing, 215 Cal. 449, 10 P.(2d) 1001.

The court gave the jury the following instruction, which is attacked by appellant on several grounds: "You have been heretofore instructed the defendant the Pacific Gas and Electric Company has admitted that it had control of the flow, supply and distribution of gas to the building in question, and if you find from the evidence that the explosion was an explosion of gas supplied by defendants and controlled by them, and that such explosion would not have occurred in the ordinary course of things if the defendant had used proper care in the managing, supplying, and controlling of such gas such facts raise the presumption that the said Pacific Gas and Electric Company was negligent."

[8] No complaint is made of the portion of this instruction which informed the jury that the defendant "has admitted that it had control of the flow, supply and distribution of gas to the building," since this was expressly admitted by the pleadings. Appellant does contend, however, that on the facts proved the giving of any instruction on the theory of res ipsa loquitur was error. In this connection appellant points out that the gas passed from the meter through pipes belonging to Joachim and through a service regulator owned by the Gas Consumers' Association, over none of which had defendant control, and argues that it is settled law that the doctrine of res ipsa loquitur can only apply when the defendant has exclusive control of the instrumentality causing the injury, and can in no event apply when the accident may as well have been due to one or more causes over which defendant had no control. This is a correct statement of the rule. Olson v. Whitthorne & Swan, 203 Cal. 206, 263 P. 518, 58 A. L. R. 129; Hill v. Pacific Gas & Elec. Co., 22 Cal. App. 788, 136 P. 492; White v. Spreckels, 10 Cal. App. 287, 101 P. 920; Ingledue v. Davidson, 102 Cal. App. 704, 283 P. 840; Lewis v. Southern Cal. Gas Co., 92 Cal. App. 670, 268 P. 930; Keller v. Cushman, 104 Cal. App. 186, 285 P. 399. Appellant particularly relies upon Hill v. Pacific Gas & Elec. Co., supra, and White v. Spreckels, supra, as being closely in point. In White v. Spreckels, supra, the plaintiff was injured by the explosion of a steam radiator in an apartment occupied by plaintiff, to which radiator defendant supplied the steam. In that case the court held that the doctrine of res ipsa loquitur could not be applied to make a case for plaintiff, since it was as likely that the explosion was caused by a defect in the radiator as it was that it was caused by an excess pressure of steam supplied by defendant; the court saying at page 294 of 10 Cal. App., 101 P. 920, 923: "If we rely on the doctrine of probabilities, we might as reasonably infer that the explosion was caused by the use of wet towels upon the radiator, or by reason of the radiator having been changed or weakened by its use by the lessee, as that it was caused by an excessive pressure of steam. The evidence is not such as to raise a presumption which shows that the defendants were guilty of negligence."

In Hill v. Pacific Gas & Elec. Co., supra, the action was for the death of an employee of a mining company who was killed by an electric shock while working in the mine. The electric current was supplied to the mining company by defendant and conveyed through the mine by wires and appliances owned and controlled by the mining company. The court held that the res ipsa loquitur doctrine could not be applied on the facts to make out a case against the defendant. The evidence in that case showed that the defendant's control of the current ceased when it left the defendant's meter, that thence it passed through transformers owned and controlled exclusively by the mining company, which were designed to reduce the electricity to a lower voltage, and thence through instrumentalities likewise exclusively owned and controlled by the mining company. The court said at page 791 of 22 Cal. App., 136 P. 492, 494: "But the electricity which caused the injury was not, at the time

and place of the injury, under the management or control of the electric company, nor were any of the appliances by which the electricity was being utilized under its management or control, nor was it in any degree responsible for any failure of these appliances to perform their offices. No causal connection of the electric company, at the time of the accident, with the thing which caused the injury, was shown."

[9] It will be observed of both these cases that the plaintiff was relying upon the doctrine of res ipsa loquitur to make out a case of negligence after the proof of the accident and injury without more. In neither case was there circumstantial evidence from which the jury or court might properly conclude that the injury had been caused in a particular manner or by a particular agency which was under the control of the defendant. In the case before us, on the other hand, the plaintiff made a strong circumstantial case that the accident occurred from one of two causes for both of which the defendant would be directly responsible: An insufficient gas pressure or a faulty adjustment of the burners by defendant's employees. If the jury found that the cause was an insufficient gas pressure, then the doctrine of res ipsa loquitur would properly apply, since the gas pressure was a matter under the direct control of defendant. The case in this respect is similar to Bergen v. Tulare County P. Co., 173 Cal. 709, 161 P. 269, in which Hill v. Pac. Gas & Elec. Co. was discussed and distinguished. In the Bergen Case, which was one for wrongful death, the defendant delivered electricity to a pump through transformers installed by defendant. The evidence justified a finding that in some manner a dangerously high voltage passed through or around the transformers causing decedent's death. The court said at page 720 of 173 Cal., 161 P. 269, 273: "The eleventh instruction stated the rule that if plaintiff had established by a preponderance of evidence the death of her decedent while he was exercising ordinary care, by an excessive and dangerous current furnished by defendant through the electric light wire, it then devolved upon defendant to show that the excessive voltage was not due to its negligence. This did not unduly extend the doctrine res ipsa loquitur as appellant complains that it did. Such control as Mr. Bergen exercised over the equipment of his pumping station could not have resulted in an increase of the voltage; therefore the presence of a death-dealing current in the wire through which defendant had contracted to furnish a current of 110 volts was sufficient to afford reasonable evidence of negligence on its part."

The same distinction was recognized and pointed out in Hill v. Pac. Gas & Elec. Co., supra, in discussing the decisions from other jurisdictions. 22 Cal. App. pages 794 and 804, 805, 136 P. 492.

[10] At the request of the defendant, the following instruction was given by the court: "You are instructed that the defendant is under no duty to inspect or maintain any of the gas appliances used by the plaintiff or his tenants or to inspect or maintain any of the gas pipes in the premises, beyond the point where such pipes connect with the outlet to the gas meter, and if you believe from the evidence in this case that the explosion which is alleged to have caused the damage to the plaintiff's premises, if there was such damage, was caused by leaks or accumulations of gas occurring in the gas oven or other appliance, or in leaks occurring in any pipes leading through said premises from the outlet to the meter, without negligence on the part of the defendant, then your verdict must be for the defendant."

By this instruction the jury were plainly told that, if the explosion was due to any instrumentality not under defendant's control without negligence on its part, it could not be liable. Reading this instruction with the one complained of, the jury must have understood them to mean that only if they found that the explosion was proximately caused by the "flow, supply and distribution of gas to the building" over which defendant "admitted that it had control" would the res ipsa loquitur doctrine be applicable. We are satisfied that this was a correct statement of the law.

[11] Appellant further complains of the use in this instruction of the words "proper care" instead of "ordinary care." This is the classic statement of the rule which had its origin in the language of Earle, C. J., in Scott v. London Dock Co., 3 Hurl. & C. (Eng.) 596; Brown v. Davis, 84 Cal. App. 180, 182, 257 P. 877. It has been repeated numberless times in this form by the appellate courts of this state (19 Cal. Jur. p. 704 and cases cited in note 8), and must have been given in this form countless times to juries. We cannot hold that the use of the words "proper care" in this connection was error or could have misled the jury.

[12] Appellant likewise argues that the use of the word "presumption" rather than "inference" in this instruction was prejudicially erroneous. It cannot be gainsaid that the res ipsa loquitur doctrine justifies an inference rather than creating a presumption. Dowd v. Atlas T. & A. Service, 187 Cal. 523, 531, 202 P. 870; Albert v. McKay & Co., 53 Cal. App. 325, 329, 200 P. 83. The appellate courts have themselves done much to create confusion in the use of the two terms especially as applied to res ipsa loquitur. As well said by the District Court of Appeal in Crooks v. White, 107 Cal. App. 304, 310, 290 P. 497, 500:

"The inaccurate use by courts of the word 'presumption,' when the word 'inference' was intended, has led to some confusion. Furthermore, these words have been frequently used by the courts interchangeably. Both the Appellate and Supreme Courts of this state have expressly approved in some cases and held unobjectionable or harmless error in others, the giving of instructions in cases similar to the case at bar, where the following or similar language was used, viz.: 'When it is shown that an injury to a passenger was caused by the act of the carrier in operating the instrumentalities employed in its business, there is a presumption of negligence, which throws on the carrier the burden of showing that the injury was sustained without any negligence on its part.' [Citing cases.]

"The instruction just quoted is not, technically speaking, a correct statement of the law, but we have been unable to find any case where the giving of such an instruction was, in itself, held to constitute reversible error."

In Atkinson v. United Railroads, 71 Cal. App. 82, 87, 88, 234 P. 863, 865, the court said: "We believe the use of the word 'presumption' in said instruction, instead of the word 'inference,' was not fatal thereto. It is true, as appellant points out, in the recent case of Dowd v. Atlas Taxicab & A. Service Co., 187 Cal. 523, 202 P. 870, the court held that the trial court was justified in modifying a proposed instruction, in that particular, before it was given to the jury; but the court did not go so far as to hold that the use of the word 'inference' was essential to the soundness of said instruction; and, inasmuch as the form used in the present case has been expressly approved in numerous previous cases which are hereinafter cited, we are of the opinion that the giving of the same in the form complained of did not have the prejudicial effect upon the jury appellant attributes to it"—citing cases.

[13] Similar rulings will be found in Harvey v. San Diego El. R. Co., 92 Cal. App. 487, 492, 268 P. 468, and Even v. Pickwick Stages System, 109 Cal. App. 636, 640, 293 P. 700. The use of the word "presumption" instead of "inference" in this instruction was technically erroneous, but we do not believe that it constituted prejudicial error. While plaintiff's case was necessarily circumstantial, it pointed almost conclusively to appellant's negligence as the proximate cause of the explosion. This will be seen if we examine the chain of circumstances briefly again. The links run: No trouble with the oven until straight natural gas substituted for reformed natural gas, making necessary an adjustment of burners; attempted adjustment of burners by defendant; constant trouble thereafter with burners flaring up and going out; gas lighted at 8 a. m. on morning of explosion; apparently no escaped gas present at that time because no explosion occurred; gas found extinguished at 8:20 a. m.; burners turned off and oven and room ventilated for 10 minutes; gas relighted and explosion occurred; most likely causes of burners going out either low pressure of gas or improper adjustment of burners, with down draft in flue as a possible, but not probable, cause. More than one man has gone to the gallows upon circumstantial evidence not so strong.

[14] Finally appellant claims that the damages were excessive. The jury allowed $7,000. The building was seriously damaged, and had been partly repaired, but could not be fully repaired without practically tearing it down and constructing it over. Three thousand dollars was spent in actual repairs, and there was a loss of rentals for a period after the explosion. The jury had before it testimony as to the value of the building before the explosion and the extent and character of the damage and many photographs of portions of the building after the explosion. The jury was in a position to assess the damages, and we cannot say that the amount arrived at was not justified by the evidence. Linforth v. S. F. G. & E. Co., 156 Cal. 58, 62, 103 P. 320, 19 Ann. Cas. 1230.

Judgment affirmed.

We concur: SPENCE, Acting P. J.; STURTEVANT, J.

NEW YORK CENT. R. CO. v. FRANK H. BUCK CO. (two cases).*

Civ. 8202.

District Court of Appeal, First District, Division 1, California.

April 18, 1933

As Amended on Denial of Rehearing May 18, 1933.

Hearing Granted by Supreme Court June 15, 1933.

1. Commerce ⇐8(12).
Courts ⇐97(5).

Rights and liabilities of parties to actions involving interstate shipments are governed by federal statutes as interpreted by federal tribunals.

2. Carriers ⇐194.

Interstate carrier and shipper may contract for prepayment of freight charges or payment when goods reach destination, payment by shipper in any event or if consignee does not pay or for payment by consignee only or by both shipper and consignee (Interstate Commerce Act [49 USCA § 1 et seq.]).

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes
*For subsequent opinion see 41 P.2d 547.

3. Carriers ⇐194.

Mere delivery of goods to carrier for transportation does not necessarily import absolute promise by shipper to pay freight charges.

4. Carriers ⇐194.

To ascertain contract between shipper and carrier as to payment of freight charges, bill of lading, which is both receipt and contract, must be looked to primarily.

5. Carriers ⇐194.

Ordinarily, person from whom carrier receives goods for shipment is primarily obligated to pay freight charges; shipper being presumably consignor and transportation ordered presumably on his own behalf.

6. Carriers ⇐194.

Inference of shipper's promise to pay freight charges may be rebutted by showing that shipper did not act for himself in ordering transportation, that carrier knew such fact, and that parties intended, not only that consignee should pay, but that shipper should assume no liability or only secondary liability.

7. Carriers ⇐195.

Railroad company's extension of time for payment of freight charges by company to which cars were delivered on shipper's instruction *held* not violation of clause in bill of lading, prohibiting delivery until all charges were paid, in view of authority granted carrier by Interstate Commerce Commission to extend time (Interstate Commerce Act [49 USCA § 1 et seq.]).

8. Carriers ⇐83.

Shipper's direction after arrival of cars at destination to deliver contents to certain company without production of bill of lading was exercise of ownership necessarily implying acceptance thereof as consignee.

9. Carriers ⇐194.

Receipt of shipment by consignee creates legal obligation to pay freight, whether demanded at time of delivery or later.

10. Carriers ⇐194.

Mere direction by consignor or consignee, liable for freight, that shipment be carried or diverted "freight collect" or delivered on payment of freight charges, does not relieve him of liability.

11. Carriers ⇐32(2).

Parties to contract for interstate shipment by rail cannot waive its terms, nor can carrier, by contract, give shipper right to ignore them and hold carrier to different responsibility than that fixed by agreement made under published tariffs and regulations.

12. Carriers ⇐194.

Unqualified promises of company, shipping freight as owner's agent, to pay freight charges as consignor, consignee, or both, made it legally liable for freight.

13. Carriers ⇐194.

No act or omission of carrier, except allowing statute of limitations to run, estops or precludes it from enforcing shipper's obligation as consignor, consignee, or both to pay freight.

14. Carriers ⇐194.

Liability of person, to whom shipment is delivered on consignee's order, to pay freight, does not relieve consignor or original consignee from liability therefor.

15. Carriers ⇐194.

Carrier's receipt of consignee's note for freight charges or filing of claim against his bankrupt estate does not relieve others liable therefor.

16. Carriers ⇐194.

Carrier's failure to notify consignor or consignee, liable for freight, of nonpayment thereof by one to whom shipment was delivered on consignee's order, does not release consignor or original consignee from liability therefor.

17. Customs and usages ⇐17.

Usage or custom may limit shipper's and carrier's liability, but cannot be relied on if in conflict with terms of contract.

18. Bankruptcy ⇐363.
Carriers ⇐196.
Customs and usages ⇐17.

In action for freight charges for fruit shipped by defendant named as consignee in bill of lading and who agreed to pay freight charges, no custom of carrier nor fact that carrier filed claim against bankrupt estate of company to which it delivered fruit on defendant's instructions nor its failure to notify defendant of nonpayment constituted defense to carrier's action against defendant for freight charges.

19. Carriers ⇐194.

Shipper signing straight bill of lading, naming it as both consignor and consignee, and expressly obligating consignee to pay freight charges, became obligated therefor on default of company to which cars were delivered on shipper's instructions.

Appeals from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Actions, consolidated for trial, by the New York Central Railroad Company against the Frank H. Buck Company. Judgment for defendant, and plaintiff appeals.

Reversed.

Dunne, Dunne & Cook, of San Francisco, for appellant.

Augustin C. Keane, of San Francisco, for respondent.

PER CURIAM.

Appeals from the judgments in two separate actions which were consolidated for trial.

The actions were for the recovery of the authorized tariff or freight on ten cars of grapes shipped by defendant in 1922 from California to different eastern points. The Southern Pacific Company was the initial carrier. This company issued a straight bill of lading, signed by defendant, covering each car, and in which a representative of defendant or some person other than the fruit company hereinafter mentioned, was designated as the one to be advised upon the arrival of the car. After the cars reached plaintiff's line, it was instructed in writing by defendant to divert the same to the latter at Rochester, N. Y., and, with the exception of three of the cars, to advise the Puccia Fruit Company. As to the remaining cars, plaintiff was instructed to advise defendant's agent named in the instructions. After the cars arrived at Rochester, defendant's authorized agent instructed plaintiff, by writings referring to the several cars, to deliver the same without bill of lading to Puccia Fruit Company "upon payment of all freight and other charges. * * *" The fruit company was notified and thereafter unloaded the cars, giving plaintiff receipts for their contents. It is conceded that the fruit company had a 24-hour credit arrangement with the plaintiff. This was authorized by a rule of the Interstate Commerce Commission. The cars were delivered to the fruit company without plaintiff having received or demanded any part of the freight or charges due thereon. Subsequently the fruit company became insolvent, and a portion only of the unpaid freight was collected by plaintiff. Defendant had no notice of the fact of nonpayment until December 31, 1923.

As special defenses, defendant alleged that it was the custom to direct delivery of cars, as was done here, and that, as part of such custom, the word "advise," as used in the bill of lading or diversion orders, usually meant, and was so understood by the carrier to mean, that the person "to be advised has bought or is buying the grapes shipped subject to the payment of freight and other charges thereon, and that delivery of said shipment shall be made only upon payment of freight and all other charges, or upon notice from the consignor waiving such payment"; that defendant was not the owner of the grapes but the marketing agent for the growers; that this was the customary method of marketing such products; and that the carriers had notice of the facts. Further, that plaintiff "elected to collect from and extend credit to the fruit company and accepted from the latter its agreement to pay in lieu of payment" of the freight and other charges on delivery; that the fruit company about the time of the expiration of the credit period became insolvent; and that no notice was given to the defendant of the fact of nonpayment for more than a year after such deliveries.

It is admitted that plaintiff filed claims for the freight against the bankrupt estate, and received dividends aggregating $334.18. There was no dispute as to the amount of the unpaid charges.

The court found in accordance with defendant's defenses, and plaintiff has appealed from the judgment entered thereon.

There was no evidence that the carriers knew that the defendant was not the owner of the grapes; and plaintiff contends that, in view of the other undisputed facts, those specially pleaded and found constituted no defense.

[1-6] The shipments being interstate, the rights and liabilities of the parties are governed by the acts of Congress as interpreted by the federal tribunals. Cincinnati, N. O. & T. P. R. Co. v. Rankin, 241 U. S. 319, 36 S. Ct. 555, 60 L. Ed. 1022, L. R. A. 1917A, 265. It was declared in Louisville & Nashville R. Co. v. Central Iron & Coal Co., 265 U. S. 59, 44 S. Ct. 441, 68 L. Ed. 900, that freight charges on interstate shipments are fixed by law, and no agreement by the carrier can reduce the amount legally payable, or release from liability a shipper who has assumed an obligation to pay the same; nor can any act or omission of the carrier, except the running of the statute of limitations, estop or preclude the carrier from enforcing payment of the full amount by a person liable therefor. But the Interstate Commerce Act (49 USCA § 1 et seq.) does not impose upon the shipper an absolute obligation to pay the charges. As to this the carrier and the shipper are free to contract, subject to the rule which prohibits discrimination. The carrier is at liberty to require prepayment, or payment may be deferred until the goods reach the end of the transportation. Wadley Southern Ry. Co. v. Georgia, 235 U. S. 651, 656, 35 S. Ct. 214, 59 L. Ed. 405. Where payment is deferred, the contract may provide that the shipper shall pay in any event, or merely that he shall pay if the consignee does not. Or the carrier may accept the goods for shipment solely on account of the consignee, and may contract that only the consignee shall be liable; or both the shipper and consignee may be made liable. The mere delivery of the goods to a carrier for transportation does not necessarily import an absolute promise by the shipper to pay the charges. To ascertain the contract, the bill of lading must be looked to primarily, as this serves both as a receipt and a contract. Ordinarily, the person from whom the goods are received for shipment assumes the obligation to pay the charges, and this obligation is ordinarily a primary one. The ship-

per is presumably the consignor, and the transportation ordered by him is presumably on his own behalf, and a promise to pay may be inferred therefrom. This inference may, however, be rebutted, and it may be shown by the bill of lading or otherwise that the shipper was not acting in his own behalf, that this fact was known to the carrier, and that the parties intended, not only that the consignee should assume an obligation to pay, but that the shipper should not assume any liability whatsoever, or that he should assume only a secondary liability.

[7] The bills of lading covering nine of the cars mentioned are set out in the record. These provided that every service to be performed should be subject to the conditions therein, whether printed or written, including the conditions on the back thereof, to which the shipper agreed and accepted for himself and assigns. These, as stated, were signed by the defendant. Three contained the following provisions: "Section 7. * * * The owner or consignee shall pay the freight and average and all other lawful charges accruing on said property; but except in those instances where it may be lawfully authorized to do so no carrier by railroad shall deliver or relinquish possession at destination of the property covered by this bill of lading until all tariff rates and charges thereon have been paid. The consignor shall be liable for the freight and all lawful charges accruing on said property except that, if the consignor stipulates by signature in the space provided for that purpose on the face of this bill of lading that the carrier shall not make delivery without requiring payment of such charges, and the carrier, contrary to such stipulation, shall make delivery without requiring such payment the consignor shall not be liable for such payment."

On the face of these documents the following was printed: "If this shipment is to be delivered to the consignee without recourse on the consignor the consignor shall sign the following statement. * * * The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges. (See section 7 of Conditions.)" None was signed by the defendant.

In the first clause of section 7 following the provision "that the owner or consignee shall pay the freight and average and all other lawful charges accruing on said property, * * *" there is the stipulation that, "except in those instances where it may be lawfully authorized to do so no carrier or railroad shall deliver or relinquish possession at destination of the property covered by this bill of lading until all tariff rates and charges thereon have been paid." This stipulation clearly refers to those instances where, by statute or by rule of the Interstate Commerce Commission, the carrier is permitted to extend the time for payment of the charges. Such was the case here; and the extension given the fruit company, in view of the authority granted the carrier by the Commission, was not in violation of this clause of the bill of lading.

Six of the bills of lading contained the following provision: "Section 7. The owner or consignee shall pay the freight and all other lawful charges accruing on said property, and if required shall pay the same before delivery." No provisions similar to those contained in the three bills of lading first mentioned, requiring collection of the freight upon delivery if stipulated by the consignor, appear thereon.

The bill of lading covering the remaining car, which was No. P. F. E. 10456, does not appear in the record, and the claim for the amount unpaid thereon will be hereinafter considered.

[8-11] The complaints alleged that the cars were delivered to defendant, but the court found that delivery was made to the fruit company. The physical facts were, of course, as found, but the legal effect of defendant's conduct, namely, its direction after the arrival of the cars that their contents be delivered to the fruit company without the production of the bill of lading, has been held to be such an exercise of ownership that their acceptance as consignee is necessarily implied. Mellon v. Landeck, 248 Ill. App. 353; Dare v. New York Central R. Co. (C. C. A.) 20 F.(2d) 379; New York Central R. Co. v. Stanziale, 105 N. J. Law, 593, 147 A. 457. Where a shipment is received by the consignee, a legal obligation arises to pay the freight whether the same be demanded at the time of delivery or later. Pittsburgh, etc., Ry. Co. v. Fink, 250 U. S. 577, 40 S. Ct. 27, 63 L. Ed. 1151; Louisville & Nashville R. Co. v. Central Iron & Coal Co., supra; Houston & T. C. R. Co. v. Lee County, etc., Co. (D. C.) 14 F.(2d) 145. The authorities also hold without exception, so far as we are advised, that a mere direction by a consignor or consignee liable for the freight that a shipment be carried or diverted "freight collect" or delivered "upon payment of freight charges," or the like, is insufficient to relieve him of such liability. Wabash Ry. Co. v. Horn (C. C. A.) 40 F.(2d) 905; Dare v. N. Y. Central R. Co., supra; Mellon v. Landeck, supra; New York Central R. Co. v. Stanziale, supra; New York Central R. Co. v. Federal Sugar Refining Co., 235 N. Y. 182, 139 N. E. 234, 26 A. L. R. 1312; Missouri Pacific R. Co. v. Pfeiffer Stone Co., 166 Ark. 226, 266 S. W. 82; Southern Pacific Co. v. Oregon Growers', etc., Ass'n, 127 Or. 364, 272 P. 281; Seaboard Air-Line R. Co. v. Montgomery, 28 Ga. App. 639, 112 S. E. 652; A. T. & S. F. Ry. Co. v. Stannard & Co., 99 Kan. 720, 162 P. 1176, L. R. A. 1917C, 1124; Chicago Junction Ry. Co. v. Duluth Log Co.,

161 Minn. 466, 202 N. W. 24, 26. Here the court said: "Under the uniform bill of lading * * * the consignor is given an opportunity to relieve himself from liability * * * by so indicating on the face of the bill." See, also, Grand Trunk Western R. Co. v. Makris, 142 Misc. 807, 255 N. Y. S. 443. In New York Central R. Co. v. Warren Ross Lumber Co., 234 N. Y. 261, 137 N. E. 324, 24 A. L. R. 1160, it was held that the language of such a direction was not contractual, its effect being merely to give the carrier an option to demand payment from the person to whom it delivered the goods; and in Western Maryland Ry. Co. v. Cross, 96 W. Va. 666, 123 S. E. 572, that the consignor was liable notwithstanding such direction, unless otherwise stipulated by signature on the bill of lading. The general rule is stated in Georgia, Florida & Alabama Ry. Co. v. Blish, etc., 241 U. S. 190, 36 S. Ct. 541, 60 L. Ed. 948, where it was held that parties to a contract of interstate shipment by rail cannot waive its terms, nor can the carrier by its contract give the shipper the right to ignore such terms and hold the carrier to a different responsibility than that fixed by the agreement made under the published tariffs and regulations.

[12-18] It was stipulated at the trial that the defendant was not the owner of the grapes but the agent for the owners, and, as stated, the court found that this was the customary way of marketing such products, and that the carrier was put upon notice of the facts. But, notwithstanding this finding, the defendant, as the consignee named in the bill of lading covering six of the cars, expressly agreed therein to pay the freight. As the consignee of three of the other cars, it made the same agreement, and the bill of lading provided that as consignor it should likewise be liable unless it stipulated by its signature on the face thereof that the carrier should not make delivery without requiring payment of the freight charges. Defendant's unqualified promises to pay, either as consignor or consignee or both, made it legally liable for the freight; and, as held in Louisville & Nashville R. Co. v. Central Iron & Coal Co., supra, no act or omission, except allowing the statute of limitations to run, will estop or preclude the carrier from enforcing this obligation. While it was held in Yazoo & M. V. R. Co. v. Zemurray (C. C. A.) 238 F. 789, that, notwithstanding the obligation of the owner or consignor to pay, the carrier might be bound by its election to collect from a consignee, yet, as pointed out in Main Island Co. v. Chesapeake & Ohio Ry. Co. (C. C. A.) 23 F.(2d) 248, this conclusion was inconsistent with later decisions in Louisville & Nashville R. Co. v. Central Iron & Coal Co., supra, that no act of the carrier could estop it from enforcing payment from any person legally liable. See, also, United States v. United States Steel Products Co. (D. C.) 27 F.(2d) 547, and New York Central R. Co. v. Federal Sugar Refining Co., supra. And, according to the following decisions, the freight can be recovered from a shipper liable therefor, notwithstanding a custom, known to the carrier, that the amount should be paid by the consignee and deducted from the price of the goods, and the consignee fails to pay: Atchison, T. & S. F. Ry. Co. v. Hunt Bros. Fruit Co. (D. C.) 34 F.(2d) 582; Moss Lumber Co. v. Michigan Central R. Co., 219 Ala. 593, 123 So. 90; Chicago, I. & L. Ry. Co. v. Peterson, 168 Wis. 193, 169 N. W. 558; Pennsylvania R. Co. v. Marcelletti, 256 Mich. 411, 240 N. W. 4, 78 A. L. R. 923. It has also been held under facts similar to those here involved that a person to whom a shipment is delivered upon the order of the consignee is the assignee of the latter, and under the statute becomes liable as though named as such consignee. New York Cent. R. Co. v. Warren Ross Lumber Co., supra; Erie Ry. Co. v. H. Rosenstein, Inc., 249 N. Y. 241, 164 N. E. 37, 61 A. L. R. 415; Pennsylvania Ry. Co. v. Titus, 216 N. Y. 17, 109 N. E. 857, L. R. A. 1916E, 1127, Ann. Cas. 1917C, 862. This, however, as shown by the decisions hereinbefore cited, does not relieve a consignor or the original consignee who is liable for the freight; nor does the fact that the carrier received the note of a consignee therefor, or files a claim against his bankrupt estate, release others who are liable; nor does the failure to notify such persons of nonpayment have that effect, as the carrier's right to recover is only barred by limitation and not by laches. Louisville & Nashville R. Co. v. Central Iron & Coal Co., supra; Cleveland, C., C. & St. Louis Ry. Co. v. Southern Coal Co., 147 Tenn. 433, 248 S. W. 297; Gt. Northern Ry. Co. v. Hocking Valley, etc., Co., 166 Wis. 465, 166 N. W. 41; New York Cent. R. Co. v. Lehigh Stone Co., 220 Ill. App. 563. While usage or custom may limit the liability of shippers and carriers (17 Cor. Jur. Custom and Usage, § 74, p. 507), neither can be relied upon if it be in conflict with the terms of the contract (Andrews v. Waldo, 205 Cal. 764, 272 P. 1052; Fuqua v. Thomas, 96 Cal. App. 304, 273 P. 1091; Rasmussen v. Pacific Fruit Exchange, 111 Cal. App. 346, 295 P. 538); and, in view of the foregoing, it seems clear that neither the customs found by the trial court, the fact that the carrier filed a claim against the bankrupt, nor its failure to notify defendant that payment had not been made, constituted defenses to the action.

[19] The eighth count of the complaint as amended at the trial alleged a claim for the freight on car P. F. E. 10,456. The weight of the grapes therein was 33,856 pounds, and the total freight claimed was $690.70. The correctness of these figures is not disputed. It was agreed at the trial that all the bills

of lading were signed by the defendant or its authorized agent, and that a bill of lading was issued for this car. This bill of lading, as stated, was not produced at the trial, and no direct evidence of its terms appears from the record. However, counsel for plaintiff, in opening its case, stated that all the cars were shipped on straight bills of lading in which the defendant was named both as consignor and consignee. Counsel for defendant in reply assented to this statement. It appears to have been undisputed that the missing bill of lading was in the same form as one of the two hereinbefore described. As we have seen, each form expressly provided that the consignee should pay the freight charges. Defendant, having signed the bill of lading, and being named therein as consignee, became obligated for the same reasons which apply to the other shipments, and this obligation was not discharged by what subsequently occurred.

For the foregoing reasons, the judgments are reversed.

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PEOPLE v. HENRY.

Cr. 2327.

District Court of Appeal, Second District, Division 2, California.

April 7, 1933.

Hearing Denied by Supreme Court May 4, 1933.

1. Licenses ⇐40.

It is not necessary that motor carrier transportation be sold without having license therefor to violate statute, it being sufficient if transportation be negotiated for or if defendant held himself out as one who provided such transportation (St. 1931, p. 1363, § 2).

2. Criminal law ⇐304(5).

Court could take judicial notice of highway route between two cities in state.

3. Licenses ⇐42(2).

If defendant, in soliciting passengers for transportation without having motor carrier's transportation agent's license, intended to use route not covered by certified carriers, it was matter of defense (St. 1931, p. 1363, § 2).

4. Licenses ⇐42(4).

Evidence *held* sufficient to support conviction for acting as motor carrier transportation agent without license (St. 1931, p. 1363, § 2).

5. Licenses ⇐42(4).

In prosecution for acting as motor carrier transportation agent without license, refusal to strike evidence that man who got into automobile handed defendant money *held* not error (St. 1931, p. 1363, § 2).

6. Licenses ⇐42(4).

In prosecution for acting as motor carrier transportation agent without license, excluding copy of judgment roll of court in another county wherein restraining order was issued restraining police officers from arresting defendant's alleged employer or his employees *held* not error since immaterial (St. 1931, p. 1363, § 2).

7. Licenses ⇐42(4).

That defendant attempted to get motor carrier transportation agent's license did not excuse his acting without such license, and evidence thereof was immaterial (St. 1931, p. 1363, § 2).

8. Criminal law ⇐687(2).

In prosecution for acting as motor carrier transportation agent without license, permitting prosecutor during closing argument to reopen case and introduce evidence regarding regular routes between cities involved *held* not abuse of discretion (St. 1931, p. 1363, § 2).

9. Criminal law ⇐687(2).

In prosecution for acting as motor carrier transportation agent without license, permitting prosecutor during closing argument to reopen case and introduce evidence regarding regular routes between certain cities being certified *held* harmless (St. 1931, p. 1363, § 2).

10. Licenses ⇐42(5).

In prosecution for acting as motor carrier transportation agent without license, whether defendant was simply another person's employee *held* for jury (St. 1931, p. 1363, § 2).

11. Constitutional law ⇐275(1).
Licenses ⇐7(1).

Act requiring motor carrier transportation agent to obtain license does not in effect compel private carrier of passengers for hire to become common carrier and thus deprive him of property without due process of law (St. 1931, pp. 1362, 1363, §§ 1, 2; Const. U. S. Amend. 14, § 1; Const. Cal. art. 1, § 13).

St. 1931, p. 1362, § 1, defining motor carrier transportation agent as one who furnishes, sells, etc., transportation furnished by carrier other than one operating under certificate of public convenience and necessity, does not compel private carriers to become common carriers since it does not apply directly to transportation and under St. 1915, p. 115, § 2¼, as added by St. 1927, p. 72, § 1 and § 50¼, as added

by St. 1927, p. 74, § 3, as amended by St. 1931, p. 2598, the only carriers required to obtain certificates of public convenience and necessity are common carriers, and the only class of carriers left is private or contract carriers.

12. Licenses ⇐11(3).

Words "certified carriers" in statute requiring motor carrier transportation agent to obtain license mean carriers using some portion of highways of state to whom certificates of public convenience and necessity have been issued (St. 1931, pp. 1362, 1363, §§ 1, 2).

13. Licenses ⇐7(1).

Act requiring agent selling transportation furnished by private carrier to obtain license *held* reasonable regulation (St. 1931, pp. 1362, 1363, §§ 1, 2).

14. Licenses ⇐7(1).

That railroad commission exercises some discretion in granting license to motor carrier transportation agent under statute does not invalidate statute (St. 1931, pp. 1362, 1363, §§ 1, 2).

15. Evidence ⇐83(1).
Licenses ⇐22.

Railroad commission cannot arbitrarily deny license to motor carrier transportation agent under statute and it is not presumed that commission will do so without good cause (St. 1931, pp. 1362, 1363, §§ 1, 2).

16. Constitutional law ⇐230(2).

Exception in statute requiring motor carrier transportation agent to obtain license, making statute inapplicable to one selling transportation of private carrier operating on highways other than those served by certified carriers violates equal protection clauses (St. 1931, p. 1362, § 1; Const. U. S. Amend. 14, § 1; Const. Cal. art. 1, § 11).

Provision of St. 1931, p. 1362, § 1, requiring license of motor carrier transportation agents, to effect that act shall not apply to movements of persons over highways or parts of highways not served by certified carriers, violates equal protection clause of Const. Cal. art. 1, §§ 11, 13; Const. U. S. Amend. 14, § 1, since effect is that those who travel on highways served by common carriers have assurance provided by licensed agent and his bond that their trip will be completed whereas those traveling on remaining highways of state are not so protected.

17. Constitutional law ⇐48.

Exercise of police power of state is entitled to every presumption in favor of its validity, and police regulation will not be disturbed unless regulation has no relation to purpose of legislation.

18. Constitutional law ⇐209.

Equal protection clause requires that state shall make, execute, and interpret its laws without discrimination (Const. U. S. Amend. 14, § 1).

19. Statutes ⇐64(8).

Statute requiring motor carrier transportation agent to obtain license containing usual saving clause *held* valid with unconstitutional exception respecting transportation over highways not served by certified carriers removed (St. 1931, pp. 1362, 1363, §§ 1, 2; Const. U. S. Amend. 14, § 1; Const. Cal. art. 1, § 11).

20. Constitutional law ⇐46(3).

Question whether statute requiring license of motor carrier transportation agents violates commerce clause of Federal Constitution was not involved in prosecution for violating statute where transportation negotiated for was intrastate (St. 1931, p. 1363, § 2; Const. U. S. art. 1, § 8, par. 3).

21. Licenses ⇐7(1).

Requirement of motor vehicle transportation agent license act requiring bond or insurance policy *held* valid regulation as applied to intrastate transportation (St. 1931, pp. 1362, 1363, §§ 1, 2).

Appeal from Superior Court, Los Angeles County; Thomas P. White, Judge.

William Henry was convicted of violating St. 1931, p. 1363, § 2, making it unlawful for any person to engage in business or act in capacity of motor carrier transportation agent within meaning of act without first obtaining license therefor, and he appeals.

Affirmed.

M. Lewis Lehman, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

ARCHBALD, Justice pro tem.

Defendant was charged in an amended information with the crime of violation of section 2, chapter 638, pages 1362, 1363, Statutes of 1931 (vol. 2, Deering's Gen. Laws 1931, p. 2545, Act 5130b). From the judgment entered on a verdict of guilty and from an order denying his motion for a new trial, he has appealed.

It is urged that the evidence does not sustain the verdict, in that it does not show a violation of the act.

C. V. Wellman and Robert J. Herron, two of the principal witnesses for the prosecution, were shown a certain advertisement appearing in a Los Angeles newspaper on or about June 16, 1932, reading as follows: "Continen-

tal Travelers Club. We will contact you with reliable people driving in every direction. 629 West Eighth St.; Trinity 0368." They were told to go to the address given and attempt to buy a ticket from Los Angeles to San Francisco. The address was that of the Morgan Hotel, and on the mezzanine floor they found two gentlemen and a lady, behind desks. A conversation ensued, which they were not permitted to relate while on the stand, the appellant not being present at the time, but it appears that as a result thereof the men proceeded to the Ford Hotel, in Los Angeles, and were seated in the lobby of that establishment when appellant appeared and inquired if they were the two gentlemen who wanted to go to San Francisco. They answered in the affirmative, whereupon appellant said he would return at about 3:30 or 4 o'clock p. m., and asked if they would be ready. He was told they would be, whereupon he left the hotel but "came right back, and he says, 'That is the car, out there.' He pointed to a Cadillac sedan. * * * He says: 'That is the car we will go in.' He asked if that man up there had quoted us a price, and he was told 'No.' So he says, 'It will be $6.00.' And I said, 'For each of us? Apiece?' and he said, 'Yes. Is that satisfactory?' I says, 'It is O.K.'" The evidence further shows that appellant returned to the Ford Hotel at about 4:30 p. m. with several bags and suitcases strapped on the carrier of the Cadillac and one man riding in the rear seat; that Wellman and Herron got in and appellant drove to Fifth and Towne avenue, where a young man who was waiting got in. With this young man was an older one who approached appellant and handed him some money. At this time two motor vehicle inspectors who had been watching the car asked appellant where he was going, to which the latter replied, "You ought to know." The passengers in the car were then asked where they were going, and the young man who had just entered the vehicle said he was going to Fresno, or possibly Oakland; that he had agreed to share the expense, the amount to be later determined. The man who was in the car when Wellman and Herron got in said he was going to Seattle, and Wellman and Herron said they were going to San Francisco and had agreed to pay $6 for the trip. After the passengers in the car got out and removed their baggage there was still some baggage remaining on the rear of the car, which appellant said belonged to some people at the Balboa Hotel, in Los Angeles. The officers then went to that place with appellant and the remaining baggage was unloaded. Witnesses also testified that appellant had no license to operate as a motor carrier transportation agent and no certificate of public convenience and necessity.

Appellant testified that he was employed by William Finn, who was engaged in the transportation of passengers between Los Angeles and San Francisco, and that the Cadillac, though belonging to appellant, was to be driven to San Francisco by Finn; that he picked up the passengers for Finn and was to be paid by the latter for so doing; that he was employed on a commission basis for the purpose of "soliciting passengers for Mr. Finn." There is also evidence that Finn had no motor carrier transportation agent's license and did not possess a certificate of public convenience and necessity, and that the railroad commission had issued certificates of public convenience and necessity and motor carrier transportation agents' licenses only over two routes between Los Angeles and San Francisco, which are commonly known as the Coast Route and the Valley or Inland Route, the Pacific Greyhound Lines holding such certificates and licenses.

Section 1 of the act in question, so far as material here, provides: "A motor carrier transportation agent within the meaning of this act is a person * * * who, for compensation, sells or offers for sale, or negotiates for, and/or holds himself out as one who sells, furnishes or provides as principal or agent, transportation for persons over the public highways of this state, when such transportation is furnished, or is offered or proposed to be furnished by other than a carrier holding a valid certificate of public convenience and necessity issued by the railroad commission of the State of California permitting of such carrier transporting persons over such highways or any of them and between the points for which such transportation is sold; or, to the border line of the State of California when one of such points is without the state. * * *" Section 2 of the act makes it unlawful for any person "to engage in the business, or act in the capacity of a motor carrier transportation agent within the meaning of this act without first obtaining a license therefor."

[1-5] The evidence to which we have called attention would seem to clearly justify the conclusion that appellant negotiated for and held himself out to the two named witnesses as one who furnished or provided, either as principal or agent, transportation over the highways of the state for compensation; that such transportation so offered was not to be furnished by a certificated carrier; and that appellant had no license to act in the capacity of such an agent. It is true no money was paid by the two witnesses named, but it is not necessary under the act that the transportation be sold. It is sufficient if it be negotiated for, or if appellant held himself out as one who provided such transportation and that conclusion is susceptible of being drawn from the evidence presented. Appellant argues, however, that the evidence does not take him out of the exception of section 1, which reads as follows: "This act shall not apply

* * * to the movements of persons over highways or parts of highways not served by certificated carriers," inasmuch as such evidence does not show that any particular route was agreed upon and so it may have been contemplated that the car would be driven over some highway other than the two shown to be certificated. We think we may take judicial notice of the fact that the only route left between the two cities mentioned is via Mojave, Independence, and Bishop, then over the mountains to near the Nevada line and thence approximately across the state from east to west into San Francisco—a route which it is inconceivable any person engaged in transporting passengers between Los Angeles and San Francisco would choose. In our opinion, however, the prosecution went farther in its proof than was necessary. The offense created by the statute is complete without such exceptions, which form no part of its description or definition but are merely matters of excuse and of defense (Ex parte Hornef, 154 Cal. 355, 97 P. 891), and if appellant had in mind any possible route not covered by the two certificated ones he should have produced evidence thereof himself. The act in effect prohibits the sale, etc., without license, of transportation over the highways of the state, furnished or to be furnished by a private or contract carrier. Under the evidence appellant came squarely within such prohibition.

The jury had a right to conclude, in the absence of explanation by appellant, that the money paid to the latter by the person who accompanied the young man who got into the car at Fifth and Towne streets was in payment, in whole or in part, of his fare to Oakland, and we see no error in refusing to strike such evidence.

[6] Nor do we see any error in the court's refusal to admit in evidence a copy of the judgment roll in the case of William Finn v. Groocox (one of the arresting officers), case No. 231,931 of the superior court in and for the city and county of San Francisco, in which a restraining order was issued purporting to restrain said Groocox and other police officers of the city of Los Angeles from arresting Finn or any of his employees. That could have no possible bearing on whether or not an offense was committed in Los Angeles county.

[7] The fact that appellant attempted to get a license and bond under the act to permit him to act as he did could not excuse his acting without such license, and evidence thereof was clearly immaterial. If such license was artbitrarily refused by the railroad commission, a direct attack on its action should have been made.

[8, 9] It was not error for the court, during the closing argument of the district attorney, to permit that officer to reopen the case to introduce testimony relative to the two regular routes between Los Angeles and San Francisco being certified. That was a matter in the discretion of the trial court and we see no abuse of it in so acting. People v. Anderson, 57 Cal. App. 721, 208 P. 204. The admitted testimony did not harm appellant even if it was not material to the People's Case.

[10] Appellant urges that he was simply Finn's employee, acting as chauffeur or operator of the car in picking up passengers in the city and taking them to the place where Finn himself would take charge for the purpose of driving them to San Francisco. It is sufficient to say that this was a matter of defense, for the consideration of the jury.

It is contended that the act violates the rights of appellant under (1) the "due process" and "equal protection clauses of the Federal and State Constitutions" (section 1, article 14, Amendments to the Constitution of the United States, and sections 11 and 13, art. 1, Constitution of California), and (2) the "Commerce Clause" (paragraph 3 of section 8, art. 1, Constitution of the United States).

[11-13] 1. Appellant urges that in effect the act compels a private or contract carrier of passengers for hire to become a common carrier and thus deprives him of his property without due process of law. We find nothing in the act which can be so construed. It is to be noted that it does not apply directly to the act of transportation. Its title is, the italics being ours: "An Act to *define motor carrier transportation agent;* to provide for the regulation, supervision and licensing *thereof*, and to provide for the enforcement of said act and penalties for the violation thereof." It defines such agent to be a "person, firm or corporation who, for compensation, sells or offers for sale, or negotiates for, and/or holds himself out as one who sells, furnishes or provides as principal or agent, transportation for persons over the public highways of this state, *when such transportation is furnished, or is offered or proposed to be furnished by other than a carrier holding a valid certificate of public convenience and necessity issued by the railroad commission* * * * *permitting of such carrier transporting persons over such highways.*" We think the class of transportation, the selling, negotiating for sale, etc., which is a very material part of such definition, is made clear by a reference to sections 2¼ and 50¼ of the Public Utilities Act, added by the amendments of 1927 (Stats. 1927, pp. 72, 73, 74, §§ 1, 3; St. 1931, p. 2598), the effect of which is to make a common carrier of every "passenger stage corporation," which includes (italics ours) "every corporation or person, their lessees, trustees, receivers or trustees appointed by any court, *engaged as a common carrier*, for compensation, in the ownership, control, operation or management" of any stage, auto

stage, or other motor vehicle used in the transportation of persons "over any public highway in this state between fixed termini, or over a regular route not exclusively used" in the limits of one municipality, or for the transportation of bona fide pupils of an institution of learning between their homes and such institution. Section 50¼ provides that no one included under such designation of "passenger stage corporation shall operate or cause to be operated any of such motor vehicles over any public highway of the state" without first having obtained from the railroad commission a certificate declaring that public convenience and necessity require such operation. In other words, by the express terms of the act the only carriers required to obtain such certificates of convenience and necessity are common carriers operating as such under the Public Utilities Act, who are subject to all the provisions thereof. The motor carrier transportation agent is one who furnishes, sells, etc., transportation furnished by a carrier other than one operating under a certificate of public convenience and necessity, viz., a common carrier. The only class of carriers left is private or contract carriers.

We think it is clear from a comparison of the act in question here with the Public Utilities Act that the Legislature intended by the use of the words "certificated carriers" to mean carriers using some portion of the highways of the state to whom certificates of public convenience and necessity have been issued under section 50¼ of the Public Utilities Act, and possibly carriers using some portion of such highways to whom such certificates were issued under the act of May 10, 1917 (Stats. 1917, p. 330), as to routes over which such last-mentioned carriers were operating when the Public Utilities Act became effective. In other words, a certificated carried is always a common carrier.

With that definition in mind we turn to the exceptions to section 1 of the act in question, which provides in part: "This act shall not apply to movements of persons when no compensation is paid; * * * nor to the movements of persons over highways or parts of highways not served by certificated carriers." In other words, no license is necessary to negotiate for the transportation of persons for hire by private or contract carriers over highways or parts thereof not served by common carriers. The converse of such statement shows the real meaning of the act, viz., that a license is necessary if the motor carrier transportation agent is negotiating for the sale, etc., of transportation over highways served by common carriers. There is nothing in such requirement, however, that prohibits a private or contract carrier from obtaining passengers to transport over such highways, if he or his agent have the license required under the act in question. "The law of this state specifically recognizes a distinction between common carriers and private or contract carriers. There can be no doubt that the state may so classify them for purposes of taxation." People v. Duntley (Cal. Sup.) 17 P.(2d) 715, 718. We think on principle that it is equally true that a similar classification may be made for the purpose of regulating the sale of the transportation furnished or to be furnished by the private carrier, and the requirement of a license on the part of such agent to engage in such business would seem to be a reasonable regulation.

[14, 15] Appellant urges that under the provisions of the act in question relative to the issuance and revocation of such licenses by the railroad commission arbitrary powers are given to the commission. The provisions attacked seem reasonably designed to guarantee that licenses will be issued to responsible men of good reputation. The fact that the commission exercises some discretion does not invalidate such provisions. The commission may not "arbitrarily deny a license * * * nor is it to be presumed that it will do so without good cause, and if it should, the courts are open for the correction of the wrong." Carter v. Stevens, 211 Cal. 281, 293, 295 P. 28, 33. No such question is before us now.

[16-19] A more serious question, in our opinion, is the contention that the act violates the equal protection clauses of the state and Federal Constitutions. Respondent's brief states that the purpose of the act was not alone to regulate the business of transportation for hire over certain state highways, but that it was intended to protect the public from the acts of financially and otherwise irresponsible persons soliciting such business whose "victims were often relieved of their money, started on their way, and then after the scheduled trip had begun they were either openly or covertly abandoned. This usually happened long before their destination was reached and often soon after leaving" the place of departure. We do not find that evidence of such happenings was presented in the instant case, but in our opinion the proviso of section 5 of the act, which reads as follows: "Provided, however, that no license may be issued unless the applicant shall first provide a good and sufficient bond, policy of insurance or indemnity in favor of the people of the State of California which, among other conditions that may be prescribed by the railroad commission, *shall assure faithful performance of any contract or agreement of transportation negotiated by or entered into by the licensee*" (italics ours), shows the purpose of the Legislature. The language of such section italicized would seem to indicate without question that one of the purposes of the act is that suggested by appellant. Just why such assurance and protec-

tion would seem to be necessary on the much traveled highways used by the common carrier, and not on the remaining highways of the state, we fail to see. In our opinion we may safely assume that the highways excepted from the provisions of the act, i. e., "those not served by certificated carriers," are the ones less traveled and upon which the opportunity for the irresponsible person to abandon his passengers before completing the trip, and rob them of their money, would be infinitely greater. We cannot think that the Legislature intended to leave any portion of the traveling public using the facilities of private or contract carriers on such highways unprotected. Considering the effect of such exception forces us to the conclusion that if it is permitted to stand the act in question becomes at once, not an instrument for the protection of the public and safety of the highways but one for the purpose of preventing to some extent at least the competition of private carriers on highways served by common carriers. This could be done, in our opinion, under the constitutional authority of the Legislature, if such a provision is necessary for the safety and convenience of the traveling public, but it cannot be done under the guise of regulation. With such provision in the act it very clearly discriminates between the private or contract carrier, who is required to obtain a license and bond, who uses highways served by a common carrier, while the private or contract carrier who uses the other highways of the state is not required to assume such burden. No reasonable ground for such distinction seems to exist, and it certainly does not operate uniformly on all passengers transported by private carriers. Those who travel on highways served by common carriers have the assurance provided by a licensed agent and his bond that their trip will be completed, while those traveling on the remaining highways of the state are not so protected. We are of opinion that with such provision in the act it violates the equal protection clauses of both state and Federal Constitutions.

The exercise of the police power of the state in the protection of the public safety and general welfare is entitled to every presumption in favor of its validity, and a regulation of the Legislature in that regard will not be disturbed unless it can plainly be seen that the regulation has no relation to the purpose of the legislation but is a clear invasion of personal rights under the guise of such a protection. Ex parte Quong Wo, 161 Cal. 220, 230, 118 P. 714. "The equal protection clause * * * makes but one demand upon the state, and gives to the state but one right. It is that the state shall make, execute, and interpret its laws without discrimination. It must not grant rights to one which, under similar circumstances, it denies to another." Title Guarantee & Trust Co. v. Garrott, 42 Cal. App. 152, 155, 183 P. 470, 471. This we think the act does in the provision here criticized. Can such provision be declared unconstitutional and the remedy intended to be provided by the act retained? We think so. The act itself has the usual saving clause that if any section, subsection, sentence, clause, or phrase thereof is held to be unconstitutional such decision shall not affect the validity of the remaining portions of the act. With such exception the act protects persons transported by private carriers over highways served by certificated carriers only, and without it the act affords the protection to *all* transported by private or contract carrier over *all* highways, by providing responsible transportation agents to deal with them and a bond or insurance policy that will assure the completion of their journeys. In our opinion such exception is unconstitutional. The act without it is complete, serves the purpose for which it was enacted, and does not violate constitutional rights.

[20] 2. The question as to whether such act violates the commerce clause of the Federal Constitution is not involved here, as the transportation negotiated for in the instant case was to be entirely within the state.

[21] As applied to intrastate transportation, we think the requirement of a bond or insurance policy is a valid regulation. In re Cardinal, 170 Cal. 519, 150 P. 348, L. R. A. 1915F, 850. See, also, the case of Finn v. Railroad Commission, 2 F. Supp. 891, decided by the District Court of the United States for the Southern Division of the Northern District of California on March 7, 1933, by a three-judge court under section 266 of the Judicial Code of the United States (28 USCA § 380).

Judgment and order affirmed.

We concur: WORKS, P. J.; CRAIG, J.

131 Cal.App. 509

MILLER v. FORSTER.

Civ. 672.

District Court of Appeal, Fourth District, California.

April 28, 1933.

1. Trusts ⇐371(2).

Complaint alleging that decedent's husband, with intent to deceive, agreed with decedent to waive claim to decedent's separate property, and thereby prevented decedent's conveyance of her separate estate, and that husband fraudulently filed petition for letters of administration asserting claim as heir, stated cause of action against him as involuntary trustee for use of decedent's daughter.

2. Trusts ⇐365(1).

Action by decedent's daughter against decedent's husband to have latter declared involuntary trustee *held* not premature where husband, in violation of agreement with decedent, had asserted claim as decedent's heir in procuring letters of administration.

3. Appeal and error ⇐185(1).

Right of appellant to raise question of trial court's jurisdiction *held* waived where not raised by demurrer or answer.

4. Trusts ⇐110.

Evidence in suit to declare involuntary trust sustained finding of existence of defendant husband's agreement with decedent after marriage to waive claim to decedent's separate property.

5. Appeal and error ⇐1010(1).

Trial court's findings will not be disturbed unless it clearly appears that conclusion reached cannot be supported on any rational view of testimony.

6. Trusts ⇐108.

In daughter's action against decedent's husband and administrator to establish involuntary trust under husband's agreement with decedent to waive claim to her separate property, joint tenancy deed offered by husband to show state of mind of parties *held* properly rejected.

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

Suit by Ida Mae Dreblow Miller, formerly Ida Mae Dreblow, against Frank E. Forster, individually and as administrator of the estate of Edith Dreblow Forster, deceased, formerly known as Edith Dreblow. Judgment for plaintiff, and defendant appeals.

Affirmed.

Duckworth & Harrison, of San Bernardino, for appellant.

Emery B. Tyler and John A. Hadaller, both of San Bernardino, for respondent.

VAN ZANTE, Justice pro tem.

This is an appeal by the defendant from a judgment rendered in favor of the plaintiff in an action to declare a trust. It is alleged in the complaint that the plaintiff is a daughter of Edith Dreblow Forster, and a stepdaughter of defendant Frank E. Forster; that her mother was married to defendant on the 7th day of September, 1928, and died in San Bernardino county on the 7th day of December, 1928, leaving an estate of real and personal property in that county; that on the 13th day of December, 1928, defendant filed his petition for letters of administration in which he named himself and plaintiff as heirs at law; that thereafter defendant was appointed administrator of the estate of Edith Dreblow Forster, and filed in the probate proceedings of said estate his verified inventory and appraisement showing that the value of the estate amounted to the sum of $18,831.37.

Defendant's first contention is that the complaint does not state facts sufficient to constitute a cause of action. Paragraph 6 of the complaint reads as follows: "That on or about October 17th, 1928, said defendant entered into a parol agreement with said Edith Dreblow Forster, his then wife, and who is now deceased, that in the event of the death of said Edith Dreblow Forster, all of the separate property of which she died possessed, should become the property of the daughter of said decedent, which daughter is the plaintiff herein; that defendant then and there further agreed with his said wife that he would not at any time, nor in any manner, make any claim whatsoever to any of the property so owned by the wife, and that he would take such steps and do such things as were necessary to have said property properly distributed to said daughter, the plaintiff herein. Plaintiff alleges that said defendant entered into said agreement and made said promises with the false and fraudulent intent of deceiving said decedent, and of lulling her into a sense of false security, and of thereby preventing her from making some writing wherein she would properly and effectively convey to plaintiff all of her said separate estate; plaintiff alleges that at said time, said defendant entered into the said agreement secretly intending not to perform the same nor carry it out after the death of said Edith Dreblow Forster. Plaintiff further alleges that the said Edith Dreblow Forster believed the said defendant, then her husband, relied on the said agreement and promises, and was deceived thereby; that had she known of the false intentions of defendant at said time or thereafter during her lifetime, she would have taken steps to properly convey to plaintiff all of her separate estate, free from any claim whatsoever of said defendant."

It is alleged in subsequent paragraphs of

the complaint that on numerous and divers occasions, both before and after the death of plaintiff's mother, defendant promised plaintiff that he would hold the property of said decedent in trust for plaintiff and would make no claim whatsoever to any of it at any time; that defendant falsely, fraudulently, and with intent to deceive and cheat the plaintiff and the court, filed his petition for letters of administration alleging therein that he and plaintiff were heirs at law of the decedent and omitted therefrom any and all statements and allegations with reference to the agreements made between himself and said decedent; that on the 22d day of January, 1930, defendant, pursuant to the false and fraudulent representations, obtained an order of court setting aside to him household goods and personal effects appraised at $200.

[1, 2] Unmistakably the allegations in the complaint are allegations of fraud practiced by defendant on plaintiff and her mother, as alleged in the complaint, and but for such fraud on the part of the defendant and misplaced confidence by reason of their relationship, on the part of the plaintiff and her mother, all the property of the decedent would have been willed or deeded to plaintiff. We think the allegations in the complaint are sufficient to show a constructive fraud and cause to have defendant declared an involuntary trustee of the property involved in this action for the use of the plaintiff and that the complaint states facts sufficient to constitute a cause of action. Jones v. Jones, 140 Cal. 587, 74 P. 143; Lauricella v. Lauricella, 161 Cal. 61, 118 P. 430; Cooney v. Glynn, 157 Cal. 583, 108 P. 506; Brazil v. Silva, 181 Cal. 490, 185 P. 174, 178, 25 Cal. Jur. 163 to 166. Nor can it be contended that this action was prematurely brought. The complaint does not disclose any attempt to interfere with the administration of the estate, nor to obtain possession of the property involved. This is simply an action to have the administrator declared a trustee of the property which he claims as an heir. It is held in the case of Brazil v. Silva, supra, that "an action to impose a trust because of fraud could be maintained as soon as the wrongdoer consummated his fraud and obtained the legal title to the property involved." The complaint shows that defendant claimed to be an heir and actually had procured an order of the probate court setting aside to him all of the household goods and personal effects of the decedent.

[3] The defendant's next contention is that the court was without jurisdiction to determine the issues in this case. The defendant did not raise this question by demurrer nor in his answer, and we think he has waived his right to raise it on appeal. We think the authorities, including two cases, Brazil v. Silva, supra, and Simons v. Bedell, 122 Cal. 341, 55 P. 3, 4, 68 Am. St. Rep. 35, on which he relies, are against his contention. We refer to the above quotation from the case of Brazil v. Silva, supra. In the case of Simons v. Bedell, supra, the Supreme Court said: "We are not prepared to say, however, that the court was without jurisdiction; and, as all parties seem to have treated the matter as properly brought before the court, we shall so treat it."

"This court will not, upon appeal, review the conclusions of a trial court as to facts essential to its jurisdiction, concerning which such court was vested with the power to hear and determine, at the instance of a party who has appeared in that court in the action or proceeding, and has omitted there to in any way urge his objection, but has proceeded therein upon the theory that the court had jurisdiction." In re Estate of Latour, 140 Cal. 414, 425, 73 P. 1070, 1074, 74 P. 441. See, also, In re Estate of Dombrowski, 163 Cal. 290, 297, 125 P. 233.

[4] Defendant's next contention is insufficiency of the evidence to justify the decision, findings, and judgment. His first objection is to finding No. 5, which reads as follows: "The court finds that on or about the 27th day of September, 1928, and again on or about October 15, 1928, said defendant entered into a parol agreement with said Edith Dreblow Forster, his wife, that in the event of the death of said Edith Dreblow Forster, all of the separate property of which she died possessed should become the property of the daughter of said decedent, which daughter is the plaintiff herein; that said defendant then and there further agreed with his wife, the said decedent, that he would not at any time, nor in any manner make any claim whatsoever to any of the property so owned by his said wife, and that he would take such steps and do such things at her death as were necessary to have said property properly distributed to said daughter, the plaintiff herein, and that said agreement was concurred in by defendant's wife, Edith Dreblow Forster, and said agreement remained in full force and effect, and was never revoked."

It is defendant's contention that plaintiff has proven only an antenuptial agreement. If the record disclosed only evidence of promises made by defendant to plaintiff and her mother and agreements made between defendant and plaintiff and her mother, we would readily agree with defendant. But we find that these promises and agreements were renewed subsequent to the marriage of defendant and plaintiff's mother. Plaintiff testified as follows:

"Q. Well were you present on an occasion in Mr. Holcomb's office on or about the 15th day of October, 1928? A. I was.

"Q. When Mr. Forster and Mrs. Forster, your mother, Mr. Holcomb, and Lloyd Martin and Mrs. Martin were present? A. Yes.

"Q. All together in Mr. Holcomb's office? A. Yes. * * *

"Q. Tell what took place there? A. We were sitting there discussing the transaction and Mr. Forster now and then would say something to my mother, and in general to everyone that was there, and finally Mr. Holcomb became rather impatient and he said to Mr. Forster, 'What have you to do in this? What business have you to say anything in this transaction?' And Mr. Forster was quiet a minute and then he said, well he didn't have any interest in the transaction except to advise his wife, Mrs. Forster, and in case anything should happen to her that her property was to go to me.

"Q. He said that on that occasion? A. Yes.

"Q. And did your mother hear that? A. Yes.

"Q. What did your mother say in reply? A. Nodded her head. * * *

"Q. All right. Now, after she died did you have a conversation then with Mr. Forster relative to his intentions regarding her property? A. Yes.

"Q. Who was present? A. Well my aunt was there. * * *

"Q. Now just relate the conversation? A. Well, Mr. Forster stated to my aunt—they were talking about things in general—and he stated to my aunt that he didn't intend to take any of Dreblow's money, and my aunt complimented him then and said she certainly did appreciate his saying that; and she told him also there was only one man in a thousand that would do that. * * *

"Q. You knew your mother had made a will, did you not? A. Yes. * * *

"Q. Did you go east with your own money? A. I went with the money Mr. Forster gave me.

"Q. Mr. Forster advanced you the money? A. Yes.

"Q. How much did he advance? A. $200.

"Q. How long did you remain in the east? A. I remained from December until the last of August.

"Q. You remained from December, 1928, until the last of August, 1929? A. Yes, sir."

The following is a part of a letter, dated May 5, 1929, plaintiff's exhibit, written by defendant to plaintiff's aunt in regard to plaintiff: "But I think she ought to stay with you and go to work; and earn her living; she is old enough now to do that. I don't know where she is going to get the money to travel on; I am not going to send it to her; now that she is through school; I am going to pay the debt on that house and when the estate is settled; then she will have some money that she can spend in traveling if she wants to. I hope that you won't think I am too arbitrary in this matter; but it is the way I look at it from here. I know that she would be a whole lot safer under your care than she would be out here; away from your influence."

Sadie Miller, a witness for the plaintiff, testified as follows:

"Q. Mr. Forster was present at the time? A. Yes, sir.

"Q. Will you just state to the court what this conversation was? A. It was in substance that Mrs. Dreblow, or Forster then, had made out her will leaving all of the estate, property and money that Mr. Dreblow had left her, to her daughter Ida Mae, and that if she passed on Mr. Forster was not to have any of it, and Mr. Forster said at the time that that was perfectly true and that he did not want any of it; that that had been the agreement between them before they married."

Mrs. Helen Roberts, a witness for plaintiff, testified as follows:

"Q. Did you have any conversation with Mr. Forster after Mrs. Forster's death? A. Yes, sir.

"Q. Will you please repeat what the conversation was? A. Well, he said—he was not going to take anything of Mrs. Dreblow's money; that it was to go to Ida Mae; that Ida Mae was to have everything.

"Q. And do you recall about what time of the day that was? A. That was, oh, I judge, around 7 or 7:30 in the morning.

"Q. You say that was one day after— A. Next morning.

"Q. After Mrs. Forster's death? A. Yes, sir.

"Q. The next morning? A. Yes, sir.

"Q. And on that occasion he said he did not want any of the Dreblow money; that it was all to go to Ida Mae? A. Yes, sir. * * *

"Q. I am asking you what conversation you had with this defendant? A. The day that the folks left for the east—

"Q. Do you know what day that was? A. Around the 17th or 19th of December.

"Q. That is the same year in which Mrs. Forster died? A. Yes, sir.

"Q. Now, where were you at the time this conversation took place? A. In my home.

"Q. Just relate what the conversation was? A. Well, he made the remark and said that he was going to take what the law allowed him.

"Q. And what did you say to that? A. I asked him if the folks knew about it, because I had told the aunt that he was going to leave everything to Ida Mae.

"Q. And what reply did he make to your question, did the folks know about it? A. He said they knew what the law was."

The defendant testified as follows:

"Q. But in Mr. Harrison's office you were informed that because of the fact that the will was drawn before Mrs. Forster married you, that the terms of the will were inoperative, isn't that true? A. I believe that is true. * * *

"Q. The relationship between yourself and your wife was always agreeable and harmonious? A. Yes, sir.

"Q. You got along well together? A. Yes, sir.

"Q. Never any trouble between you, no disputes of any kind? A. No, sir.

"Q. You had confidence in her and she in you? A. Yes, sir."

In his petition the defendant named himself and plaintiff as heirs at law of decedent. This petition is made a part of plaintiff's verified complaint and the allegations therein are not denied in the answer.

[5] There is considerable other evidence in the record of the same character as that quoted above. However, we think the evidence quoted is substantial and supports the finding No. 5, and the other findings to which objection is made on the ground of insufficiency of the evidence. We think the evidence quoted shows, either directly or by inference, fraud practiced by defendant, reliance by the plaintiff and her mother on defendant's promise; and that, but for such fraud, plaintiff's mother would have willed or deeded the property involved to her. "As in other cases, every intendment is in favor of the finding made. Such finding is not to be overthrown on appeal, unless it is very plain to the appellate court that the conclusion reached cannot be supported on any rational view of the testimony." Lewis v. Lewis, 167 Cal. 732, 733, 141 P. 367, 368, 52 L. R. A. (N. S.) 675. See, also, Taylor v. Kelley, 103 Cal. 178, 37 P. 216; Garratt v. Automotive Finance Corporation, 71 Cal. App. 534, 235 P. 745.

[6] Defendant's last contention is that rulings of the trial court were prejudicial to him. He bases his contention on that portion of the record reading as follows:

"Q. I show you this and ask you if this is the deed upon which you acquired this property? A. Yes, sir.

"Mr. Hadaller: We object to the introduction of this deed as incompetent, irrelevant and immaterial and not within the issues. We are not contesting this deed.

"Mr. Harrison: The point is this: It is a joint tenancy deed and according to the testimony of the daughter a thousand dollars of the mother's money went into this property, dated the 16th day of November, 1928, after a lot of the so-called conversation. I think it is material to show intent and the state of the parties' minds.

"The Court: The property is not in question of course.

"Mr. Harrison: According to the testimony of the daughter a thousand dollars of the mother's money went into that property and that act itself shows how these parties were handling their money.

"The Court: It is not in question here.

"Mr. Harrison: I believe it is material as to the question of intent and of fraud that they have alleged here.

"The Court: I cannot see that it is. It is not in question here. If the wife contributed a thousand dollars to the purchase price of that she had a right to do so.

"Mr. Harrison: That is true but it goes to show the state of mind or the acts of the parties that speak louder than words.

"The Court: It seems to me, if it is anything, it is evidence against your side of the case."

We agree with the ruling made by the trial court.

Judgment affirmed.

We concur: BARNARD, P. J.; MARKS, J.

In re FINKLER'S ESTATE.*

FINKLER v. PURCELL et al.

WAITE et al. v. SAME.

Civ. 1244.

District Court of Appeal, Fourth District, California.

April 24, 1933.

Rehearing Denied May 24, 1933.

Hearing Granted by Supreme Court June 23, 1933.

1. Judgment ⇐199(1).

Right of trial court to render judgment notwithstanding verdict is same as right to grant nonsuit or direct verdict (Code Civ. Proc. § 629).

Nonsuit may be granted, or directed verdict ordered against will contestants, when, disregarding conflicting evidence, and giving to the contestants' evidence all the value to which it is legally entitled, indulging in every legitimate inference that may be drawn therefrom, the result is a determination that there was no evidence of sufficient substantiality to support a verdict in favor of contestants if such a verdict were returned.

2. Trial ⇐139(1).

Trial court may direct verdict for defendant where there is no substantial evidence tending to prove controverted facts necessary to establish plaintiff's case.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

 *For subsequent opinion see 46 P.2d 149.

3. Trial ⇐143.

To deprive trial court of right to direct verdict on ground evidence is conflicting, conflict must be substantial one.

4. Wills ⇐50.

Testator has sufficient testamentary capacity if he has sufficient mental capacity to understand nature of act, recall property, and remember relation to persons who have claims upon his bounty.

5. Wills ⇐31.

Generally, will, attacked on ground that testator lacked sufficient testamentary capacity, will be sustained where it appears that testator was capable of directing business affairs.

6. Wills ⇐55(3).

Evidence *held* to establish that testator, notwithstanding delusion and eccentricity, possessed sufficient testamentary capacity.

7. Wills ⇐82.

In determining validity of will, nieces and nephews, descendants of deceased brothers and sisters of testator's predeceased wife, are not natural objects of his bounty.

8. Wills ⇐82.

Where testator and his half-sister were estranged, omission to remember half-sister in will did not make will an unnatural one.

9. Wills ⇐166(1).

To establish undue influence, proofs must show pressure which overpowered mind of testator and bore down volition at time he executed will.

10. Wills ⇐166(7).

Mere proof of opportunity to influence testator's mind, even when coupled with interest or motive, will not sustain finding of undue influence, in absence of testimony showing pressure operating directly on testamentary act.

11. Wills ⇐163(1).

Contestant, to have will set aside on ground of undue influence, must establish circumstances inconsistent with voluntary action by testator.

12. Wills ⇐166(1).

Evidence *held* insufficient to establish undue influence which destroyed testator's free agency at time he executed will.

13. Wills ⇐108, 167.

Testator, to make valid will, or to legally revoke valid will, must comply with statute (Probate Code, §§ 53, 74).

14. Wills ⇐130.

Holographic will must be dated, and if holographic will has no date, it is without validity (Probate Code, § 53).

15. Wills ⇐186.

Revocation of holographic will, to be valid, must be dated and alterations, if not dated, cannot relate back to date of original will (Probate Code, § 53).

16. Wills ⇐384.

Finding that testator made alterations in holographic will, but did not thereby revoke will or any terms thereof, *held* binding on appellate court, in absence of evidence to contrary (Probate Code, §§ 53, 74).

Appeals from Superior Court, San Mateo County; George H. Buck, Judge.

Proceedings in the matter of the estate of Henry C. Finkler, deceased, wherein Christina A. Finkler, and Sumner J. Waite and others, filed separate will contests, opposed by M. J. Purcell and another. From a judgment admitting the will to probate, and from an order granting the motion for judgment notwithstanding a verdict in favor of the contestants, the contestants appeal.

Judgment and order affirmed.

Henry Eickhoff, Henry Eickhoff, Jr., and George W. Wilson, all of San Francisco, and J. E. McCurdy, of San Mateo, for appellant Christina A. Finkler.

Knight, Boland & Riordan, of San Francisco, for appellants Sumner J. Waite, Emmett Brophy, Edith F. Stewart, Aurelia Hanlan, and Bernice Macaire.

Ross & Ross, of Redwood City, for respondents.

CAMPBELL, Justice pro tem.

The decedent, Henry C. Finkler, died November 18, 1930, by suicide. A document, in form a holographic will, bearing date of April 21, 1930, was in due time presented to the probate court as the last will and testament of said deceased. By said will decedent named as sole beneficiaries thereunder, M. J. Purcell, the husband of a niece of decedent's predeceased spouse, and B. Grant Taylor. Mr. Finkler left as his only heirs at law, Christina Finkler, a half-sister, and Sumner J. Waite, Emmett Brophy, Edith F. Stewart, Aurelia Hanlan, and Bernice Macaire, nephews and nieces of Aileen Finkler, predeceased wife of Henry C. Finkler, contestants herein, and Aileen Purcell, a niece of Aileen Finkler, who is the wife of respondent M. J. Purcell.

A contest was filed by Christina A. Finkler, a half-sister of the deceased, who based her action upon the following grounds, to wit: (1) That at the time the deceased executed the will in question he was not mentally competent to make a will. (2) That the said will was procured to be executed under the undue

influence of M. J. Purcell. (3) Incompleteness of the will.

Subsequently a like contest was filed by Sumner J. Waite, Emmett Brophy, Edith F. Stewart, Aurelia Hanlan, and Bernice Macaire upon similar grounds, except that they did not allege undue influence. The contest went to trial before the court with a jury, and at the conclusion of contestants' case a motion for nonsuit was made upon the grounds of insufficiency of the evidence, which motion was denied by the court. At the close of the trial proponents moved for a directed verdict on the ground of insufficiency of the evidence. The court denied the motion. The special issues of incompetency and undue influence were thereupon submitted to the jury for decision, the other issues being reserved for the court. The jury returned a verdict finding: (1) That at the time of the execution of the purported will dated April 21, 1930, the decedent Henry C. Finkler was of unsound mind, and (2) that the said purported will dated April 21, 1930, was procured through the undue influence of M. J. Purcell. Thereupon the proponents moved for a judgment notwithstanding the verdict, which was granted. In addition the court ruled against the contestants on the remainder of the issues and the will was admitted to probate. From this judgment the contestants have appealed. Separate briefs have been filed by the two groups of contestants.

Appellant Christina Finkler attacks the judgment admitting the will to probate on the grounds: (1) The court erred in granting proponents a judgment notwithstanding the jury's verdict that decedent was of unsound mind at the time of the execution of the will, and that it was procured through undue influence; and (2) assuming the document to be a will, all the alterations, interlineations, cancellations, and additions thereto are valid and must be given effect. Appellant Sumner J. Waite and his cousins in their brief attack the judgment on the second ground alone, and also allege that there was a revocation of the devise of the realty. By section 629 of the Code of Civil Procedure, enacted in 1923, it is provided that "when a motion for a directed verdict, which should have been granted, has been denied and a verdict rendered against the moving party, the court, at any time before the entry of judgment, either of its own motion or on motion of the aggrieved party, shall render judgment in favor of the aggrieved party notwithstanding the verdict. * * *"

[1] Both contestants and respondents concede the law to be that the right of the court to render a judgment notwithstanding the verdict is the same as the right of the court to grant a nonsuit or direct a verdict, and that a nonsuit may be granted or a directed verdict ordered when, disregarding conflicting evidence, and giving to the contestants' evidence all the value to which it is legally entitled, indulging in every legitimate inference that may be drawn therefrom, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of contestants if such a verdict were returned.

[2, 3] In Estate of Sharon, 179 Cal. 447, at page 459, 177 P. 283, 288, the court says: "It is a settled rule of law regarding trials by jury that in a proper case the court has full power to direct the jury to render a verdict. This power exists in favor of the defendant where there is no substantial evidence tending to prove all the controverted facts necessary to establish the plaintiff's case. It is not necessary that there should be an absence of conflict in the evidence. To deprive the court of the right to exercise this power, if there be a conflict, it must be a substantial one."

There are numerous decisions to this effect. We cite the following cases: Estate of Baldwin, 162 Cal. 471, 473, 123 P. 267; Sill v. Ceschi, 167 Cal. 698, 704, 706, 140 P. 949; Estate of Caspar, 172 Cal. 147, 155 P. 631; Jacobson v. Northwestern, etc., Co., 175 Cal. 468, 473, 166 P. 3; Perera v. Panama P. I. E. Co., 179 Cal. 63, 175 P. 454.

In Estate of Hamburger (Cal. App.) 14 P. (2d) 802, 805, one of the more recent cases upon the subject, the court says: "Without here attempting to draw a fine technical definition of a nonsuit and without trying to harmonize the several leading cases upon the subject (and we confess that there are statements in the opinion in Estate of Ivey, 94 Cal. App. 576, 271 P. 559, with which we do not entirely agree), we think the following expresses the problem before us, in so far as the question of mental incapacity is concerned: Is there any substantial testimony that decedent was so mentally incapacitated on the 18th day of August, 1930, that he could not have understood the contents of the document which he signed on that day as his last will and testament? * * *"

The first question then that presents itself to this court for consideration and determination is: Is there any substantial testimony that decedent, Henry C. Finkler, was so mentally incapacitated on the 21st day of April, 1930, that he did not have testamentary capacity?

The estate involved is of the value of approximately $54,659, and consists of 182 acres of land near Redwood City in San Mateo county, valued at $40,000; real estate in San Francisco county valued at $1,000; personal property and jewelry valued at $500; and cash in the bank valued at $13,159.

It appears from the record in this case that Mr. Finkler had been secretary of the Supreme Court of the State of California for more than 50 years prior to his death; that

he was acting as such secretary when he drew the will in question here and up to the very night before he committed suicide; that he lived on a ranch near Redwood City; that during the summer of 1930, at the time of making the will, and subsequent thereto, he was a fire commissioner of the Emerald Lake Fire District. The deceased, at the time of his death, was 72 years old. His mother was born in Mexico and at the time of her marriage to Finkler had two daughters by a former marriage, Christina and Clara, both of whom took the Finkler name; the decedent's father committed suicide in the seventies. During her lifetime the decedent's mother had twice been committed to an asylum by reason of insanity. Likewise the deceased's half-sister Clara had been adjudged insane and committed to an institution.

From this pathological background we will now proceed to examine the testimony adduced at the trial necessary to the consideration of the case.

Various witnesses were called by appellant and testified. To set out at length the testimony of each individual witness would add nothing to the legal literature of this state. Hence, we shall confine ourselves to a general summary of the facts as they appear from the testimony of the various witnesses as set forth in appellant's brief.

The evidence shows that decedent was building an airplane in the attic of his home at Redwood City; he spoke of a tunnel which ran from the hill on his property to Lake Merced; he had several loaded guns around his house; he failed to recognize and speak to acquaintances at various times; he considered his Redwood City property very valuable; he watched the delinquent tax sales; he thought he could obtain bargains at such sales; he was cruel to dumb animals; he claimed supernatural powers; and he thought there was a valuable water supply on his San Mateo county property.

[4] While some of the testimony introduced by appellant tends to show a mental weakness and indicates beyond question that the deceased had delusions at various times during the latter years of his life, and also that in many ways he was peculiar and that during many years he was eccentric in some respects, yet all of such testimony should be read in the light of the opinion in Estate of Bemmerly, 110 Cal. App. 550, 560, 294 P. 33, 37: "The law is well settled in this state that a 'testator is of sound and disposing mind and memory, if, at the time of making his will he has sufficient mental capacity to be able to understand the nature of the act he is doing, and to understand and recall the nature and situation of his property, and to remember and understand his relations to the persons who have claims upon his bounty, and whose interests are affected by the provisions of the instrument.'"

In Estate of Casarotti, 184 Cal. 73, 80, 192 P. 1085, 1087, the court says: "It must be borne in mind that it is not every weakness and impairment of the faculties of the testator that will invalidate a will. Even where a testator is feeble in health, suffering under disease and aged and infirm, yet if he was of sufficiently sound mind to be capable of understanding the nature and situation of his property, and of disposing thereof intelligently, without any delusions affecting his action, he had sufficient capacity to make a will. Estate of Motz, 136 Cal. 558, 69 P. 294; Estate of Purcell, 164 Cal. 300, 128 P. 932; Estate of Huston, 163 Cal. 166, 124 P. 852; Estate of Weber, 15 Cal. App. 224, 114 P. 597."

[5] It is quite significant that none of the contestants' witnesses testified in any way whatsoever as to Mr. Finkler being unable to understand business transactions or being unable to understand or recollect the nature of his property or his relation to his half-sister and the nieces and nephews of his deceased wife. It is further significant that no witness for contestants gave any reason for his opinion as to the sanity of the testator sufficient to sustain that opinion. A factor of great importance involving will contests is to be found in the proof as to the decedent's business ability. As a matter of fact the propounded instrument is usually sustained where it appears that the decedent was capable of directing business affairs. 26 Cal. Jur. 674; Huyck v. Rennie, 151 Cal. 411, 90 P. 929.

In Estate of Redfield, 116 Cal. 637, at page 655, 48 P. 794, 799, the court approves a quotation from the prerogative court of New Jersey, as follows: "'The abstract opinion of any witness, medical or of any other profession, is not of any importance. No judicial tribunal would be justified in deciding against the capacity of a testator upon the mere opinion of witnesses, however numerous or respectable. A man may be of unsound mind, and his whole neighborhood may declare him so; but whether that unsoundness amounts to incapacity for a discharge of the important duty of making a final disposal of his property is a question which the court must determine upon its own responsibility. It * * * is to be ascertained by the court by the application of certain rules of law, in the exercise of a sound discretion regulated by these rules. The opinion of a witness must be brought to the test of facts, that the court may judge what estimate the opinion is entitled to. It is proper and legal to ask a witness his opinion as to the mental capacity of the individual to discharge the duty in question. The court will judge of * * * the proper weight to be given to his opinion from the facts and circumstances upon which he founds his opinion.' Stackhouse v. Horton, 15 N. J. Eq. 202, 208."

In Estate of Chevallier, 159 Cal. 161, 168, 169, 113 P. 130, 133, the court says: "In con-

sidering the evidence it is important, preliminarily, to observe that it is not every form of insanity, not every mental departure from the normal, which destroys an otherwise valid testamentary act. The rule of law is not that no person who is insane may make a valid will, but that the will of no person who, by reason of insanity, is incapable of making valid testamentary disposition shall be upheld. Thus the wills of aged and infirm people, of people sick in mind as well as in body, are always upheld, if, notwithstanding their enfeeblement, testamentary capacity is shown. So, again, it may be well and perhaps soundly reasoned that all persons who commit crime and that all persons who commit suicide are aberrant, abnormal, and therefore insane. But such is not the insanity which the law has in mind. It must be an insanity of one of two forms, either insanity of such broad character as to establish mental incompetency generally, or some specific and narrower form of insanity, under which the testator is the victim of some hallucination or delusion. And even in the latter class of cases it would not be sufficient merely to establish that a testator was the victim of some hallucination or delusion to avoid the will. The evidence must go further and establish that the will itself was the creature or product of such hallucination or delusion, or, in other words, that the hallucination or delusion bore directly upon and influenced the creation and terms of the testamentary instrument. It would thus not be sufficient, to avoid a will, to show that the testator believed that the moon was made of green cheese, but if it should be established in addition thereto, that because of this belief he devised or bequeathed his property in a way which, saving for the belief, he would not have done, a case is presented where the abnormality of mind has a direct influence upon the testamentary act."

In Estate of Perkins, 195 Cal. 699, 703, 235 P. 45, 46, the court says:

"It is well settled that, upon the contest of a will on the ground that the deceased was of unsound mind, the actual mental condition of the testatrix *at the time of the execution of the will* is the question to be determined. [Citing cases.] Evidence as to mental condition before or after the execution of the will is important only in so far as it tends to show mental condition at the time of the execution of the will. The presumption is always that a person is sane, and the burden is always upon the contestants of the will to show affirmatively, and by a preponderance of the evidence, that the testatrix was of unsound mind at the time of the execution of the will. [Citing cases.] Insanity exists as a matter of law only from the time it is shown to exist and proof of subsequent insanity will not create nor carry a presumption of its past existence. Estate of Dolbeer, supra [149 P. 227, 86 P. 695, 9 Ann. Cas. 795].

"Every mental departure from the normal will not destroy a testamentary disposition, otherwise valid, of the testatrix' estate. It is not the rule of law that no person who is insane may make a valid will. The real rule is that the will of a person, who by reason of insanity is incapable of making valid testamentary disposition of his estate, shall not be upheld. Estate of Chevallier, 159 Cal. 161, 113 P. 130; Estate of Wasserman, 170 Cal. 101, 148 P. 931.

"Mental derangement sufficient to invalidate a will must be insanity in one of two forms: (1) Insanity of such broad character as to establish mental incompetency generally; or (2) some specific and narrower form of insanity under which the testator is the victim of some hallucination or delusion. Even in the latter class of cases, it is not sufficient merely to establish that a testator was the victim of some hallucination or delusion. The evidence must establish that the will itself was the creature or product of such hallucination or delusion; that the hallucination or delusion bore directly upon and influenced the creation and terms of the testamentary instrument. The evidence must establish, in addition to the fact of the existence of the hallucinations or delusions, the fact that by reason of these hallucinations or delusions the testatrix devised or bequeathed her property in a way which, except for the existence of such delusions, she would not have done. In short, the abnormality of mind must have had a direct influence upon the testamentary act. Estate of Chevallier, supra; Estate of Collins, 174 Cal. 663, 670, 164 P. 1110; Estate of Redfield, 116 Cal. 637, 48 P. 794; Estate of Casarotti [184 Cal. 73, 192 P. 1085], supra."

[6] In addition to the testimony that appellants have directed to our attention, we have searched the entire record and have failed to find any substantial evidence that indicates that any delusions existed in the mind of the decedent the day he executed his will or that any delusions affected in any manner his testamentary capacity. Such being the state of the evidence and applying the principles of law above set forth to the instant case, the conclusion is inescapable that the contestants failed to sustain the burden of establishing the fact that at the time of the execution of the will, to wit, April 21, 1930, the testator was so mentally incapacitated that he did not have testamentary capacity. From the evidence it appears to us that the testator was affected with some of the idiosyncrasies, peculiarities, and eccentricities of life but that they were induced by his mode of living and by advanced age, and the evidence taken as a whole merely proves that at the time of

his death his mental and physical powers were waning.

We conclude that there is an utter failure of any evidence showing that either the delusions or eccentricities described showed that the decedent did not possess testamentary capacity at the time he executed his will.

[7] Appellant contends that the will is unjust, because it omitted from its provisions the natural objects of his bounty, the contestants herein. The contestants, referred to as "his nieces and nephews," are admittedly unrelated to the testator, but are descendants of deceased brothers and sisters of Aileen Finkler, the testator's predeceased spouse. They are heirs at law of the testator, but are not the natural objects of his bounty.

The remaining contestant, Christina Finkler, testified that: "We have been estranged for many years. Just why I do not know." That she never had at any time visited his home in Redwood City until after his death; that she came down to see his remains.

Mrs. Purcell testified regarding appellant Christina Finkler that "she had done nothing to assist in the care of her mother during her declining years." After his wife's death she had declined to join decedent or share his home or relieve his loneliness.

Nellie Lewis, a lifelong friend of Finkler's, testified that Mr. Finkler showed her his will a week or two after he had drawn it; that he told her he would not leave Mrs. Finkler's people anything; that he was very bitter toward Christina Finkler; and that he didn't want to remember her at all.

B. Grant Taylor testified that decedent showed him the will and said: "I have decided that the best thing I can do with my property is to leave it to you and Mike Purcell. You have four children and Mike has six and it will be very helpful to you." Mr. Taylor also testified as to Mr. Finkler again showing him the will while they were passengers on a boat to Sacramento to attend a session of the Supreme Court and of his preparing a rough form of will for Mr. Finkler and of inserting a provision therein for Christina Finkler.

"Q. Who suggested Christina's name? A. I did.

"Q. You thought it would be a good idea to provide for her? A. I felt that being a sister it would be proper for him to provide for her."

[8] The evidence clearly shows that decedent and appellant Christina Finkler were estranged and had very little to do with one another. The estrangement appearing in evidence, the omission to remember her does not make the will an unnatural one. Estate of Kaufman, 117 Cal. 288, 49 P. 192, 59 Am. St. Rep. 179; Estate of Lavinburg, 161 Cal. 536, 119 P. 915; Estate of Morcel, 162 Cal. 188, 121 P. 733.

As to the other contestants, the nieces and nephews of Mr. Finkler's deceased wife, they were in no sense legally or morally the natural objects of his bounty.

2. It seems to us also that the evidence is entirely lacking as to the alleged undue influence of M. J. Purcell. A summary of the testimony indicates that after decedent's wife died Mr. and Mrs. Purcell visited decedent at his home in San Mateo county; that their relations were friendly; that decedent had openly expressed his admiration for Purcell and love for the Purcell children.

In regard to the execution of the will Mr. Purcell testified that he saw Mr. Finkler on the 21st day of April, 1930, at his place of business at 404 Sutter street, and Finkler said he had been to the dentist, and the dentist suggested extracting two teeth, which he thought was a pretty good idea since they were sore. Mr. Finkler said he had not made any will and that he decided he would make his will before he had that work done, as he realized if he died he would die intestate. He told Purcell that the dentist had injected novocaine. Purcell further testified that he had made no suggestion at the time with reference to making a will; that he gave decedent a piece of paper and pen to write with, but that decedent had requested the articles of him; that Mr. Finkler specifically asked Purcell for a piece of paper without any printing on it and said: "Before I have these teeth extracted I want to make my will." The witness testified he saw decedent writing, but was at no time present when decedent was actually writing the will. After the will was written, Purcell accompanied decedent to Dr. Bartlett's office to have his tooth extracted, after which they went to the State Building. Purcell then took Mr. Finkler to the Purcell home where he spent the night.

[9-11] This is the testimony, in substance, upon which appellants predicate the theory of undue influence.

In Estate of Hamburger, supra, the court says: "It seems to us that the evidence shows that the contestant entertained but a suspicion of undue influence, unfounded in fact so far as shown by the testimony produced. 'Proof, to establish undue influence, must be had of a pressure which overpowers the mind and bears down the volition of the testator at the time the will is made. It consists in the exercise of acts or conduct by which the mind of the testator is subjugated to the will of the person operating upon it. Estate of Holloway, 195 Cal. 711, 235 P. 1012; Estate of Anderson, 185 Cal. 700, 198 P. 407. Mere proof of opportunity to influence a testator's mind, even when coupled with an interest or motive to do so, will not sustain a finding of undue influence, in the absence of testimony showing that there was pressure operating directly on the testamentary act and to such

an extent as to affect the terms of the testament. Estate of Fleming, 199 Cal. 750, 251 P. 637; Estate of Bryson, 191 Cal. 521, 217 P. 525. It is not sufficient for a contestant merely to prove circumstances consistent with the exercise of undue influence, but, before a will can be overthrown, the circumstances proved must be inconsistent with voluntary action on the part of the testator. Estate of Morcel, 162 Cal. 188, 121 P. 733.' Estate of Donovan, 114 Cal. App. 228, 299 P. 816, 818. See, also, Estate of Presho, 196 Cal. 639, 238 P. 944, and Estate of McDevitt, 95 Cal. 17, 30 P. 101."

[12] The evidence in this case, when weighed by the standard just quoted, falls far short of showing any such undue influence as in effect destroyed the testator's free agency and overwhelmed his volition at the time of making the will. In fact, the evidence is entirely lacking as to the alleged undue influence of proponent M. J. Purcell.

3. The next question involved in this appeal is the legal effect of changes made in a holographic will by the testator below the date and above his signature when those changes consist partly of interlineations and additions of other words and the placing of the initials of testator on the margin of the document.

The trial court made certain findings regarding the will, the pertinent parts of which are as follows:

"III. That Henry C. Finkler on the 21st day of April, 1930, made and executed his olographic last will and testament which is in the words and figures following, to-wit:

"San Francisco, Cal.
"April 21, 1930—

"All my property, money or realty I will to Mike Purcell and B. Grant Taylor collectively—Any person legally proving relation they will give such person ten dollars—

"Both to act as executors without bonds—
"H. C. Finkler.

"IV. That said will is entirely written, dated and signed by the hand of said testator Henry C. Finkler; that at the time of the execution of said will Henry C. Finkler was of sound mind and not acting under the undue influence of M. J. Purcell or any other person whatsoever; that said will was executed by said Henry C. Finkler with testamentary intent that it should be his last will and testament, and that said will was intended by said testator as a final and complete testamentary instrument and was not conditioned upon the execution of a codicil or codicils and was and is his last will and testament.

"V. That said Henry C. Finkler did subsequent to the execution of said will, and at a time subsequent to the 29th day of April, 1930, make certain alterations, interlineations, additions and changes in said will, but did not thereby revoke said will or any of the terms thereof, and that none of said alterations, interlineations, additions or changes were dated or signed by said testator, and were and are of no effect."

Section 53 of the Probate Code, which is based on the former section 1277 of our Civil Code, reads as follows: "§ 53. Holographic will. A holographic will is one that is entirely written, dated and signed by the hand of the testator himself. It is subject to no other form, and need not be witnessed. No address, date or other matter written, printed or stamped upon the document, which is not incorporated in the provisions which are in the handwriting of the decedent, shall be considered as any part of the will."

[13] A testator, to make a valid will, must comply with the statute. If he wants to revoke a valid will, he likewise must comply with the statute relating to revocation.

Section 74 of the Probate Court, based upon former sections 1292 and 1293 of the Civil Code, reads as follows:

"Other means. Except as hereinabove provided, no written will, nor any part thereof, can be revoked or altered otherwise than:

"(1) Instrument executed with same formalities. By a written will, or other writing of the testator, declaring such revocation or alteration, and executed with the same formalities required for the execution of a will; or,

"(2) Destruction, proof of. By being burnt, torn, canceled, defaced, obliterated or destroyed, with the intent and for the purpose of revoking the same, by the testator himself, or by some person in his presence and by his direction. If such act is done by any person other than the testator, the direction of the testator, and the fact of such injury or destruction, must be proved by two witnesses."

[14-16] The will in question shows on its face that the decedent in his own handwriting made some interlineations. There is no evidence as to when the interlineations or changes were made. So that as far as the evidence is concerned it would be a mere guess or surmise if this court undertook to say when the interlineations or changes complained of were made. The statute above quoted says that a will may be revoked by a writing of the testator declaring such revocation or alteration and executed with the same formalities with which a will should be executed. One of the formalities of a holographic will is that it must be dated. Without a date it has no validity. It necessarily follows that a valid revocation of a holographic will must be dated, and the decedent having failed to date the changes and alterations, they cannot relate back to the date of the original will and are therefore of no validity. The statute above quoted, in referring to revoking

or altering a will, says it may be destroyed by proof of being "burnt, torn, canceled, defaced, obliterated or destroyed" with the intent and for the purpose of revoking the same. The finding of the trial court here is that the testator did make certain alterations, interlineations, and changes in the will, but did not thereby revoke said will or any of the terms thereof. In the absence of any evidence to the contrary, this court is bound by the findings of the trial court.

The record failing to disclose any substantial evidence that at time of the execution of the will the testator was so mentally incapacitated that he could not have understood the contents of the document which he signed, or that the testator was actuated by undue influence, or that the will was revoked or any of the terms thereof canceled, the judgment and order of the trial court must be affirmed. It is so ordered.

We concur: BARNARD, P. J.; MARKS, J.

131 Cal.App. 517

GARLAND v. SMITH.

Civ. 551.

District Court of Appeal, Fourth District, California.

April 28, 1933.

1. Appeal and error ⇐1022(2).

Appellate court is not warranted in interfering with finding of referee, adopted by trial court, where finding is not entirely lacking in evidentiary support.

2. Bills and notes ⇐90.

Want of consideration is valid defense to liability on note in action by payee.

3. Bills and notes ⇐518(2).

In action wherein defendant filed cross-complaint based on note payable to defendant, evidence *held* to support finding, in effect, that note was purely accommodation note, and that there was lack of consideration.

4. Bills and notes ⇐534.

Attorney's fees provided for in note are in nature of special damage under contract.

5. Bills and notes ⇐530, 534.

Provision in note for payment of interest and attorney's fees *held* not independent agreement, and therefore proof of want of consideration for note constitutes valid defense to liability for interest and attorney's fees.

6. Appeal and error ⇐931(10).

Findings of referee, adopted by trial court, will be construed to uphold rather than to defeat judgment.

7. Appeal and error ⇐931(3).

When, from facts found by trial court, other facts may be inferred which will support judgment, inference will be deemed to have been made.

8. Appeal and error ⇐1071(6).

Where more complete findings would have been adverse to appellant, failure to make further findings is not ground for reversal of judgment.

9. Courts ⇐116(1).

Where it appears that clerk's record does not correctly show order in fact made by court, record may be corrected to express true facts.

10. Reference ⇐24.

Law action involving questions of fact may be referred to referee only on agreement of parties duly filed or entered (Code Civ. Proc. § 638).

11. Courts ⇐116(3).

Court has inherent power to correct records so as to show that order of reference was properly made pursuant to stipulation (Code Civ. Proc. § 638).

12. Appeal and error ⇐901.

Party asserting that order of reference was invalid has burden to show that there was not in fact agreement of parties therefor (Code Civ. Proc. § 638).

13. Reference ⇐34.

Objection to reference which has been ordered without consent is waived by failure to take exception thereto.

14. Reference ⇐34.

Where defendant appeared before referee without objection and submitted evidence in support of answer and cross-complaint, defendant waived all objections to reference.

Appeal from Superior Court, Orange County; James L. Allen, Judge.

Action by H. F. Garland against E. W. Smith, wherein the defendant filed a cross-complaint. From a judgment in favor of the plaintiff, the defendant appeals.

Affirmed.

O. T. Gilbank, of Los Angeles, and Kennith H. Burns, of Santa Ana, for appellant.

D. G. Wettlin, of Santa Ana, for respondent.

JENNINGS, Justice.

Plaintiff instituted this action to recover from defendant a balance of $591.21 alleged

to be due for the performance of certain work provided for by the terms of a contract entered into between the parties and for the reasonable value of additional work performed by plaintiff which was not included in the contract. The defendant filed an answer containing a general denial of all allegations of the complaint and a cross-complaint whereby he sought to recover from plaintiff the sum of $315 on account of a promissory note in this amount executed by plaintiff to defendant as payee and an additional sum of $314.77 alleged to be due from plaintiff as an overpayment for work performed pursuant to the contract mentioned in the complaint and under a second contract which provided for the performance of similar work on another building. The plaintiff filed an answer generally and specifically denying the allegations of the cross-complaint.

The trial court before whom the action was pending ordered that it be referred to a designated referee who should try all issues both of law and of fact. In accordance with the order thus made, the case was tried before the referee appointed by the court. Following the presentation of evidence, the referee reported to the court the findings of fact made by him and his conclusions of law drawn from the findings. The court thereupon adopted the findings and conclusions of the referee, and rendered judgment in conformity therewith decreeing that plaintiff have and recover from defendant the sum of $346.21, together with his costs incurred in the action. From the judgment thus rendered the defendant prosecutes this appeal.

The principal contention presented by appellant is that the findings of the referee are not supported by the evidence. A brief statement of the facts developed by the evidence will be conducive to a clearer understanding of the matters to be considered upon this appeal.

During the summer of 1927, appellant entered into a contract with the city board of education of the city of Santa Ana to make certain additions to two school buildings in the city of Santa Ana. Included in the work which was to be performed on said buildings was certain plastering work. Appellant thereupon on August 1, 1927, entered into two verbal contracts with respondent, a plastering contractor, for the performance of the plastering work on the two buildings. One of the contracts related to plastering to be done on the Edison school building, and the other contract provided for similar work to be done on the arcades of the Santa Ana Polytechnic High School. The amount sought to be recovered by respondent was for a balance claimed to be due for work done on the high school building. The contract price stipulated for this work was $1,186. The price fixed for the performance of the work on the Edison school building does not definitely appear. Appellant testified that it was $625. Respondent testified that it was $652, and that he performed work thereon in addition to that provided for in his contract, for an agreed price of $20, making a total of $672. The work which was agreed to be performed on the high school building consisted of the application of a brush coat to the arcades of the building and the preparation of the arcades for such brush coat by scouring and rubbing said arcades with carborundum stone. After the contract for the plastering work to be done on the arcades of the high school building had been made, the parties agreed to modify the contract to provide that respondent should apply a sand finish to the arcades in lieu of a brush coat, and, in addition, that he should run molds and form caps and bases on said arcades. This was work which was different from the work provided in the original agreement, and obviously entailed the expenditure of more time and the utilization of more material. The performance of this extra or additional work and the reasonable value therefor gave rise to the dispute between the parties which occasioned the bringing of the action.

The referee found that the reasonable value of this extra and additional work was $1,337.98. When to this figure is added the sum of $1,186, the original contract price, it is evident that the referee considered that the total amount due for the performance of the work on the high school building was $2,523.98. A specific finding was made that the total amount due from appellant to respondent for work done pursuant to both contracts was $3,148.98. The definite finding of the last-mentioned figure makes it evident that the referee accepted appellant's testimony that the agreed price for the work performed by respondent on the Edison school building was $625. Another finding was made that the sum of $1,914.77 was paid by appellant to respondent on account of the contract and the additional work performed on the high school building and that a total amount of $2,802.77 was paid by appellant on both contracts including the additional work performed on the high school building.

[1] It is earnestly contended that the referee's finding that the reasonable value of the extra work performed by respondent on the high school building amounted to $1,337.98 is entirely lacking in evidentiary support. The evidence with respect to this feature of the controversy consisted principally of the testimony of the parties to the action. It was irreconcilably conflicting. While it does not appear how the referee arrived at the figure which he adopted as the reasonable value of the work, the record shows that respondent testified that the reasonable value of the extra and additional work performed by him exceeded the amount found by the ref-

eree by more than $200. There was therefore evidence which would have supported a finding of a larger amount. It cannot be said, therefore, that the finding as to the reasonable value of the extra work on the high school building is entirely lacking in evidentiary support. Under these circumstances, a reviewing court is not warranted in interfering with the finding. Schroder v. Aden Gold Mining Co., 144 Cal. 628, 630, 78 P. 20; Ferro v. Lagomarsino, 45 Cal. App. 741, 744, 188 P. 626.

Similar objection is voiced to the referee's finding that the total amount paid by appellant for work on the high school building was $1,914.77. The evidence with respect to this feature was also in direct conflict. Respondent testified that he had received payments from appellant aggregating $1,889.79. Appellant's testimony showed that he had made payments on account of both contracts and the additional work performed on the high school building which amounted to $2,802.77. Here, again, it cannot be discovered how the referee arrived at the amount which he found had been paid for the work performed on the high school building. It cannot, however, be said to be entirely lacking in evidentiary support, and the appellant's objection to the finding may not be sustained.

[2-8] Further complaint is made that the referee failed to make any finding with respect to interest and attorney's fees claimed to be due from respondent on account of the note for $315 executed by respondent on October 14, 1927, which note comprised one of the two items sought to be recovered by appellant's cross-complaint. The referee specifically found that at the time the note was executed the work being done by respondent on the high school building was in progress, and the amount which would accrue to respondent on account of the contract and the extra work on said building was undetermined, and that in consideration of the execution of the note appellant paid to respondent the sum of $263, and furnished no other or further consideration therefor. This finding was in exact conformity with respondent's testimony. The record shows that the item of $263 formed part of the total amount of $2,802.77 which the referee found was paid by appellant to respondent on account of both contracts and the additional work performed on the high school building. From the fact that the sum of $263 paid by appellant on the date of the execution of the note was thus allowed as a credit to appellant, and from the further fact that the referee, after allowing the aforesaid sum as a credit, found a balance due to respondent on account of the extra work on the high school building, it is apparent that the referee accepted respondent's testimony with respect to the execution of the note, the effect of which was that the note was given by respondent purely as an accommodation to appellant. The allowance of the credit of $263 therefore entirely eliminated any consideration for the execution of the note, and appellant, the payee, was not entitled to recover upon it from the maker, since want of consideration is a good and valid defense by the maker of a promissory note in an action by the payee. Hunt v. Glassell, 47 Cal. App. 774, 191 P. 373; Aimo v. Mitchell, 124 Cal. App. 497, 12 P.(2d) 1059. Obviously, the agreement to pay interest and attorney's fees included in the note is a part thereof. It is not an independent agreement. Want of consideration or proof of any facts which show that the payee is not entitled to recover from the maker is a valid defense, not only to the contract to pay the principal amount of the note, but also to the incidental agreement of the maker to pay interest on the principal amount. Attorney's fees provided for in a promissory note are in the nature of special damage under the contract. De Jarnatt v. Marquez, 127 Cal. 558, 60 P. 45, 78 Am. St. Rep. 90; Dozier v. Hillman, 105 Cal. App. 127, 287 P. 116. If the purported contract represented by the note was in fact not a contract by reason of an entire lack of the necessary element of consideration, it follows that there could be no allowance of attorney's fees depending in the final analysis on the existence of a contract. From the facts found by the referee with respect to the execution of the note, it necessarily follows that the agreement to pay interest and attorney's fees fell with the denial of recovery to appellant on the note of which the aforesaid agreement formed a part. It is a fundamental rule of construction that findings will be so construed as to uphold rather than to defeat the judgment, and when, from facts found by the court, other facts may be inferred which will support the judgment, such inference will be deemed to have been made by the trial court. Anglo-California T. Co. v. Oakland Rys., 193 Cal. 451, 460, 225 P. 452; Randisi v. Simone, 26 Cal. App. 661, 662, 147 P. 1176. It is evident, in the light of the entire record, from the facts found by the referee, and from the judgment ordered by the court, that, if more complete findings had been made, they would have been adverse to appellant's contentions. This being the case, the failure to find further is not a ground for reversal of the judgment. Hulen v. Stuart, 191 Cal. 562, 572, 217 P. 750; Miller v. Ambassador Park Syndicate, 121 Cal. App. 92, 9 P.(2d) 267.

One further contention of appellant is entitled to consideration. It is urged that the court before whom the action was pending erred in ordering that it be referred to a referee, since the record fails to show that there was a stipulation of the parties that it should be so transferred. It is perhaps a sufficient answer to the contention thus presented to point out that the judgment from which this appeal is prosecuted recites that

at the time the case was set for trial the respective parties to the action, through their counsel, stipulated and agreed in open court to a reference to a designated referee and that the court thereupon ordered a reference. In addition to this recitation, the record also contains an order of the court correcting the clerk's minutes, which order is dated February 20, 1931, and directs that it be entered nunc pro tunc as of June 18, 1930. This order recites that it appears from an inspection of the records that the order originally made by the court on June 18, 1930, was so entered that it did not correctly set forth the order which was made, and that the records should be corrected so that they would conform to the facts and speak the truth. It is then provided that the minutes of the court shall be corrected to read as follows: "25231. Garland versus Smith. It being stipulated and agreed by and between the attorneys for the respective parties herein, in open court, that this cause be referred to Carl Heim as referee as to the law and facts, the court orders that said cause be referred to Carl Heim, as referee, as to the law and facts."

[9] It is fundamental that every court of record has the inherent power to cause its acts and proceedings to be correctly set forth in its records, and that, whenever it is brought to the attention of the court that the clerk's record does not correctly show the order which was in fact made by the court at the time it was given, the authority of the court to cause its records to be corrected in accordance with the facts is undoubted. Kaufman v. Shain, 111 Cal. 16, 43 P. 393, 52 Am. St. Rep. 139; People's Ditch Co. v. Foothill Irr. Dist., 123 Cal. App. 257, 11 P.(2d) 86.

[10-12] By the provisions of section 638, Code of Civil Procedure, reference of an action of the character which is here under consideration may be ordered only "upon the agreement of the parties filed with the clerk, or entered in the minutes." The validity of the order of reference depended, therefore, upon the existence of an agreement evidenced in one of the two modes specified in the statute. Assuming, therefore, that the court's order of February 20, 1931, speaks the truth, and that counsel for the respective parties agreed in open court on June 18, 1930, that the cause should be referred to a referee, it was clearly within the court's power to cause its records so to be corrected as to show that the order of reference was properly made. An attack by appellant upon the order of reference as being invalid renders it necessary that he show that there was not in fact an agreement of the parties evidenced as required by the above-cited statute. This burden appellant has not sustained.

[13, 14] Furthermore, objection to a reference which has been ordered without consent is waived by a failure to take exception thereto. Hendy Machine W. v. Pacific C. C. Co., 99 Cal. 421, 33 P. 1084; Shain v. Peterson, 99 Cal. 486, 33 P. 1085; In re Estate of Magerl, 201 Cal. 162, 256 P. 204. Not only does the record herein fail to show that any exception was taken by appellant to the order of reference, but it affirmatively appears therefrom that appellant appeared before the referee without objection and submitted evidence in support of the allegations of his answer and cross-complaint. Under these circumstances, appellant must be held to have waived all objections to the reference. Shain v. Peterson, supra; Bonner v. Lehfeldt, 39 Cal. App. 649, 179 P. 722.

For the reasons stated, the judgment is affirmed.

I concur: BARNARD, P. J.

131 Cal.App. 533

In re AMPUSAIT'S ESTATE.

TRUSS v. AMPUSAIT et al.

Civ. 8634.

District Court of Appeal, First District, Division 1, California.

April 29, 1933.

Hearing Denied by Supreme Court June 26, 1933.

1. Executors and administrators ⇐314(11).

On petition for partial distribution of estate, court was required to determine whether petitioners were entitled to share in portion of estate to be distributed (Code Civ. Proc. §§ 1658–1661).

2. Executors and administrators ⇐315(6).

Decree of partial distribution, unless set aside, *held* conclusive as to portion of estate distributed, and on question of heirship of parties to proceeding, or who had notice of pendency thereof and made no objection thereto or appearance therein (Code Civ. Proc. §§ 473, 1658–1661).

3. Executors and administrators ⇐315(6).

Decree of partial distribution of estate, determining that parties to proceeding were heirs, *held* not conclusive upon issue of heirship at time of final distribution, as against alleged heirs without notice of, and not made parties to, proceeding for partial distribution.

4. Judgment ⇐812(3).

Judgments in rem are binding upon persons not parties to or participants in proceeding only so far as status, title, or other res constituting subject-matter is adjudicated.

5. Executors and administrators ⇐314(11).

Court, in proceeding for partial distribution of estate, is not authorized to determine definitely and finally issue of heirship (Code Civ. Proc. §§ 1658–1661).

6. Descent and distribution ⇐71(1).

Determination of issue of heirship can be definitely made only by special proceeding under statute, or upon or after settlement of final account of administrator (Code Civ. Proc. § 1664).

Appeal from Superior Court, Alameda County; Lincoln S. Church, Judge.

Proceedings in the matter of the estate of George Ampusait, deceased. From an order vacating a decree of final distribution in favor of Joseph Ampusait and others on the application of May Truss, the former appeal.

Order affirmed.

Ford & Johnson, of San Francisco, for appellants.

A. S. Whitmore and Paul A. McCarthy, both of San Francisco, for respondent.

KNIGHT, Justice.

This is an appeal from an order vacating a decree of final distribution. The legal sufficiency of the moving papers and the evidence upon which the order is based is not challenged. The single point involved is whether certain findings as to heirship, and a decree of partial distribution based thereon, made and entered some two and a half years prior to the granting of final distribution, to which respondent, who is decedent's daughter, was not a party and of which she had no knowledge, precluded her from asserting her right of inheritance as such daughter at the time of final distribution.

The facts leading up to the making of the order appealed from were substantially as follows: The decedent, George Ampusait, was a resident of Alameda county. He died in May, 1924, leaving an estate consisting of more than $10,000 in cash. The public administrator of that county was appointed administrator of the estate. As stated, respondent is the decedent's daughter, and at all times herein mentioned resided in Los Angeles. Appellants are respectively the surviving brother, nieces, and nephews of the decedent. In December, 1926, appellants filed an unverified petition for the partial distribution of $10,000. Their relationship to the decedent was alleged therein; but nowhere in said petition was it indicated that the decedent was survived by a daughter; nor was it alleged that the persons specified in said petition were the next of kin of said decedent or sole surviving heirs. The hearing of the petition was set for a date in January, 1927, and in conformity with the requirement of the statute notice thereof was given to the administrator personally and to all other persons interested, by posting, but the matter was not heard until June, 1927, at which time, from the evidence then before it the court made certain findings, which upon the issue of heirship, were as follows: "That said deceased left him surviving, petitioner Joseph Ampusaitis, who is a brother of said deceased, and petitioners Siegmund Krause, Anna Krause, Karl Krause and August Krause, who are nephews and niece of said deceased. Said deceased also left him surviving Joseph Krause, who is a nephew of said deceased, and that all of said nephews and said niece hereinbefore mentioned are the children of a predeceased sister of said deceased. Said deceased also left him surviving, Anna Vosilitiene, Karolis Krause, Joseph Krause and Adelia Scheuber, who are nieces and nephews of said deceased, and Richard Nestle and Oscar Nestle, who are grandnephews of said deceased, and that said last mentioned nephews and nieces and grandnephews are the children and grandchildren of another predeceased sister of said deceased." Continuing the court found that said deceased "left him surviving no wife, issue, father or mother and no other brother and no sister and no other nieces or nephews or grandnieces or grandnephews, and that said brother and said nieces and nephews and said grandnephews are his only heirs at law. That said brother of said deceased is entitled to one-third of said estate, that said nephews and nieces are each entitled to one-fifteenth of said estate, and said grandnephews are each entitled to one-thirtieth of said estate." The conclusions of law were that $900 should be distributed as follows: To Joseph Ampusaitis, $500; Siegmund Krause, $100; Anna Krause, $100; Karl Krause, $100; and August Krause, $100. No distribution was made to the remaining relatives mentioned in the findings.

The decree of partial distribution was entered on the same day. It recited "that petitioner Joseph Ampusaitis is a brother and heir at law of said deceased, and that Siegmund Krause, Anna Krause, Karl Krause and August Krause are nieces and nephews and heirs at law of said deceased and are the children of a predeceased sister of said deceased, and that petitioners are entitled to partial distribution of said estate." But said decree contained no recital or finding as to the existence or nonexistence of other heirs. About two and a half years later and on December 2, 1929, the administrator filed his final account and petition for final distribution. The account showed that there was then on hand $14,495.94 awaiting distribution. The statutory requirements as to giving notice by posting were complied with, and on

December 12, 1929, after a hearing, the court made its decree of settlement and final distribution. In said decree the court found that "the names, ages and residences of the heirs at law of said deceased are: Joseph Ampusait, brother, Siegmund Krause, nephew, Anna Krause, niece, Karl Krause, nephew, August Krause, nephew, Anna Vosilitiene, niece, Karolis Krause, also known as Charles Krause, nephew, Joseph Krause, also known as Joseph Wiatkiawicia, nephew, Adelia Scheuber, niece, Richard Nisselit, also known as Richard Nestle, grandnephew, Oscar Nisselit, also known as Oscar Nestle, grandnephew, Anna Nisselit, also known as Ann Nestle, grandnieces." And the amount of cash above mentioned was ordered distributed to said persons in proportion to the degree of their relationship to the decedent. As stated, respondent was not a party to either proceeding, nor was she aware that either had been instituted.

Shortly after the rendition of the decree of final distribution, it was set aside on motion of respondent made under the authority of section 473 of the Code of Civil Procedure. The evidence adduced in support of the motion consisted of two affidavits, one of which was made by respondent. In it she averred that she was the decedent's daughter, and that within a month after the appointment of the administrator she called on him at his office in Oakland, and informed him of such fact; that he advised her to secure the services of a certain attorney in that county to look after her interest, which she did; that on numerous occasions afterwards she conferred with said attorney and believed that he was protecting her interests; that on or about October 31, 1929, she became apprehensive as to whether her interests were being properly safeguarded and she consulted an attorney in Los Angeles, who through correspondence with the administrator ascertained that no appearance had been filed in her behalf in the matter of said estate; that thereupon said attorney caused an investigation to be made as to the condition of the estate; but that before other counsel could be retained in or near the county wherein the estate was pending settlement, and without knowledge on her part, final distribution of the estate was applied for and granted. The other affidavit was made by one of respondent's present attorneys, who, besides corroborating many of the facts set forth in respondent's affidavit, stated that within a week after the granting of the decree of final distribution he called at the office of the attorney theretofore retained by respondent at the suggestion of the administrator and learned that said attorney was then on an ocean voyage and would not return until the middle of the following month. Consequently, without awaiting his return, the motion to vacate the said decree was prepared, filed and presented. No counter affidavits were filed, nor did appellants otherwise challenge the truth of the statements made in the affidavits presented on behalf of respondent. But as a bar to the granting of the motion appellants introduced in evidence the decree of partial distribution and the findings upon which it was based; and it was contended before the trial court, as here, that said decree and findings constituted a final adjudication upon the issue of heirship, and that conceding respondent to be the decedent's surviving daughter, she was precluded thereby from asserting any rights as such to any portion of the residue of said estate.

[1-4] We are unable to sustain the foregoing contention. It is true, of course, that under the provisions of the Code sections relating to partial distribution as they existed at the time these proceedings took place (sections 1658 to 1661, incl., Code Civ. Proc.), before partial distribution could be granted on petition of an heir, in the matter of the estate of an intestate, it was necessary for the court to determine from the evidence then before it whether or not those petitioning were entitled to share in the portion of the estate about to be distributed in that particular proceeding, and its decree was made accordingly. It is true also that unless set aside on appeal or under the provisions of section 473 of the Code of Civil Procedure said decree became final and conclusive as to the portion of the estate thereby distributed (In re Estate of Tymms, 78 Cal. App. 79, 247 P. 1091), and as to the heirs who were parties to the proceeding, or who were aware of the pendency of the proceeding and made no objection thereto or appearance therein (In re Estate of Murphy, 145 Cal. 464, 78 P. 960); but none of the cases cited by appellants go to the extent of holding, as they argue, that a decree rendered in such a proceeding is controlling upon the issue of heirship at the time of final distribution, as against those heirs who, like the respondent, were unaware of the proceeding on partial distribution, were not parties to it, and whose existence was not known to the court at the time such proceeding was heard and determined, and consequently whose claims were never before the court to be considered or passed upon. And manifestly, to hold that under the foregoing conditions a rightful heir is precluded from asserting his or her right of inheritance on final distribution would necessarily violate some of the fundamental principles upon which the doctrine of res adjudicata is founded. As said in Re Estate of Blake, 157 Cal. 448, 457, 108 P. 287, 291: "The rule of the authorities is that a judgment in a proceeding in rem where there has been no contest or litigation is res adjudicata with respect to the matter or res actually involved in the proceeding and is res adjudicata as to any fact which affected the particular matter or

res involved in it, and this is as far as it operates. The judgment cannot be invoked as res adjudicata in a subsequent proceeding which affects other property. Cromwell v. County of Sac., 94 U. S. 351, 24 L. Ed. 195; Overby v. Gordon, 177 U. S. 214, 20 S. Ct. 603, 44 L. Ed. 741; Freeman on Judgments, vol. 1, § 253." In other words, as held in Re Estate of Bloom, 213 Cal. 575, 2 P.(2d) 753, judgments in rem are binding upon persons who are not parties to or participants in the proceeding only so far as the status, title or other res constituting the subject-matter is adjudicated.

[5, 6] Nor is there anything in the Code sections relating to the granting of partial distribution of the estate of an intestate authorizing the court, in a proceeding instituted thereunder to determine definitely and finally the issue of heirship. As will be seen from an examination of those sections, they go no farther than to empower the court to pass upon the right of the party or parties petitioning for partial distribution to share in that portion of the estate about to be distributed. And as will be noted, the terms of the decree of partial distribution in the present case do not extend beyond such limitation. True, the findings declare that the decedent left no issue, but the findings are evidently of little, if any, value because there is nothing in said Code sections authorizing the making of findings separate from those contained in the decree itself. Furthermore, it was in substance held by the Supreme Court in the early case of Smith v. Westerfield, 88 Cal. 374, 26 P. 206, that the issue of heirship could be definitely determined only by a special proceeding instituted pursuant to section 1664 of said Code (which doubtless authorizes the making of findings) or upon or after the settlement of the final accounts of the administrator. And even in cases of a special proceeding to determine heirship, the section governing the same (section 1664) contains this saving clause: "Nothing in this section contained shall be construed to exclude the right upon final distribution of any estate to contest the question of heirship, title, or interest in the estate so distributed, where the same shall not have been determined under the provisions of this section; but where such questions shall have been litigated, under the provisions of this section, the determination thereof as herein provided shall be conclusive in the distribution of said estate."

In re Estate of Spreckels, 165 Cal. 597, 133 P. 289, 291, which is one of the cases emphasized by appellants in support of their contention, is not in point; and the manner in which a portion of the opinion therein is quoted on page seven of their opening brief, is clearly misleading. The matter of determination of heirship was not there involved. The case dealt with the question of the validity of certain trust clauses in the will pursuant to which some of the beneficiaries thereunder sought partial distribution, and the trial court denied the same upon the ground that the trust clauses were invalid. An appeal was taken and the trial court's decision was reversed (In re Estate of Spreckels, 162 Cal. 559, 123 P. 371), the Supreme Court holding that the trust clauses were valid. Thereupon the beneficiaries renewed their application in the trial court for partial distribution and also petitioned for final distribution. Both petitions were granted, and appeals were taken from the decrees thus made. On these appeals the Supreme Court held in effect that its judgment of reversal on the former appeal sustaining the validity of the trust clauses and the will was conclusive as against appellants who were parties to the appeal, and consequently was res adjudicata as to who were entitled to take the estate on final distribution; and that since the subsequent decrees made by the superior court conformed to said judgment of reversal they were correctly made. The portion of the court's opinion dealing with this phase of the appeal was as follows: "On May 28, 1912, these respondents applied to the superior court for partial distribution as asked under said original application therefor of August 23, 1909, and on the same day a decree therefor was made. *This is the subject of one of the present appeals now under consideration (No. 6357). On May 29, 1912, the respondents, under the proceedings for final distribution heretofore mentioned, applied for distribution to them under the terms of the will, and a decree to that effect was made May 31, 1912. This is the subject of the other appeal now under consideration. (No. 6358). These decrees were made in conformity with the terms of the will and the judgment of this court sustaining its validity rendered on the appeals from the order denying partial distribution.* That judgment is conclusive on the appellants who were parties to the proceedings in which it was rendered, is *res adjudicata* as to who were entitled to take the estate on distribution, *and the decrees appealed from made in favor of respondents in conformity with it were correctly made, unless the attack which appellants make on the judgment of this court on the former appeals is to be sustained.*" The portions of the opinion above italicized (except the term res adjudicata) are omitted from the quotation in appellants' brief. The language quoted by appellants from In re Jessup, 81 Cal. 408, 21 P. 976, 22 P. 742, 1028, 6 L. R. A. 594, is merely to the effect that a party is not compelled to resort to the proceeding set up for the determination of heirship by section 1664 of said Code, before applying for partial distribution. The point in Re Estate of Murphy, supra, was simply that an executrix of a will, who was also a devisee

thereunder, and who as such devisee failed to appear and object to the granting of partial distribution was bound thereby. The legal principle adhered to in Re Estate of Tymms, supra, and in Re Estate of Nolan, 145 Cal. 559, 79 P. 428, was that a decree of partial distribution or an order directing the payment of money, in the absence of appeal therefrom, are res judicata as to the portion of the estate thus distributed and as to the money directed to be paid. Here respondent concedes that as to the $900 distributed to appellants on partial distribution, the decree is final. The remaining cases cited by appellants relate either to the question of the conclusiveness of a decree of final distribution, with which we are not here concerned, or to points not pertinent to the present inquiry.

The order is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

131 Cal.App. 546

Ex parte BRYSON.

Cr. 151.

District Court of Appeal, Fourth District, California.

April 29, 1933.

1. Statutes ⇐158.

Earlier statute is repealed by subsequent statute, even in absence of repealing clause, where Legislature must have intended repeal should result.

2. Statutes ⇐159.

Intention of Legislature to repeal prior statute is necessarily implied where two acts cannot be reasonably construed as standing together.

3. Intoxicating liquors ⇐25.

Local option law *held* repealed by implication by state prohibition law subsequently adopted, and therefore is not in force, notwithstanding repeal of prohibition act (St. 1911, p. 599; St. 1921, p. 79; Pol. Code, § 328).

Application by Orville Bryson for a writ of habeas corpus to secure release from custody on a charge of selling alcoholic liquor containing more than one per cent. of alcohol by volume.

Petitioner discharged.

Bradley & Bradley and J. M. Lopes, all of Visalia, for petitioner.

Walter C. Haight, Dist. Atty., and Robert K. Meyers, Deputy Dist. Atty., both of Visalia, for respondent.

BARNARD, Presiding Justice.

The petitioner was charged by complaint with two violations of what is commonly called the Wyllie Local Option Law (Stats. 1911, p. 599). In the first count it was charged that on the 28th day of March, 1933, within the city of Visalia, county of Tulare, the petitioner, in violation of the law referred to, sold certain described alcoholic liquor containing more than one per cent. of alcohol by volume. In a second count it was charged that on the same day and in the same place he violated the same law in that he unlawfully had in his possession another described quantity of alcoholic liquor containing more than one per cent. of alcohol by volume. The respondent sheriff justifies his retention of petitioner by producing a commitment in regular form.

No facts are in dispute, and petitioner relies entirely upon the contention that the complaint does not state any offense for the reason that the Wyllie Local Option Law has been repealed. It is conceded that there is no other law on the subject in the city of Visalia, and the only question here presented is whether or not the Wyllie Act was repealed by implication through the adoption of what is known as the Wright Act (Stats. 1921, p. 79).

The respondent cites People v. Capelli, 55 Cal. App. 461, 203 P. 837, and People v. Collins, 54 Cal. App. 531, 202 P. 344, as decisive of the question before us. It was held in those cases, and particularly in the Capelli Case, that the Wyllie Act was not superseded or rendered inoperative by the Volstead Act (27 USCA) and was not repugnant to or inconsistent with that act, for the reason that, under the second section of the Eighteenth Amendment to the United States Constitution, the several states have concurrent power to enforce the provisions of section 1 of that Amendment by appropriate legislation, and because the Wyllie Act, in so far as it went, operated in furtherance of the purposes of the amendment referred to. At the time those cases were decided the Wyllie Local Option Law was the only general law on the subject in this state. Later the Wright Act was adopted and the question now before us is not as to the effect of this state legislation in view of existing national laws on the same subject, but is as to the effect of the later upon the earlier of these state laws.

[1-3] The effect of the Wright Act upon various local ordinances has been passed upon in a number of cases. In re Mingo, 190 Cal. 769, 214 P. 850; In re Iverson, 199 Cal. 582, 250 P. 681; In re Simmons, 199 Cal. 590, 250 P. 684; Olivieri v. Police Court of City of Bakersfield, 62 Cal. App. 91, 216 P. 44. It has been held that the Wright Act did not prevent local communities from making addition-

al or more stringent regulations than those provided in that act, so long as these were in keeping with the purpose of the act and not in conflict therewith. So far as we are informed, the question now before us has not heretofore been passed upon.

While the repeal of statutes by implication is not favored (Railroad Commission of California v. Riley, 192 Cal. 54, 218 P. 415), it is the general rule that a statute is repealed by a subsequent statute, even in the absence of any repealing clause, when it is apparent that the Legislature must have intended such a result. Earle v. Board of Education, 55 Cal. 489; Christy v. Board of Supervisors of Sacramento County, 39 Cal. 3. In the last-named case the court said: "A statute may be repealed by express words, or by necessary implication. The latter takes place whenever, by subsequent legislation, it becomes apparent that the Legislature did not intend the former Act to remain in force. If a later statute be wholly repugnant to an older one, so that, upon any reasonable construction, they cannot stand together, the first is repealed by implication, though there are no repealing words. The reason is, that the last expression of the legislative will must prevail, and must supersede all prior legislation which is entirely inconsistent with it."

And an intention to repeal the prior statute is necessarily implied whenever there appears such an irreconcilable conflict and repugnancy between the provisions of two acts that they cannot be reasonably construed as standing together. Fraser v. Alexander, 75 Cal. 147, 16 P. 757; People v. Burt, 43 Cal. 560; Mansfield v. Chambers, 26 Cal. App. 499, 147 P. 595. The purpose of the Wyllie Local Option Law is thus expressed in its title: "An act to provide for the regulation of the traffic in alcoholic liquors by establishing local option; authorizing the filing of petitions praying for elections to vote upon the question whether the sale of alcoholic liquors shall be licensed within the territory described in such petitions; providing for the calling and holding of such elections; making it the duty of the proper governing body to declare such territory to be no-license territory unless a majority of votes is cast in favor of license; providing that no licenses, permits or other authority to sell or distribute alcoholic liquors in no-license territory shall be granted; forfeiting and declaring void all such licenses or permits theretofore issued and in force; making it a penal offense to sell, give away or distribute alcoholic liquors within such territory, with certain exceptions; and providing penalties for such offenses."

The purpose of the Wright Act is thus expressed in its title: "An act to enforce the provisions of article eighteen of the amendments to the constitution of the United States; prohibiting all acts or omissions prohibited by the Volstead act; imposing duties on courts, prosecuting attorneys, sheriffs and other officers, and extending their jurisdiction; and providing for the disposition of fines and forfeitures."

The Wyllie Local Option Law, while a state law, became effective in a particular community only by vote of the people therein. When it became effective in any community its prohibitive provisions applied to intoxicating liquors containing more than one per cent. of alcohol by volume. So far as any state law is concerned, after the adoption of the Wyllie Act, the sale of alcoholic liquors containing not more than one per cent. of alcohol by volume was permitted and was legal everywhere in the state, and the sale of such liquors containing more than one per cent. of alcohol by volume was permitted and was legal in any portion of the state in the absence of the adoption, by the voters of any particular district, of a contrary regulation as permitted by the act. The subsequently adopted Wright Act had the effect of prohibiting and forbidding the sale of liquor containing more than one-half of one per cent. of alcohol by volume, and applied throughout the state regardless of the action of any particular community. This act not only took away from the people of any community the right to decide by election whether or not liquors containing more than one per cent. of alcohol could be lawfully sold therein, but went much farther than the provisions of the Wyllie Act in those places where the same had been put into effect, by prohibiting the sale and possession of such liquors as contained more than one-half of one per cent. of alcohol and not more than one per cent. of alcohol, such liquor not being within the purview of the earlier act.

It could hardly be argued that while the Wright Act was in effect those provisions of the Wyllie Local Option Law which permitted the people of any particular community to decide by election whether liquor should be legally sold in that community, were also in effect. Nor that while the Wright Act was in effect the former implied right to sell liquors containing up to one per cent. of alcohol was still in effect. It seems perfectly plain that the Legislature, in passing the Wright Act with its universal application and much more stringent provisions, could not have intended to leave the Wyllie Local Option Law in full force and effect. It is contrary to reason and good sense to suppose that such could have been the intention, when the provisions of the Wright Act are so inconsistent and so conflicting with those of the earlier act. During the time it was in effect the Wright Act absolutely prohibited many things that were perfectly legal under the Wyllie Act, not only in those communities which had by election come within its provisions, but elsewhere. Under the provisions of the Wyllie Local Op-

tion Law it was legal to sell intoxicating liquors containing not more than one per cent. of alcohol by volume in any part of the state, while under the provisions of the Wright Act, such liquor which contained more than one-half of one per cent. of alcohol could not be legally sold anywhere within the state. Under the Wyllie Act the sale of liquor of any alcoholic content was legal, so far as that act went, in such places as had not come by election within the prohibitive provisions of the act, while under the Wright Act, even in those places, legal sales of liquor were confined to those containing not more than one-half of one per cent. of alcohol. It can hardly be said that a state statute making such acts illegal is not inconsistent and conflicting with another state statute which does not make the same acts illegal, but which, by every reasonable inference, allows and permits the same as within the law. We are forced to conclude that the Wright Act, its provision being in conflict with those of the Wyllie Local Option Law and prevailing over the same, had the effect of repealing, by implication, the earlier act. If this conclusion is correct and the Wyllie Local Option Law was repealed by the adoption of the Wright Act, the later repeal of the last-named act cannot have the effect of reviving the act so repealed (section 328, Pol. Code).

The petitioner is discharged.

We concur: MARKS, J.; JENNINGS, J.

W. FINE & SON v. HALL et al.

Civ. 4755.

District Court of Appeal, Third District, California.

April 15, 1933.

Rehearing Denied May 15, 1933.

Hearing Granted by Supreme Court June 12, 1933.

1. Action ⇐28.

Plaintiff whose property has been converted or misappropriated may waive tort and sue in assumpsit for value of property as for goods sold and delivered.

2. Limitation of actions ⇐58(4).

Stockholder's liability is primary obligation independent of any proceedings that may be commenced against corporation (Civ. Code, § 322).

3. Limitation of actions ⇐58(4).

Stockholder's liability arises immediately on incurring of obligation by corporation (Civ. Code, § 322).

4. Attachment ⇐11.

In action to enforce stockholder's statutory liability, creditor of corporation *held* entitled to issuance of attachment against stockholder's property (Civ. Code, § 322; Code Civ. Proc. §§ 537, 556).

5. Limitation of actions ⇐58(4).

Action to enforce stockholder's liability, based on corporation's refusal to deliver grain as required by negotiable warehouse receipts issued by corporation, *held* not barred, where brought within two years of issuance of warehouse receipts (Civ. Code, § 322).

6. Constitutional law ⇐24.

Constitutional amendment giving Legislature plenary powers as to legislation concerning corporations, and repeal of constitutional provision imposing liability on stockholders, did not by implication, repeal statute fixing stockholder's liability (Const. art. 12, § 3, and § 1, amended in 1930; Civ. Code, § 322; St. 1931, p. 1762).

7. Constitutional law ⇐24.

Statute inconsistent with constitutional provision as amended is repealed by implication, although amendment makes no mention thereof.

8. Statutes ⇐158.

Repeals of statutes by implication are not favored.

9. Constitutional law ⇐24.

Where statute can stand despite passage of constitutional amendment, it will be given full effect until expressly repealed by Legislature.

10. Constitutional law ⇐20.

In construing constitutional provision, consideration may be given to intent of Legislature in adopting amendment thereto, but intention cannot prevail as against express language of amendment.

11. Attachment ⇐11.

In action to enforce stockholder's liability, based on corporation's issuance of negotiable warehouse receipts, plaintiff's right to attachment against stockholder's property *held* not barred by reason of having filed claim in bankruptcy court or because bond covered warehousemen's liability.

12. Constitutional law ⇐168.

Repeal of constitutional provision imposing liability on stockholders *held* not to affect right of creditor of corporation as to claim, based on statute, arising prior to repeal, since stockholder's liability is contractual (Const. art. 12, § 3; Civ. Code, § 322).

Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

Action by W. Fine & Son against Grace G. Hall and another. From a judgment dismissing the action, and from orders sustaining the demurrer to the complaint without leave

to amend and dissolving the attachment, plaintiff appeals.

Reversed.

De Lancey C. Smith and Francis C. Brown, both of San Francisco (J. Oscar Goldstein, of Chico, of counsel), for appellant.

Walter H. Linforth and William M. Cannon, both of San Francisco, and George F. Jones, of Oroville, for respondents.

Mr. Justice PLUMMER delivered the opinion of the court.

Two questions are presented for our consideration upon this appeal: (1) The correctness of the order of the trial court sustaining the defendants' demurrer to the plaintiff's complaint without leave to amend and dismissing the action; (2) the order of the trial court dissolving the attachment issued at the instance of the plaintiff. As Orville Pratt, named as a defendant, did not appear in the action, for convenience hereafter we will refer to Grace G. Hall as the defendant.

The complaint is in two counts, and has for its purpose the enforcement of a stockholder's liability, it being alleged therein that the defendant Grace G. Hall is the owner of all but two shares of the capital stock of the corporation mentioned in the complaint.

The first count of the complaint, among other things, alleges the existence of a corporation known as "Kitrick & Hall," organized under the laws of the state of California, of which Grace G. Hall owns 498 shares of the 500 shares of the capital stock thereof. In paragraph 5 of the first cause of action set forth in the complaint, it is alleged that on or about April 30, 1931, the corporation known as Kitrick & Hall executed and caused to be delivered to the plaintiff negotiable warehouse receipts in writing, certifying to the storage in a warehouse owned and operated by said corporation in Chico, Cal., of 11,977 sacks of barley, and also further certifying to the storage in a warehouse owned and operated by said corporation in the town of Durham, of 4,107 sacks of barley, deliverable to, or upon the order of, the plaintiff; and further alleging that said barley was at all times thereafter, and at the time of the filing of the complaint, of the value of $14,591.68. The complaint then alleges that said warehouse receipts were owned by the plaintiff, and had been owned by plaintiff ever since the issuance thereof, and that on April 30, 1931, plaintiff presented said warehouse receipts to said Kitrick & Hall, Inc., and offered to pay all charges for storage due thereon, and demanded delivery of the barley.

The complaint further alleges the refusal to deliver the barley, save and except 615 sacks thereof, and concludes with a demand for judgment in the sum of $14,032.03 against the defendants in this action.

The second count of the complaint, after certain preliminary allegations not necessary to be mentioned herein, sets forth that, within two years preceding the commencement of the action, Kitrick & Hall, a corporation, became, and at the date of the institution of the action was, indebted to the plaintiff in the sum of $14,032.03 for money had and received by said Kitrick & Hall, a corporation, for the use and benefit of the plaintiff, etc., and that no part of said sum had been paid to the plaintiff. The second count of the complaint refers to the allegations showing that Grace G. Hall was, at all times mentioned in the complaint, the owner of 498 shares of the capital stock of the corporation of Kitrick & Hall. To this complaint the defendant Grace G. Hall interposed only a general demurrer, as follows:

"I. That the first cause of action set forth in plaintiff's complaint does not state facts sufficient to constitute a cause of action against this defendant;

"II. That the second cause of action set forth in plaintiff's complaint does not state facts sufficient to constitute a cause of action against this defendant."

At the time of filing her demurrer, the defendant Grace G. Hall also gave notice of a motion to dismiss the attachment issued in said action, on the grounds that said writ of attachment was improperly and irregularly obtained and issued, and that the commencement or prosecution of said action is not authorized by law, and that the court has no jurisdiction of the subject-matter thereof. The court sustained the general demurrer and granted the motion to dismiss the attachment, from which orders and the judgment of dismissal the plaintiff appeals.

The order of the trial court sustaining the demurrer interposed by the defendant, and granting her motion to dismiss the attachment, and the entry of judgment of dismissal of the action, appears to be based upon the theory that, when section 3 of article 12 of the Constitution was repealed at the general election held on November 4, 1930, all right of action, if any, held by the plaintiff in this action thereupon ceased, and that section 322 of the Civil Code was at the same time repealed by implication.

Before considering the legal phases involved, it is proper to state the facts set forth in the plaintiff's brief, and likewise admitted in the defendants' reply thereto, to wit: That four warehouse receipts were introduced in evidence on the motion to discharge the attachment, disclosing that on May 3, 1930, a warehouse receipt was issued showing deposit of barley in a Durham warehouse, under lots numbered 262, 265, and 266, of 2,231 sacks of barley; a warehouse receipt dated May 15, 1930, showing deposit in a Durham warehouse of lots numbered 272, 316, and 318, of 1,876 sacks of barley; a warehouse receipt

dated April 6, 1931, showing deposit in a Chico warehouse under lot numbered 627, of 6,330 sacks of barley; and a warehouse receipt dated April 11, 1931, showing deposit in a warehouse in Chico, under lot numbered 628, of 5,647 sacks of barley.

Upon the issuance of these negotiable warehouse receipts the liability of the corporation was created, and likewise the liability of the defendant Grace G. Hall, as a stockholder therein, became fixed.

The foregoing recited admissions show that all of the barley deposited in a Durham warehouse was deposited prior to November 4, 1930, and negotiable warehouse receipt issued therefor, likewise prior to November 4, 1930; also that the barley deposited in a Chico warehouse was all deposited during the month of April, 1931, several months preceding the repeal of section 322 of the Civil Code, which became effective on August 14, 1931.

[1] Reversing the order followed by the appellant and respondents in their briefs, we will first consider the second cause of action alleging liability as and for money had and received. The law seems to be very well settled that a plaintiff whose property has been converted or misappropriated may waive the tort and sue for the value of the property wrongfully converted.

In the case of Armstrong v. Kubo & Co., 88 Cal. App. 331, 263 P. 365, 367, this court had occasion to thoroughly consider the cases supporting the rule of law which we have just stated. The cases cited in that opinion are overwhelmingly to this effect, that, where one's goods are wrongfully taken and used by another, suit in assumpsit for their value, as for goods sold and delivered, may be maintained. We there quoted from the case of Corey v. Struve, 170 Cal. 170, 149 P. 48, as follows: "While the complaint does allege that the property was 'converted' by the defendants, we think that the action was in reality one in assumpsit for the value of the property sold, or perhaps it might be more aptly characterized as one in the nature of a suit for money had and received. In this state, one whose goods are wrongfully taken and used by another may sue in assumpsit for their value, as for goods sold and delivered." We also there cited authorities to the effect that in this state there is only one form of action, and that the action cannot be defeated because it may be improperly named.

The same question came before this court in the case of Glantz v. Freedman, 100 Cal. App. 611, 280 P. 704, where the value of certain grapes wrongfully taken was under discussion. We there said: "In such action, the remedy of an action for damages for breach of contract was not plaintiff's exclusive remedy, and he was entitled to sue for the value of the grapes as for goods sold and delivered." This court again cited a number of authorities showing that, where one's goods are wrongfully taken and used by another, he may waive the tort and sue in assumpsit for the value of the property. The authorities cited in the two cases decided by this court sufficiently support the right of the plaintiffs in this action to sue in assumpsit, if the action is not otherwise barred. The question is thus presented to us when the liability of a stockholder arises.

[2] In 6 California Jurisprudence, 1014, this question is thus answered: "The liability of a stockholder being one created by law, the statute runs three years after the creation of that liability, and not three years from the time the liability becomes enforceable against the corporation. That is, the liability of the stockholder accrues at the inception of the corporation's liability, and the statute commences to run from that date. Under the statute a 'liability' is created when a contract binding on it is made by the corporation, independently of whether the liability is absolute or contingent or of when the right to enforce it may accrue. * * * The effect of this rule, together with the fact that the liability of the corporation and that of the stockholder are separate and distinct with different periods of limitation in most cases, is that a stockholder may be liable for his proportion of a debt of the corporation even after the cause of action against the corporation itself is barred; and the statute of limitations may have run against the stockholders' liability before it has run against the corporation, or even before it has accrued against the corporation," etc. The liability, as we have seen, by the admissions of the parties was created by the negotiable warehouse receipts issued for the barley deposited in a Durham warehouse, was created as to one lot on May 3, 1930, and as to the second lot deposited in the same warehouse on May 15, 1930, and as stated in the case of Aronson & Co. v. Pearson, 199 Cal. 286, 249 P. 188, 51 A. L. R. 1380, the stockholder's liability is a direct and immediate primary obligation independent of any proceedings that might be commenced against the corporation. This case also takes up the right of one prosecuting an action against a stockholder to have an attachment issued and levied upon the property of a stockholder, notwithstanding that the obligation of the corporation has been secured by a mortgage.

It is further said in that case, quoting from the syllabus: "A stockholder's liability being separate and distinct from the liability of the corporation for its debts, and being based upon contract, a creditor in a suit against the stockholder on his statutory liability * * * may sue the stockholder and attach his property, notwithstanding the mortgage against the corporation."

[3] That the liability of a stockholder is primary and arises immediately upon the in-

curring of an obligation by the corporation is also sustained by the following cases: Chambers v. Farnham, 182 Cal. 191, 187 P. 732; Gardiner v. Royer, 167 Cal. 238, 139 P. 75; Coulter Dry Goods Co. v. Wentworth, 171 Cal. 500, 153 P. 939. In all these cases it is held that the liability of the stockholder arises coincident with the execution of the contract, whatever it may be, by the corporation, out of which the obligation arises.

[4] In the case of Kennedy v. California Savings Bank, 97 Cal. 93, 31 P. 846, 33 Am. St. Rep. 163, it was held that a stockholder's liability was within the scope of section 537 of the Code of Civil Procedure, and that an attachment would lie against the property of a stockholder.

The cases of Standard Auto Sales Co. v. Lehman, 43 Cal. App. 763, 186 P. 178, and Young v. Rosenbaum, 39 Cal. 646, likewise support the right of a creditor of a corporation to the issuance of an attachment against the property of a stockholder defendant in an action to enforce a stockholder's liability under the statute. The motion in the instant case to discharge the attachment is based upon the provisions of section 556 of the Code of Civil Procedure, to wit: That the attachment was improperly and irregularly issued.

The cases which we have cited herein show conclusively that neither of the alleged grounds for discharging the attachment is tenable.

No question was tendered to the trial court as to either count in the complaint being ambiguous, uncertain, or barred by the statute of limitations.

[5] The second count in the complaint alleges that, within two years preceding the filing of the complaint, the corporation become indebted to the plaintiff in the sum for which judgment was demanded. The liability of the defendant arose coincident with the obligation of the corporation. The demurrer, as we have stated, was only general; it did not raise the issue as to any uncertainty as to the time when the obligation arose, or any ambiguity as to the facts constituting the basis of the action; nor did the demurrer interposed by the defendant tender any issue as to whether the cause of action did or did not arise preceding the 4th day of November, 1930. The complaint was filed on the 11th day of May, 1931, from which it follows that the cause of action based upon the negotiable receipts issued on May 3 and May 15, 1930, was well within the limitations of the two years set forth in the complaint. These facts were all before the court at the time it entered its order sustaining the defendant's demurrer against both causes of action without leave to amend.

What we have stated above conclusively shows that the plaintiff had a cause of action against the defendant, even though the defendant's contention be admitted as good law that the repeal of section 3 of article 12 of the Constitution on November 4, 1930, took away the plaintiff's right of action as to the negotiable warehouse receipts issued and delivered to the plaintiff in April, 1931, and that in so doing the court committed reversible error. An examination of the record shows that there was nothing irregular or improper in the issuance of the attachment.

The record shows that the trial court reached the following conclusions:

(1) That a stockholder's liability was imposed by section 3 of article 12 of the Constitution, which was repealed on November 4, 1930, without a saving clause; (2) that the section of the Constitution was a self-operative provision, and that, when the section was repealed, all existing causes for this liability abated; (3) that section 322 of the Civil Code was repealed by necessary implication, and that no cause of action could arise under that section after the constitutional provision was repealed.

[6] Prior to the repeal, as we have stated, on November 4, 1930, section 3 of article 12 of the Constitution, so far as pertinent here, read as follows: "Each stockholder of a corporation or joint-stock association shall be individually and personally liable for such proportion of all its debts and liabilities contracted or incurred, during the time he was a stockholder, as the amount of stock or shares owned by him bears to the whole of the subscribed capital stock or shares of the corporation or association."

Section 322 of the Civil Code, until its repeal, which we have stated became effective August 14, 1931, read as follows: "Each stockholder of a corporation is individually and personally liable for such proportion of all its debts and liabilities contracted or incurred during the time he was a stockholder as the amount of stock or shares owned by him bears to the whole of the subscribed capital stock or shares of the corporation. Any creditor of the corporation may institute joint or several actions against any of its stockholders, for the proportion of his claim payable by each, and in such action the court must ascertain the proportion of the claim or debt for which each defendant is liable, and a several judgment must be rendered against each, in conformity therewith," etc.

On November 4, 1930, section 1 of article 12 of the Constitution was amended to read as follows: "Section 1. The Legislature shall have power, by general laws and not otherwise, to provide for the formation, organization and regulation of corporations and to prescribe their powers, rights, duties and liabilities and the powers, rights, duties and liabilities of their officers and stockholders or members. All laws now in force in this State concerning corporations and all laws that may be hereafter passed pursuant to this

section may be altered from time to time or repealed."

It will be observed that the amendment to section 1 of article 12 of the Constitution does not purport, either in express terms or by implication, to repeal any laws then existing relative to the powers, rights, duties, and liabilities of officers or stockholders or members of corporations. It may be admitted that the intent of the electorate in repealing section 3 of article 12, and amending section 1 of article 12 of the Constitution, intended to give the Legislature absolute or plenary power relative to prescribing the powers, rights, duties, and liabilities of officers and stockholders of corporations, but there is nothing in the amended section which tends to take away any legislative action theretofore taken fixing such rights, duties, liabilities, or obligations. Section 3 of article 12 of the Constitution as it stood prior to November 4, 1930, contained no machinery for the enforcement of the liabilities therein created; nor did the section as it then stood prohibit the Legislature from fixing the same powers, duties, and liabilities, and then provide a procedure for the enforcement thereof.

Section 1 of article 12 of the Constitution, prior to November 4, 1930, read as follows: "Corporations may be formed under general laws, but shall not be created by special act. All laws now in force in the state concerning corporations, and all laws that may be hereafter passed pursuant to this section, may be altered from time to time or repealed." There is nothing in section 1 as it read prior to its repeal on November 4, 1930, which prohibited the Legislature from passing a general law which included in its provisions the same terms as to duties and liabilities of officers and stockholders mentioned in section 3 of article 12 of the Constitution as it then read. The fact that the amendment to section 1 of article 12 of the Constitution gave the Legislature plenary power to legislate as to the rights, duties, obligations, and liabilities, etc., of officers and stockholders of corporations, does not conflict with section 322 of the Civil Code setting forth those rights, duties, and liabilities and the method of enforcement prior to the repeal of the section which became effective August 14, 1931. Under the provisions of section 1 of article 12 of the Constitution as amended, the Legislature might at any session re-enact section 322 of the Civil Code, and, if the power to re-enact section 322 of the Civil Code is given under the provisions of section 1 of article 12 of the Constitution as amended, the conclusion must necessarily follow that there was no conflict between the amended section of the Constitution and section 322 of the Civil Code.

In Gardiner v. Bank of Napa, 160 Cal. 577, 117 P. 667, 670, the court had before it the question of a stockholder's liability founded upon section 322 of the Civil Code as it existed prior to the adoption of the Constitution of 1879 and section 3 of article 12 of said Constitution.

In considering the question of an alleged conflict between section 3 of article 12 of the Constitution and section 322 of the Civil Code, the court said: "It is urged that the Constitution on this subject is not self-executing, but that it requires legislation to give it effect; that section 322 of the Civil Code is inconsistent with section 3 of article 12 of the Constitution of 1879, and is therefore, under section 1, art. 22, repealed by it, and, since there has been no other legislation on the subject, since the adoption of the new Constitution, to give the constitutional provision effect, that this right of creditors to enforce the personal liability of stockholders has lapsed. Section 1, art. 22, referred to, provides 'that all laws in force at the adoption of this Constitution, not inconsistent therewith, shall remain in full force and effect until altered or repealed by the Legislature.' If, therefore, the provisions of section 322, quoted, are not inconsistent with the provisions of article 12, § 3, they are in express terms, continued in force. As we have already seen, they are clearly not inconsistent, but in all respects in harmony. Under both, the stockholder is liable in the aggregate for his proportion of all debts and liabilities of the corporation contracted while he was a stockholder, and no more. The Constitution does not provide how the liability shall be enforced, whether against each stockholder separately, or all jointly, while the statute goes further, and does so provide for its enforcement, and that provision is not inconsistent with the provision of the Constitution, but in the end it reaches the same result. * * * Were section 322 to be formally re-enacted now by the Legislature, would anybody pretend that it would be inconsistent with the constitutional provision now in question in such sense as to render it unconstitutional and void? * * * If it would not be inconsistent, and therefore unconstitutional and void, if formally re-enacted, it cannot be inconsistent, and therefore repealed now."

Section 31 of article 4 of the Constitution of 1849 provided as follows: "Corporations may be formed under general laws, but shall not be created by special act except for municipal purposes. All general laws and special acts passed pursuant to this section may be altered from time to time, or repealed."

Section 36 of the same article read: "Each stockholder of a corporation or joint-stock association shall be individually and personally liable for his proportion of all its debts and liabilities."

Section 322 of the Civil Code was enacted March 21, 1872. Section 3 of article 12 of the Constitution of 1879, so far as applicable

here, read as follows: "Each stockholder of a corporation, or joint-stock association, shall be individually and personally liable for such proportion of all its debts and liabilities contracted or incurred, during the time he was a stockholder, as the amount of stock or shares owned by him bears to the whole of the subscribed capital stock or shares of the corporation or association."

Section 1 of article 22 of the Constitution of 1879 is as follows: "That all laws in force at the adoption of this Constitution, not inconsistent therewith, shall remain in full force and effect until altered or repealed by the Legislature; and all rights, actions, prosecutions, claims and contracts of the State, counties, individuals, bodies corporate, not inconsistent therewith, shall continue to be as valid as if this Constitution had not been adopted," etc.

Following a consideration of the different sections of the Constitution of 1849 and 1879, the court, in Gardiner v. Bank of Napa, supra, held that there was no conflict between section 3 of article 12 of the Constitution of 1879 and the provisions of section 322 of the Civil Code enacted in 1872. The wording of section 322 of the Civil Code, in so far as it fixes a liability, is identical with the wording of section 3 of article 12 as it read before being repealed on November 4, 1930. The provisions of the Code then go further and provide, as we have stated, the machinery for enforcing that liability.

It may be further stated that section 1 of article 12 of the Constitution, as amended on November 4, 1930, instead of restricting the powers of the Legislature, really released the Legislature from all constitutional shackles relative to prescribing the powers, rights, duties, and liabilities of corporations, and the rights, duties, and liabilities of officers and stockholders of corporations. In other words, it left the whole matter to the Legislature with plenary powers to fix by statute, all and singular, such rights, powers, duties, and liabilities. Such an amendment and such a liberation of the powers of the Legislature certainly cannot be held to be inconsistent with the exercise by the Legislature of its constitutional powers theretofore existing to enact general laws regulating corporations, etc. That the Legislature has seen fit to repeal section 322 of the Civil Code does not support the conclusion that the section was not in full force and effect until the date of its repeal. The second paragraph of the general corporation law, approved June 12, 1931 (St. 1931, p. 1762, Deering's Civ. Code, p. 101), reads: "The repeal effected by this act shall not affect the existence of any corporation formed, nor impair or take away any existing cause of action against any corporation, its stockholders, directors or officers, for any liability incurred prior to the time when this act shall go into effect."

[7-9] In 12 C. J., p. 725, § 97, we find the following: "While a new constitution is by its very nature intended to supersede a prior constitution, it is not intended to supersede the entire body of the statutory law. To the extent, therefore, that existing statutes are not expressly or impliedly repealed by the constitution, they remain in full force and effect." Of course, if the amended Constitution is inconsistent, a repeal by implication necessarily follows, although no mention is made of the inconsistent statute. However, the law is well settled that repeals by implication are not favored, and, if the statute can stand, it will be given full force and effect until expressly repealed by the Legislature.

[10] Again, in construing a constitutional provision, consideration may be given to the intent of the Legislature in adopting an amendment thereto. This intention, however, cannot prevail as against the express language of the amendment. Section 1 of article 12 of the Constitution, as amended in 1930, expresses in its language the full intent of the electorate, and enforces the following conclusion, to wit: That the whole subject of the powers, duties, liabilities, etc., of corporations and stockholders is placed in the hands of the Legislature without any restrictive provisions whatsoever, and embodies no intent to repeal a single section of the Civil Code or any statutory law theretofore existing relative to corporations, but gives the Legislature full power to amend, alter, or repeal any provision of the Code or statutory enactment governing corporations or fixing liabilities thereof, or the duties and liabilities of officers and stockholders.

While the cases of Western Pacific v. Godfrey, 166 Cal. 346, 136 P. 284, Ann. Cas. 1915B, 825, and Wood v. Hamaguchi, 207 Cal. 79, 277 P. 113, 63 A. L. R. 861, and other cases cited by the respondent, speak of the liability of stockholders having its inception in the Constitution, in neither of the cases which we have just mentioned nor any of the cases called to our attention was the power of the Legislature, by enacting section 322 of the Civil Code, fixing likewise the liability of stockholders and providing for the enforcement of that liability, called in question or in anywise limited. Under the sections of the Constitution which we have quoted the Legislature had the general power to enact section 322 of the Civil Code without the aid of section 3 of article 12 of the Constitution. The power of the Legislature, instead of being given by that section, was in fact limited thereby. Such limitation is really the basis of the decision in Wood v. Hamaguchi, supra.

We do not need to enter into a discussion of the case of Martello v. Superior Court, 202 Cal. 400, 261 P. 476, as a reference thereto shows that it is readily distinguishable from the circumstances presented here.

That the amendment to section 1 of article 12 of the Constitution was a liberation and not a limitation of the powers of the Legislature, and so intended by the electorate, appears from the following portion of the amendment: "For the purpose of removing existing limitations upon the power granted by section 1 of article twelve of the Constitution, amended as herein proposed, sections 2, 3, 9, 11, 12 and 14 of article twelve of the Constitution are hereby repealed," submitted at the same time and ratified by the People November 4, 1930 (see St. 1929, p. 2239).

That the Legislature, in adopting the Corporation Code (Deering's Code), p. 101, gave the interpretation to section 322 of the Civil Code as it then stood, which we have herein given, appears from the fact that it expressly exempted from the repealing portions of the general corporation law any rights of actions based on the liability of stockholders, etc., existing at the time that the General Corporation Law should go into effect. No other interpretation can be given than that the Legislature had in mind that stockholder's liabilities existed just as the Civil Code provided prior to the adoption of the General Corporation Law, and that such liabilities, etc., rights of actions, and causes of action were not intended to be limited, modified, or taken away.

[11] The contention on the part of the respondents that the plaintiff had no right to the issuance of attachment by reason of having filed a claim in the bankruptcy court, and also by reason of a certain bond covering the liability of warehousemen, constituted a security precluding the issuance of attachment herein, is shown by the authorities which we have cited to be untenable.

[12] That the constitutional amendment known as "Section 1 of article XII" did not destroy existing causes of action is definitely settled in the case of Coombes v. Getz, 285 U. S. 434, 52 S. Ct. 435, 76 L. Ed. 866, reversing the decision of the Supreme Court of this state, Coombes v. Franklin, 213 Cal. 164, 1 P.(2d) 992, 4 P.(2d) 157, the liability of directors of corporations in that case being held contractual. The same rule applies to the liability of stockholders being contractual; likewise the contractual obligations based upon section 322 of the Civil Code could not be modified or changed, as such rights and liabilities existed at the date of the inception of the contracts and the creation of the liabilities herein referred to, all of which existed prior to August 14, 1931. These questions being definitely settled by the decision of the Supreme Court of the United States, supra, no further discussion thereof on our part would add anything to the established law. See, also, concurring opinion of Presiding Justice Conrey in Regan v. Albin (Cal. App.) 16 P.(2d) 1029.

Being of the opinion that the complaint stated a cause of action by reason of the law hereinbefore set forth, it follows that the court was in error in sustaining the defendants' demurrer thereto. By reason of the fact that the complaint is somewhat uncertain in that the dates when the several warehouse certificates were issued are not set forth in the complaint, an amendment thereto should have been allowed. It also appearing that the attachment was neither improperly nor irregularly issued, the order discharging the same was erroneous.

It is therefore ordered: (1) That the judgment of dismissal in this action be reversed; (2) that the order sustaining the defendant's demurrer to the plaintiff's complaint, without leave to amend, be reversed, and that the plaintiff be allowed to amend if so advised, in accordance with the facts disclosed and presented to the trial court upon the motion to discharge the attachment; (3) it is further ordered that the order of the trial court dismissing and setting aside the attachment be reversed.

We concur: PULLEN, P. J.; R. L. THOMPSON, J.

131 Cal.App. 401

STEVENSON v. PANTALEONE et al.

Civ. 4734.

District Court of Appeal, Third District, California.

April 25, 1933.

Hearing Denied by Supreme Court June 23, 1933.

1. Frauds, statute of ⇐148(2).

Antenuptial agreement between husband and wife to make each other beneficiaries in their life policies *held* presumed to be in writing, as respects sufficiency of complaint, though not alleged to be written (Civ. Code, § 1624, subd. 3; Code Civ. Proc. § 1973, subd. 3).

2. Frauds, statute of ⇐129(1).

Consummation of marriage and husband's naming of wife as beneficiary in his life policy *held* insufficient part performance of oral antenuptial agreement of husband and wife to marry and make each other beneficiaries in their life policies to remove bar of statute of frauds (Civ. Code, § 1624, subd. 3; Code Civ. Proc. § 1973, subd. 3).

Appeal from Superior Court, Los Angeles County; Warren V. Tryon, Judge.

Action by H. J. Stevenson against Ethel Thelma Hendrickson Pantaleone and another. From a judgment for defendants, plaintiff appeals.

Affirmed.

William Ellis Lady, of Los Angeles, for appellant.

Meserve, Mumper, Hughes & Robertson, of Los Angeles (Timon E. Owens, of Los Angeles, of counsel), for respondents.

BURROUGHS, Justice pro tem., delivered the opinion of the court.

This cause was tried upon the second amended complaint and the answer thereto. A number of questions have been presented, but we do not deem it necessary to discuss all of them in arriving at a determination of the case, owing to the view we have taken of the law applicable to the points herein discussed. Two causes of action are stated in the complaint. One based upon a constructive trust alleged to have accrued through the violation of an agreement entered into between plaintiff and one Edith M. Hendrickson, by which they mutually agreed to marry one another, and immediately thereafter to make each other the beneficiary of life insurance policies which each held on his or her life. It is alleged therein that the marriage was consummated; that plaintiff made his wife the beneficiary under the policies held on his life, but that his wife failed to name him as the beneficiary in the policy issued on her life, and that the two defendants are the named beneficiaries in the policy issued on her life; that upon the death of Edith M. Hendrickson Stevenson they collected the amount due on the policy, and now refuse to account for the same to this plaintiff.

It is also alleged that plaintiff believed the said promise of his intended wife, and relied thereon, and, if said promise had not been made, he would not have entered into the marriage relation as aforesaid; that his said intended wife never intended to change the beneficiaries named in the policy held on her life.

The other cause of action is for money had and received. The answer of the defendants, in appropriate language, denied the existence of the alleged trust, or that any money was due from them, or either of them, to the plaintiff. The cause was tried by the court; each party offered evidence on the issues involved; and the court reserved a ruling as to its admissibility. Briefs were filed by the respective parties, and thereafter the court made the following order which was entered in the minutes of the court: "The objection heretofore made by the defendants to the introduction of evidence in the above entitled case is hereby sustained, and judgment is hereby ordered for the defendants." Thereafter the court made its findings of fact, conclusions of law, and judgment in conformity with said order, and the plaintiff has appealed from the judgment.

[1] The record has been brought up under the alternative method. The objections made by the defendants, and sustained, went to all of the evidence offered by the plaintiff, and therefore the allegations of the complaint having been denied by the answer, were without evidentiary support, and no other judgment than the one entered was possible. It is not assigned or claimed that the complaint does not state facts sufficient to constitute a cause of action. Although the agreement between the parties is not alleged to be in writing, it is a legal presumption that it is. Freitas v. Freitas, 31 Cal. App. 16, 159 P. 611. It is claimed, however, that the cause of action for money had and received cannot be maintained upon the evidence of a trust, but, under the view we take of the case, such subject becomes immaterial as to both causes of action.

[2] The vital question to be determined is this: Conceding that the excluded evidence established an agreement, it is equally clear therefrom that the agreement was oral. Such being the case, was there, as claimed by the appellant, such a performance of its terms as would raise the bar of the statute of frauds?

One of the objections upon which the offered testimony was excluded was based upon subdivision 3 of section 1624 of the Civil Code, which section, so far as material, reads as follows: "The following contracts are invalid, unless the same, or some note or memorandum thereof, is in writing and subscribed by the party to be charged, or by his agent: * * * 3. An agreement made upon consideration of marriage other than a mutual promise to marry. * * *"

The objection was also predicated on section 1973 of the Code of Civil Procedure, and subdivision 3 thereof, which is in substance the same as section 1624, supra. Although there was no contract in writing, nor any note or memorandum thereof in writing subscribed by the parties, it is claimed by appellant that the rejected evidence discloses that the contract had been fully executed by him, and partly by her, and therefore the statute of frauds has no application here. This contention is stated in the appellant's opening brief as follows: "Both parties to said agreement performed some portion thereof. Plaintiff performed each and every provision thereof on his part to be performed, and the only provision that was not performed was the promise on the part of said Edith M. Hendrickson to change the beneficiary or beneficiaries in her policy of insurance from defendants to that of plaintiff, and this action is the result thereof." The excluded evidence supports the following conclusions: That they agreed to get married; that they agreed to change the beneficiaries from those named in the policies, in favor of each other; that

the premiums on the policies were to be paid from their community earnings; that no premiums were paid on the policy of insurance issued on the life of plaintiff's wife on account of sickness overtaking her, and, while she was sick the premiums were taken care of by a provision in the policy of insurance; that plaintiff kept up the premiums on the policies on his life; that, but for such antenuptial agreement with her and its anticipated fulfillment, the plaintiff would not have consummated the marriage and performed the agreement on his part; that they were married; that the plaintiff thereafter changed the beneficiary named in the insurance policies carried on his life to his wife; that his wife did not change the beneficiaries named in her policy to the name of the plaintiff; that she had stated to her beneficiaries that she did not intend to make a change; that she left her policy in the custody of the plaintiff, and he knew that she had not made the change.

Do the foregoing facts constitute part performance sufficient to take the case out of the statute of frauds? If so, then the court erred in excluding the testimony; if not, then the order of exclusion was properly made, for there can be no question that the contract was one required to be in writing.

In Hughes v. Hughes, 49 Cal. App. 206, 193 P. 144, the plea was made that the defendant, in consideration of the plaintiff marrying him, agreed to deed plaintiff certain property; make a will bequeathing to her all of his property at his death, and perform certain other acts. The marriage was consummated, and the will was made, but defendant refused to convey the property. The above case is authority for the propositions that marriage does not take the case out of the statute of frauds; that the execution of the will was not sufficient part performance, and the oral contract could not be enforced because not executed in conformity with subdivision 3 of section 1624 of the Civil Code. Also that a court of equity will not enforce an oral antenuptial agreement to convey real and personal property after the marriage, unless it is made to appear that the promisor, by some fraud or deceit, prevented the oral agreement being reduced to writing.

In Peek v. Peek, 77 Cal. 106, 19 P. 227, 1 L. R. A. 185, 11 Am. St. Rep. 244, it is held that marriage is not of itself part performance of a parol contract to convey real property in consideration of marriage, sufficient to take the case out of the statute of frauds.

In Gould v. Mansfield, 103 Mass. 408, 4 Am. Rep. 573, which is cited with approval in Hughes v. Hughes, supra, is involved the principle applicable to the case at bar. The facts alleged in the complaint in that action, to which a demurrer was sustained by the court, was to the effect that the plaintiff and one Nancy Gould agreed by parol that each of them should make a will in the other's favor, and give and devise thereby all her property, both real and personal, to the other, and that neither of them was to make any different will at any time, or to dispose of her property in any manner different therefrom. Afterwards Nancy Gould made another will in favor of other parties, and died. The court said: "There has been no part performance which amounts to anything. The plaintiff says she made a will devising her property to Nancy. But such an instrument was ambulatory, and might have been revoked by various acts, or by implication of law from subsequent changes in the condition or circumstances of the testator. * * * The plaintiff's property is still, as it has always been, in her own hands, and subject to her own control." See, also, In re Edwall's Estate, 75 Wash. 391, 134 P. 1041; McClanahan v. McClanahan, 77 Wash. 138, 137 P. 479, Ann. Cas. 1915A, 461.

In the case at bar the right to change the beneficiary named in the several insurance policies at all times rested in the insured, and, as said in the case last cited, concerning the power to make a will, the right to change the will was ambulatory, and the same right exists to change the beneficiary in a policy of insurance, and not constitute a sufficient part performance to take the case out of the statute of frauds.

In Browne, Stat. Fr., §§ 452–454; Williams v. Morris, 95 U. S. 444, 24 L. Ed. 360, the rule is laid down that it is not enough that the act of part performance is evidence of some agreement; but it must be unequivocal and satisfactory evidence of the particular agreement itself. To the same effect is Swash v. Sharpstein, 14 Wash. 426, 44 P. 862, 32 L. R. A. 796; Trout v. Ogilvie, 41 Cal. App. 167, 182 P. 333; 58 C. J., p. 994, § 190; 12 Cal. Jur. p. 898, § 60.

In Henry v. Henry, 27 Ohio St. 121; Finch v. Finch, 10 Ohio St. 501, it is held that, where a wife, in consideration of marriage, orally agreed to convey real property to her husband, the marriage of the parties, moving onto the land and making valuable improvements thereon, were not sufficient acts of part performance to take the case out of the statute of frauds; such acts being as much referable to his character as a husband as under the oral antenuptial agreement. In Trout v. Ogilvie, 41 Cal. App. 167–172, 182 P. 333, 335, it is said: "To take a contract out of the operation of the statute of frauds, however, the acts relied upon must be unequivocally referable to the contract. Acts which, though in truth done in performance of a contract, admit of an explanation without supposing a contract, are not, in general, such acts of part performance as will take the case out of the operation of the statute. 36 Cyc. 645. The acts relied upon must clearly appear to have been done in pursuance of the contract, and to result from the contract and

not from some other relation." (See cases there cited.)

In Baker v. Bouchard, 122 Cal. App. 708, 10 P.(2d) 468, the decision of the court, so far as material to the case at bar, is epitomized in the syllabus as follows: "In an action to enforce a trust in real property alleged to have arisen by virtue of an oral agreement between plaintiff and defendant's intestate whereby the decedent agreed, in consideration of plaintiff taking up her residence in decedent's home and providing and caring for him during his declining years, that he would make a will devising to her the real property in question, which oral agreement plaintiff claimed she fully performed, an attempted will by decedent devising said property to plaintiff which did not refer to the alleged oral agreement and which was void for want of compliance with statutory provisions governing wills, did not constitute a sufficient memorandum of the alleged oral agreement to comply with the requirement of section 1624 of the Civil Code and section 1973 of the Code of Civil Procedure. In such action, the fact that plaintiff fully performed her part of the alleged oral agreement did not take the contract out of the operation of the statute of frauds."

In O'Brien v. O'Brien, 197 Cal. 577–586, 241 P. 861, it is held that neither subsequent marriage nor the execution of a will pursuant to an oral antenuptial agreement to make a will is such part performance as will relieve the contract from the operation of the statute of frauds.

In the case before us, the change of the beneficiary by the plaintiff may be attributable to his character of husband, and nothing else. So far as the wife is concerned, she did no act toward performance.

In Luders v. Security Trust, etc., Bank, 121 Cal. App. 408, 9 P.(2d) 271, 272, in an action to enforce a trust based on an alleged oral agreement, it is said: "Nor does this case fall within the rule that the statute of frauds cannot be invoked in case of a completed oral contract (Schultz v. Noble, 77 Cal. 79, 19 P. 182; Colon v. Tosetti, 14 Cal. App. 693, 113 P. 365, 366), for the contract now sued upon was not completed. The reason that the contract is now in court is because the decedent did not perform his part of the alleged agreement. * * *"

The case of Freitas v. Freitas, 31 Cal. App. 16, 159 P. 611, was an action where the plaintiff and her prospective husband entered into an agreement whereby he promised her that, if she would marry him, he would make her the beneficiary under a life insurance policy. They were married, and thereafter he made his wife such beneficiary and delivered the policy to her. Later he stole the policy from her and changed the beneficiaries, who are the defendants in this action. It was held that the oral contract, having been fully executed, was enforceable against the defendants. It has always been held that the statute of frauds has no application to fully executed contracts. Bates v. Babcock, 95 Cal. 479, 30 P. 605, 16 L. R. A. 745, 29 Am. St. Rep. 133; 23 Cal. Jur. p. 465, § 33.

From the foregoing review of the evidence offered by the plaintiff, it is clear that Edith M. Hendrickson did nothing that could be construed as an act of part performance of the oral antenuptial agreement; even the act of marriage did not constitute part performance. The only act performed by plaintiff which could be attributable to the said agreement was the change in the beneficiary in the policies of insurance issued on his life, and, under the above-cited authorities, such act was insufficient to raise the bar of the statute. Such being the case, the ruling of the court sustaining the objections to the offered evidence was correct, because the agreement was not in writing and no facts were shown sufficient to support its enforcement as an executed oral agreement. The other questions raised, therefore, become immaterial.

The judgment is affirmed.

We concur: PLUMMER, Acting P. J.; R. L. THOMPSON, J.

131 Cal.App. 473

TROZERA et al. v. McDONELL et al.

Civ. 671.

District Court of Appeal, Fourth District, California.

April 27, 1933.

1. Quieting title ⇐37(1).

In action to quiet title, answer that defendants claimed interest in realty involved, denial that claims were without right and allegation that defendants were fee-simple owners thereof *held* to raise issue and make necessary evidence to support findings for plaintiffs.

2. Pleading ⇐114.

Traverse need not be expressed negatively; any averment in answer contrary to what is alleged in complaint being equivalent to denial.

3. Pleading ⇐114.

Generally, any allegation in answer which, if true, necessarily shows that allegation of complaint as to same matter is untrue, is good "traverse," and sufficient as "denial."

[Ed. Note.—For other definitions of "Denial" and "Traverse," see Words and Phrases.]

4. Taxation ⇐734(9).

Failure to state penalties and costs separately in notice of sale invalidated tax deed based thereon.

5. Taxation ⇐734(7, 9).

Where notice of sale and delinquent tax list omitted word "cost," tax deed based thereon was void.

6. Stipulations ⇐14(1).

Stipulation that title to realty in controversy, unless divested by tax deeds, was in defendants, precluded claim of adverse possession, where it was held that tax deed was void.

Appeal from Superior Court, Riverside County; Pat R. Parker, Judge.

Action by Rosario Trozera and another against Alexander Franklin McDonell and another. From a judgment for plaintiffs, defendants appeal.

Reversed.

John F. Poole, of Los Angeles, for appellants.

David W. Richards and Donald P. Mayhew, both of Los Angeles, for respondents.

VAN ZANTE, Justice pro tem.

This is an action to quiet title to certain real property in Riverside county. Judgment was rendered in favor of plaintiffs, and defendants have brought this appeal on a bill of exceptions.

Defendants contend that the judgment should be reversed on the ground that the tax proceedings had were defective, and therefore the deed based thereon is invalid. Plaintiffs contend that the defendants in their answer to their complaint have not raised an issue, and that therefore it is immaterial whether there was sufficient, or any, evidence to support the findings. We cannot agree with this contention. The particular portion of the complaint to which they refer reads as follows: "That plaintiffs are now and their predecessors in interest have been for more than five years last past the sole and exclusive owners in fee and in possession of all that certain real property situate in the county of Riverside, state of California, and particularly described as follows, to-wit: [Then follows a particular description of the property involved.]

The particular portion of the answer to which plaintiffs refer reads as follows: "Deny that plaintiffs are now or their predecessors in interest have been for more than five years last past, or at all, the sole or exclusive owners in fee or in possession of all that certain real property situate in the county of Riverside, state of California, and particularly as follows, to-wit: [Then follows the same description of the same property.] Evidently plaintiffs have overlooked another portion of the answer, which reads as follows: "Admit that these defendants and each of them claim an interest and estate in or to said real property hereinabove described adverse to the plaintiff, but denies that said claims are and each of them is without right. Deny that these defendants have no right, title, interest or estate in or to the lands hereinabove described, or any part thereof. Allege that these defendants are the fee simple owners thereof."

[1-3] Even though we concede that the first portion of defendants' answer quoted is too literal and evasive, the latter portion quoted is certainly sufficient to raise an issue, and consequently it would require evidence to support the findings. "But it is not essential that a traverse should be expressed in negative words. An averment in the answer of the contrary of what is alleged in the complaint is equivalent to a denial (Perkins v. Brock, 80 Cal. 320 [22 P. 194]), and the averments in the answer here are, in our opinion, equivalent to a denial of the execution of the lease." Stetson v. Briggs, 114 Cal. 511, at page 515, 46 P. 603, 604. "It may be said, generally, that any allegation in an answer which, if found to be true, necessarily shows that the allegation of the complaint as to the same matter is untrue, is a good traverse, and sufficient as a denial." Burris v. People's Ditch Co., 104 Cal. 248, at page 253, 37 P. 922, 923. See, also, Watterson v. Owens River Canal Co., 167 Cal. 370, 139 P. 804.

We find the following stipulation in the bill of exceptions: "It was thereupon stipulated by plaintiffs and defendants that the fee title unless divested by the aforesaid tax deeds and proceedings were in the defendants Judson and McDonell as to their respective pieces of property." Defendants contend that the notice of sale is defective as to the Judson property, in that the penalties and costs are not separately stated. The Judson property consists of three parcels described in the notice of sale. The wording as to each parcel (except the description and amount) is the same. The notice of sale as to the first parcel reads in part as follows:

Taxes of 1905	$.70
Penalties and costs on delinquent roll	.59
Interest at 7% per annum from July 1, 1906	.83
	$2.12
Total Taxes	$.70
Total Penalties on Delinquency and Costs	.59
Total Interest	.83
Advertising this notice	13.33

[4] We think that, by reason of the fact that the penalties and costs are not separately stated, the tax deed based thereon is void as to each of the three parcels. "In the notice of sale under section 3897, Political Code, the penalties and costs were commingled in one item amounting to $1.12. The Code requires, among other things, that the notice 'shall also contain a detailed statement of all the delinquent taxes, penalties, costs, interest, and expenses up to the date of such sale.' Respondents contend that it was necessary to state each of these items separately and that the penalties and costs could no more be embraced in one item than could all of the items have been so stated. * * * It is true the owners could readily have ascertained the amount of these items, though stated in one amount. So might it be said they could have figured out all the items separately, had they been grouped as one. But the law required a 'detailed statement of all the delinquent taxes, penalties, interest, and expenses.' It was as necessary to state the penalties and costs separately as it was to state all the delinquent taxes or of interest or of advertising the notice. It was said, in Campbell v. Canty, 12 Cal. App. Dec. 373: 'Whatever the provision is, it must be complied with strictly; this is one of the most important of all safeguards that have been deemed necessary to protect the interests of persons taxed and nothing can be substituted for it or secure the failure to give it.' It was also said in that case, quoting from Black on Tax Titles, §§ 205–207: 'It is held in all of the states that the giving of notice in the manner and form prescribed by the statute is an essential jurisdictional fact.' Not only is the giving of notice of the sale essential, but it must be such notice as the statute prescribes." Cordano v. Kelsey, 28 Cal. App. 9, at page 19, 151 P. 391, 395, 398. See, also, Gottstein v. Kelly, 206 Cal. 742, 276 P. 347.

Defendants also contend that the notice of sale as to the McDonell property is defective, in that the word "cost" is omitted from the delinquent tax list. This tax list reads in part as follows:

"Delinquent Tax List.

No.		Total Tax and Penalties.
18903	Baker Hardware Co. S. 32 acres of lot 4, less 2 acres to school, section 7, twp. 2 south, range 3 west, 30 acres....	$ 3.07"

[5] We think that the tax deed is void by reason of this omission. "In the case of Bussenius v. Warden, 71 Cal. App. 717, 722, 236 P. 371, it was held that the requirement of section 3764 of the Political Code, as amended in 1913 (Stats. 1913, p. 556), that the delinquent list to be published by the tax collector must contain the names of the persons and a description of the property delinquent, and 'the amount of taxes, penalties, and costs due,' is not complied with where the tax list sets forth the amount due as taxes and costs, but fails to set forth the amount due for penalties; and that a subsequent tax deed predicated upon such defective notice is void. To the same effect is Snodgrass v. Errengy, 86 Cal. App. 664, 261 P. 497. The word 'penalty' is not synonymous with the word 'percentage,' from which it would follow that, if the principle announced in the last two cited cases is correct, the notice of sale was insufficient, with the ultimate result that the deed upon which appellant relies was of no validity, and conveyed no title to him. Since plaintiff was legally possessed of no title to the property in question, he is in no position to complain of the relief which was granted to defendant in quieting his title thereto. In the case of Canty v. Staley, 162 Cal. 379, 123 P. 252, 255 may be found the statement that: 'Parties who purchase property at tax sales acquire the title to the property, if all the proceedings for the levy of the taxes and the sale are regular and in strict conformity to law; but, if not so, they acquire no rights to the property which either a court of law or equity can enforce' (citing authorities)." Gottstein v. Kelly, 206 Cal. 742, at page 748, 276 P. 347, 350.

Counsel have called our attention to several other irregularities in the tax proceedings, but we deem it unnecessary to consider these any further.

[6] Finally, plaintiffs claim ownership of the property involved herein through adverse possession. We think plaintiffs are estopped by the above stipulation from claiming adverse possession. Furthermore, there is no evidence in the record to show any possession or occupancy of the property on the part of the plaintiffs.

Judgment reversed.

We concur: BARNARD, P. J.; MARKS, J.

218 Cal. 106

MOULTON, Director of Agriculture, v. WILLIAMS FRUIT CORPORATION et al.

S. F. 14814.

Supreme Court of California.

May 1, 1933.

Rehearing Denied May 29, 1933.

1. Factors ⇐2½.

Contract whereby growers shipped grapes on consignment to licensed produce dealer which guaranteed minimum price to growers *held* contract of "consignment" and not of "sale," and surety on dealer's bond was liable for guaranty (St. 1927, p. 1813, § 1).

Produce Dealers' Act (St. 1927, p. 1813, § 1), defines a produce dealer as one who shall receive produce for sale on commission or contract with the producer thereof for farm products to be sold by him on commission or accept in trust from the producer thereof for the purpose of resale, or who shall in any way handle for the account of or as an agent of the producer thereof any kind of farm products, and such definition is broad enough to authorize such contract of consignment.

[Ed. Note.—For other definitions of "Consignment" and "Sale," see Words and Phrases]

2. Factors ⇐2½.

That licensed produce dealer was not guilty of fraud, deceit, or negligence in marketing grapes for which it did not realize sufficient return to cover minimum price guaranteed to growers under consignment contracts *held* not to bar recovery on guaranty on dealer's bond to faithfully handle grapes (St. 1927, pp. 1813–1816, 1818, §§ 1, 5, 8, 9, 12).

THOMPSON, J., dissenting.

In Bank.

Appeal from Superior Court, City and County of San Francisco; C. J. Goodell, Judge.

Suit by Dudley Moulton, as Director of Agriculture of the State, against the Williams Fruit Corporation and the American Surety Company of New York. From a judgment in favor of plaintiff, the last-named defendant appeals.

Affirmed.

Prior opinion, 14 P.(2d) 88.

Rehearing denied; THOMPSON, J., dissenting.

Joseph G. De Forest, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Frank English, Deputy. Atty. Gen. (C. J. Carey, of San Francisco, of counsel), for respondent.

R. P. Wisecarver, Redman, Alexander & Bacon, Hartley F. Peart, and Horace W. B. Smith, all of San Francisco, amici curiæ.

PRESTON, Justice.

This appeal arises from a judgment entered November 23, 1931, for $5,000 in favor of plaintiff and against defendants, based upon a written stipulation of facts, having certain exemplars thereto attached.

Plaintiff is the director of agriculture of the state of California, and acts in the premises in behalf of five certain grape growers of the state who claim to be creditors of defendant fruit corporation. This corporation defaulted, and defendant surety corporation alone questions the judgment.

The facts are that defendant fruit corporation, during the grape season of 1928, entered into separate written contracts with each of said growers to handle on consignment all their grape crops for said season. The contracts were of the same general form; an illustration of a portion of one of them being as follows: "Contract. Parties: Williams Fruit Corporation, Shipper, Vida M. Martin, Grower. It is mutually agreed: The Grower hereby places on consignment with shipper the entire crop of muscats (season of 1928) consisting of 16 acres, more or less, grown * * * at or near Selma * * * delivery point, shippers' packing house * * * Selma * * * $15.00 per ton guarantee. * * *"

The fruit corporation in due course re-

ceived the grape crops and marketed them admittedly to the best advantage, but it failed to realize a net return sufficient to cover the guaranty specified, and in so doing, it is admitted that the fruit corporation was guilty of no negligence, deceit, or bad faith in the matter, but on the contrary secured the best price the market afforded and did not even deduct its commissions, but returned the full avails to the growers. The growers, however, standing on their above-mentioned guaranty, claimed to be creditors in an amount aggregating more than $5,000; they complained to the director of agriculture, who made unsuccessful demands upon defendants, and this suit followed.

The action arises under the statutes of 1927, chapter 860 (page 1812 et seq.), in effect July 31, 1927. Under this act defendant fruit corporation applied for and obtained a license as a "produce dealer" and gave its bond in the sum of $5,000 as required by the act. Appellant became the surety thereon. The obligation of the bond followed the language of the act, and, so far as here material, reads: "Now, Therefore, If said principal shall well and truly comply with the provisions of the act and shall faithfully and honestly handle farm products as such licensed produce dealer, until January 1, 1929, in accordance with the terms of said act and any and all amendments thereto, then this obligation is to be void; otherwise to remain in full force and effect. * * *"

The question we must solve is: "Does the bond cover the cause of action here set forth? Plaintiff contends that the act expressly covers it, in that the growers became creditors of the fruit corporation to the extent of $15 per ton for their grapes, and, by not returning this sum to them, the corporation expressly violated the provisions of the act which required it to faithfully account to them for the net proceeds of sale of the crops. Plaintiff relies specifically on the provisions of section 5 of said act (page 1814) that "said bond shall be conditioned upon compliance with the provisions of the act and upon the faithful and honest handling of farm products in accordance with the terms of this act. * * * In case of failure by a produce dealer to pay consignor creditors for farm produce received from said consignors to be sold, the state director of agriculture shall proceed forthwith to ascertain the names * * * of all consignor creditors, * * * together with the amounts due and owing to them * * * and shall request all such consignor creditors to file a verified statement of their respective claims. * * * Thereupon the state director of agriculture is hereby authorized to and shall proceed forthwith to bring an action on the bond in behalf of said consignor creditors which has been filed in the department by said produce dealer. * * *" Plaintiff also relies on certain provisions found in sections 8, 9, 12 (pages 1815, 1816, 1818), and elsewhere in said act, all of which by clear implication make it a violation thereof for a dealer to fail to account to a grower for the proceeds of the sale of produce received and marketed by such dealer.

Appellant contends that under the statement of facts here shown, however, neither deceit, fraud, willful negligence, nor any breach of the provisions of the act appear; that the transaction was, in effect, a sale by the grower to the dealer and the surety is not liable for the purchase price; that the grower, by accepting the guaranty over his signature and allowing a sale to be made thereunder, in effect extended credit to the produce dealer, and the bond does not cover credit insurance; that, by insertion of said guaranty, the contracts became in effect private contracts between the grower and the produce dealer for breaches of which the surety is not liable; lastly, that the provisions of the act providing for a suit by the director of agriculture are procedural only and do not fix the liability of the surety.

[1] We are unable to come to any other conclusion than that the failure of the corporation to account to the growers to the extent of $15 per ton for their grapes was a clear violation of the terms of the act. The contract was one of consignment and not of sale. The presence of the guaranty did not alter its essential features. Title to the goods did not pass until sale was made by the factor. Pugh v. Porter Bros., 118 Cal. 628, 50 P. 772. The guaranty was but an inducement to the grower to enter into the contract.

The provisions of the act defining a produce dealer are very comprehensive and cover one "who shall receive produce for sale on commission or contract with the producer thereof for farm products to be sold by him on commission or accept in trust from the producer thereof for the purpose of resale * * * or who shall in any way handle for the account of or as an agent of the producer thereof any kind of farm products." Stats. 1927, pp. 1812, 1813, § 1. This definition seems clearly to be broad enough to authorize the contracts in suit.

If the fruit corporation had sold the grapes for $20 per ton, it would have been required to return to the grower the net amount based on such a selling price; if they had been sold for exactly $15 per ton, the corporation would have been required to do the same thing; if sold for $10 a ton, the corporation would have been obliged to make up the deficiency. Such situations could easily be visualized by the surety as a result of the plain provisions of the act.

[2] We attach no importance whatsoever to the contention that fraud, deceit, or willful negligence must be shown before a cause of action may arise under the act. It is true

that such conduct authorizes a cause of action in any injured party but the act is much broader in its terms and expressly authorizes a suit by the director of agriculture in all cases where a dealer has failed to account to a consignor for the proceeds of produce sold and disposed of by him, thus violating the act.

The judgment is affirmed.

We concur: WASTE, C. J.; LANGDON, J.; CURTIS, J.; SHENK, J.; SEAWELL, J.

IRA F. THOMPSON, Justice.

I dissent. I cannot bring myself to agree with the prevailing opinion. In the first place, a reading of the Produce Dealers' Act (Stats. 1927, p. 1812 et seq.) clearly indicates that the bond was required to be furnished by the dealer in order to protect his consignors against dishonesty, fraud, deceit, or willful negligence. For instance, in section 5 we read as follows: "Said bond shall be conditioned upon compliance with the provisions of the act and upon the faithful and honest handling of farm products in accordance with the terms of this act." It is patent from a consideration of this language and the purpose to be served by the enactment of the measure, which latter fact is always to be considered in the interpretation of an act, that the Legislature had in mind the protection of the consignors against the defalcations or fraudulent dealings of his consignee. Furthermore, section 11 of the act is illuminating. It reads:

"It shall be the duty of every produce dealer, having received any farm products for sale as such dealer, to promptly make and keep a correct record showing in detail the following with reference to the handling, sale, or storage of such farm products: (a) The name and address of the consignor; (b) the date received; (c) the condition and quantity upon arrival; (d) date of such sale for account of consignor; (e) the price for which sold; (f) an itemized statement of the charges to be paid by consignor in connection with the sale; (g) each consignment of product shall be given a lot number or other identifying mark, which number or mark shall appear on all sales tags and/or on any other essential records needed to show what the produce actually sold for; (h) a detailed statement shall be kept on file of the filing of any claim or claims which have been or may be filed by the produce dealer against any person, firm, exchange, association or corporation for overcharges or for damages resulting from the injury or deterioration of such farm products by the act or acts or neglect or failure of such person, firm, exchange, association, or corporation, and such records shall be open to the inspection of the state director of agriculture and the consignor or consignors of farm products for whom such claim or claims are made; provided, that the money returns, if any, collections, or damages received by said produce dealer from said persons, firms, exchanges, associations or corporations for and on behalf of consignor or consignors of farm products by reason of said overcharges, damages, or deterioration shall forthwith be paid to the aforesaid consignor or consignors of farm products, less charges for collection thereof in accordance with the schedule of charges filed under section 6 of this act. A copy of record and account of sales of farm products together with remittances in full of the amount realized by such sales, less the agreed commission and other charges, shall be delivered to the consignor upon the consummation of the sale together with all moneys received by him in payment for any consignment of farm products, less the agreed commission and other charges, within ten days after receipt of said moneys by said dealers, unless otherwise agreed in writing; and provided, however, that the names and addresses of the purchasers need not be given.

"It shall also be the duty of every produce dealer to retain a copy of all records including sales tags, account sales, and other records covering each transaction, for a period of one year from the date thereof, which copy shall at all times be available for, and open to, the confidential inspection of the state director of agriculture and the interested consignor or any authorized representative of either. In the event of any dispute or disagreement between a consignor and a produce dealer arising at the time of delivery as to condition, quality, grade, pack, quantity or weight of any lot, shipment or consignment of farm products, it shall be the duty of the state department of agriculture to furnish upon the payment of a reasonable fee therefor to be paid by requesting party a certificate establishing the condition, quality, grade, pack, quantity or weight of such lot, shipment or consignment, such certificate shall be prima facie evidence in all courts of this state as to the recitals thereof at the time such inspection was made. The burden of proof shall be upon the produce dealer to prove the correctness of his accounting as to any transaction which may be questioned."

Manifestly the purpose of requiring the records to be kept in the manner outlined is that an examination will disclose whether there has been a failure to honestly account for the sales price.

Section 12 of the act indicates a similar intent. It reads as follows: "Any person, firm, exchange, association or corporation who shall assume or attempt to act as a produce dealer of farm products as defined by this act without a license, or any person, firm, exchange, association or corporation who, being a produce dealer of farm products, shall (a) impose false charges for handling or services in connection with farm products,

or (b) fails to account promptly, correctly, fully and properly and to make settlement therefor as herein provided, or (c) shall intentionally make false or misleading statement or statements as to market conditions, or (d) shall make fictitious sales or shall be guilty of collusion to defraud the producer, or (e) shall directly or indirectly purchase for his or its own account, goods received by him, or it, upon consignment without prior authority from the interested consignor, or shall fail promptly to notify the consignor of such purchases, if any, on his, or its own account; provided, that this clause shall not be so construed as to prevent any produce dealer from taking to account of sales, in order to close the day's business, miscellaneous lots or parcels of farm products remaining unsold, if such produce dealer shall forthwith enter such transaction on his account of sales, or (f) shall intentionally make false statement or statements as to the grade, condition, markings, quality or quantity of goods shipped or packed in any manner or (g) shall fail to comply in every respect herewith, shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not to exceed one thousand dollars or by confinement in the county jail for not more than one year, or by both such fine and imprisonment. It is hereby made the duty of the several district attorneys of this state to prosecute all violations of this act subject to prosecution in their respective counties. Civil suits and criminal prosecutions arising by virtue of any of the provisions of this act may be commenced and tried in either the county where the products were received by the produce dealer, or within the county in which the principal place of business of such produce dealer is located within the State of California, or within the county in which the violations of this act occurred." The provisions of section 9 are to like effect.

And let us notice other language in section 5 as follows: "Any consignor of farm products claiming to be injured by the fraud, deceit or wilful negligence of any produce dealer may bring action upon said bond against both principal and surety in any court of competent jurisdiction to recover the damages caused by such fraud, deceit and wilful negligence, or the failure to comply with the provisions of this act." It is possible that, if the consignee failed to keep the records provided for in section 11, damages might possibly flow to the consignor. But I find nothing in the act which requires the broker to be able to fulfill his ordinary and general contractual obligations. The whole interest and purpose is to protect against trickery, chicanery, and dishonesty—but there is nothing to indicate a desire on the part of the Legislature that the surety should be required to underwrite the financial ability of the produce dealer. As stated in the opinion of the court, it is admitted that there was no negligence, deceit, or bad faith on the part of the fruit corporation. Hence it was without the scope of the bond which was given in accordance with the requirements of the act.

TRIMBLE et al. v. TRIMBLE et al.

S. F. 14601.

Supreme Court of California.

May 1, 1933.

Rehearing Granted May 29, 1933.

1. Husband and wife ⇐14(4).

Statutory presumption that where property is acquired by married woman and her husband they become tenants in common is rebuttable (Civ. Code, § 164).

2. Husband and wife ⇐14(4).

Evidence supported finding that presumption of gift by husband where property was acquired in name of husband and wife was overcome (Civ. Code, § 164).

3. Husband and wife ⇐267(1).

Where husband, before death, made gift of community real property without consent of wife, wife could avoid gift to extent necessary to protect her interest.

4. Husband and wife ⇐267(1).

Where husband, before death, made gift of community real property, in judging wife's claim, case must be regarded as if there had been no conveyance (Probate Code, § 201).

5. Husband and wife ⇐267(1).

Where husband made no testamentary disposition of his property save to wife, she was entitled to succeed to whole thereof where husband had attempted to make gift of community real property without wife's consent (Probate Code, § 201).

6. Husband and wife ⇐247.

Right of inheritance is completely subject to legislative control and statute enlarging wife's right to succeed to community property upon husband's death applies to property acquired before enactment (Probate Code, § 201).

In Bank.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Action by Elizabeth G. Trimble and another against Russell Trimble, a minor, by Willard Trimble, his guardian ad litem, and others. From the judgment, plaintiffs appeal.

Reversed.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes
*For subsequent opinion see 26 P.2d 477.

Dutton & Gilkey, of Oakland (Lewis E. Lercara, of Oakland, of counsel), for appellants.

Milton Sevier and V. Lewis Kaye, both of Oakland, for respondents.

LANGDON, Justice.

This is an action to set aside deeds of alleged community property, made by decedent husband without the consent of his wife.

The decedent, Alexander J. Trimble, and plaintiff Elizabeth G. Trimble were married on April 17, 1892, and lived together as husband and wife up to the time of his death. On December 21, 1915, they purchased with community funds a house and lot, herein called the Fruitvale property. On February 1, 1920, they contracted to purchase an orchard, herein called the Contra Costa property, and payments were completed and a deed taken August 21, 1925. Each of the deeds was in the names of both spouses. Early in 1929 Alexander Trimble became seriously ill, being confined to his bed with a nurse in constant attendance. On May 23, 1929, he made deeds of the above-mentioned properties in favor of his children, defendants herein, reserving a life estate to his wife. He died testate June 19, 1929. By the terms of his will, all of his property was left to his wife. On October 29, 1929, she commenced this action to set aside the deeds to defendants. The trial court found that all of the land was community property; that it was conveyed to the defendants for valuable consideration; that as a result the defendants were owners of the Fruitvale property, subject to plaintiff's life interest therein; and that plaintiff was entitled to a one-half interest in the Contra Costa property, subject to administration of the decedent's estate. Plaintiff appealed.

[1, 2] There are two issues of fact which must be considered prior to any discussion of the law. The trial court found that both parcels of land were community property. Appellant contends that under the presumption established by section 164 of the Civil Code, where property is acquired by a married woman and her husband, they become tenants in common, a one-half interest therein being the separate property of the wife, and the remaining one-half interest being the community property of the spouses. See Dunn v. Mullan, 211 Cal. 583, 296 P. 604, 77 A. L. R. 1015; Estate of Regnart, 102 Cal. App. 643, 283 P. 860. This presumption is of course rebuttable, and the trial court found that it had been overcome by the evidence. While the record is meager, we have concluded that the finding may be upheld. One witness testified to an express declaration of Mrs. Trimble that all of the property was community property. One of the sons testified that his father had declared with reference to the Contra Costa property that "he had bought a place for himself to take care of his future, in case he would lose his job, he would have an income for himself the rest of his life." This declaration, according to the witness, was made in the presence of Mrs. Trimble. There is, of course, no doubt that the property was purchased with community funds, and the presumption of gift by the husband may be deemed sufficiently controverted by the evidence.

The second issue of fact is presented by the deeds to defendants. They are entitled "Deeds of Gift" and recite a consideration of "love and affection." In spite of this language, however, the court found that the true consideration was a promise by the children to pay for the medical expenses and nurse's compensation during his illness. There is testimony in the record showing that the plaintiff attempted to discharge the nurse, and that the children, at the decedent's request, agreed to keep her and pay her wages; but there is no evidence at all to show that this obligation was undertaken as consideration for the transfer of the properties. Our examination of the record convinces us that the instruments are what they purport to be, namely, deeds of gift, and that there is no evidence to support the finding of the court that they were transfers for valuable consideration.

[3] This case is, in short, one in which the husband, prior to his death, made a gift of two parcels of community real property, without the consent of his wife. Under settled principles, she may avoid said gift to the extent necessary to protect her interest therein. Dargie v. Patterson, 176 Cal. 714, 169 P. 360, 362. The question remains, however, as to the extent of her right. May she avoid the deed as to one-half the interest conveyed, or may she avoid it as to the whole? Prior to 1923, this question could be authoritatively answered by Dargie v. Patterson, supra, wherein it was declared that the nonconsenting wife "may recover an undivided one-half of such property in an action brought against the grantee." But the theory of that case must be carefully noted: "The widow * * * is entitled, so far as her rights are concerned, to treat that conveyance as a nullity. She has the right to avoid the conveyance so far as is necessary for the protection of her interest in the property conveyed. *As to her, the case must be regarded as if there had been no conveyance,* and the property had, accordingly, *remained a portion of the community estate, of which the husband had died seized.*" 176 Cal. 720, 169 P. 360, 362.

[4, 5] It will at once be obvious that the conclusion of the Dargie Case to the effect that the wife could recover but one-half of the property, cannot determine the problem presented by the instant case, and this problem has apparently never received consid-

eration in this state. At the time of the former decision, the wife's right in community property upon the death of the husband was to receive one-half thereof, save perhaps in certain exceptional cases not relevant here. Since 1923, however, the wife has had the right to receive the whole of the property, in the event that the husband makes no other testamentary disposition thereof. Cal. Probate Code, § 201. Her interest, therefore, is greater than it was at the time of the Dargie decision, and, in accordance with the principles laid down in that case, her recovery must be greater. We must, in judging plaintiff's claim, regard this case "as if there had been no conveyance," and the property had "remained a portion of the community estate." The decedent made no testamentary disposition of his property save to his wife. Consequently it seems clear that she is entitled to succeed to the whole thereof.

[6] Nor can there be any distinction between the two pieces of land on the ground that one was *acquired* before the 1923 amendment to the statute. It has, of course, been definitely determined that the husband's power of disposition, including testamentary disposition, over community property, cannot be impaired by a statute passed subsequent to its acquisition which enlarges the wife's right, by giving her power to dispose of such property by will. McKay v. Lauriston, 204 Cal. 557, 269 P. 519. But it is equally well settled that the right of inheritance is completely subject to legislative control, and that the statute enlarging the wife's right to succeed to community property upon the husband's death applies to property acquired prior to its enactment. Estate of Phillips, 203 Cal. 106, 263 P. 1017. The instant case falls within the rule of the last-mentioned decision. There is no attempted testamentary disposition by the husband to third persons. He has simply made a gift in violation of the statute prohibiting such gifts. The wife has the right, as explained in the Dargie Case, to restore the property to the estate. Thereafter she is entitled to the share she would receive under the rules of succession, which, as we have seen, is in this case the entire property. See McMurray, Community Property, California Jurisprudence 1930 Supplement, § 87, p. 126; Modern Woodmen of America v. Gray, 113 Cal. App. 729, 734, 299 P. 754.

Lahaney v. Lahaney, 208 Cal. 323, 281 P. 67, is not in conflict with this view, for in that case the wife was one of the grantees, and claimed under the deed. See 18 Cal. L. Rev. 400. But more important is the fact that the husband in said case died September 9, 1922, prior to the 1923 statute discussed herein, and the question could not, therefore, have been raised.

We have found no California case expressing a conclusion contrary to that reached herein, save a very recent decision of the District Court of Appeal [Travelers' Ins. Co. v. Fancher (Cal. App.) 20 P.(2d) 1004] which, in our opinion, does not give adequate consideration to the important statutory changes in 1923.

The judgment is reversed.

We concur: SEAWELL, J.; CURTIS, J.; THOMPSON, J.; SHENK, J.; PRESTON, J.

218 Cal. 114

A. PALADINI, Inc., v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al.

S. F. 14794.

Supreme Court of California.

May 1, 1933.

1. Courts ⇐489(1).

Marine engineer injured while on high seas could sue in state court, which has concurrent jurisdiction with federal courts of actions in personam to recover personal money judgment for maritime injuries (Jud. Code § 24(3), 28 USCA § 41(3).

2. Action ⇐53(2).

Injured employee could bring separate actions in state court against corporation employer and its stockholders.

3. Shipping ⇐209(2).

Right of damage claimants to bring suits in state court cannot deprive vessel owners of right to limit liability (46 USCA §§ 183–185; Admiralty Rules 51–57 [28 USCA § 723]).

4. Courts ⇐489(1).

Federal courts have exclusive jurisdiction of suit brought under admiralty rules to limit liability to value of interest in vessel (46 USCA §§ 183–185; Admiralty Rules 51–57 [28 USCA § 723]).

5. Shipping ⇐207.

Limited Liability Act applies to claims against shipowners for personal injury and death, as well as to claims for loss of or injury to property (46 USCA §§ 183–185).

6. Shipping ⇐205.

Corporation owning ship is entitled to limit its liability (46 USCA §§ 183–185).

7. Courts ⇐506.

Proceedings by stockholders to limit statutory stockholders' liability did not stay state court action against corporation on account of its independent liability (46 USCA §§ 183–

185; Admiralty Rules 51–57 [28 USCA § 723]).

8. Courts ⇐506.

Proceeding of shipowners in federal court to limit liability does not remove cause from state court, but merely stays further proceedings in state court actions (46 USCA §§ 183–185; Admiralty Rules 51–57 [28 USCA § 723]).

9. Shipping ⇐208.

Determination that employee's injuries occurred without knowledge or privity of corporation was condition to corporation's right to limit liability (46 USCA § 183; Admiralty Rule 51 [28 USCA § 723]).

10. Evidence ⇐82.

It could not be presumed to defeat injunctive relief of monition issued by federal court in proceedings to limit liability of stockholders of shipowner that monition was issued in violation of clear requirement of admiralty rule (46 USCA § 183; Admiralty Rule 51 [28 USCA § 723]).

11. Corporations ⇐523.

Judgment obtained against corporation binds its assets and property, but is not enforceable against stockholders and their property.

12. Corporations ⇐252.

Where action is based on unliquidated liability, action may be brought against stockholders before suit against corporation.

13. Corporations ⇐253.

Judgment obtained against corporation is admissible as evidence in subsequent action against stockholders, but is not conclusive against them regarding existence or amount of liability.

14. Corporations ⇐253, 259(1).

Corporation in defending action against itself does not act on behalf of its stockholders as regards their individual stockholders' liability, nor do stockholders represent corporation in actions brought against them, though there can be but one satisfaction of debt.

15. Corporations ⇐419.

Corporation's right to control prosecution of actions against it resides in its board of directors.

16. Corporations ⇐246.

Stockholder has right to act for himself as to his proportionate liability, which right is several as regards liability of other stockholders and corporation.

17. Shipping ⇐205.

Fault or participation of managing officers of corporation shipowner is chargeable to corporation to destroy its claim to limitation of liability, but stockholder who is personally free from fault is entitled to limit his liability (46 USCA §§ 183–185; Admiralty Rules 51–57 [28 USCA § 723]).

18. Shipping ⇐209(1).

Right secured to corporation shipowner to limit liability and corresponding right in stockholders regarding their several personal liabilities does not include right in either to compel other to become party to federal limitation suit (46 USCA §§ 183–185; Admiralty Rules 51–57 [28 USCA § 723]).

19. Shipping ⇐209(1).

Corporation is not necessary party to limitation suit brought by stockholders to limit their personal stockholders' liabilities (46 USCA §§ 183–185; Admiralty Rules 51–57 [28 USCA § 723]).

20. Courts ⇐493(2).

State court action against corporation may proceed concurrently with federal limitation suit brought by stockholders, since liabilities are separate and independent (46 USCA §§ 183–185; Admiralty Rules 51–57 [28 USCA § 723]).

21. Dismissal and nonsuit ⇐60(1).

Delay of more than five years after answer filed to bring action against corporation to trial required dismissal, where prosecution of such action had not been stayed by proceeding by stockholders to limit liability under federal statute (46 USCA §§ 183–185; Admiralty Rules 51–57 [28 USCA § 723]; Code Civ. Proc. § 583).

In Bank.

Application for writ of mandate by A. Paladini, Incorporated, against the Superior Court in and for the City and County of San Francisco and another.

Writ granted.

Prior opinion, 13 P.(2d) 739.

Redman, Alexander & Bacon, of San Francisco, for petitioner.

Ford & Johnson and Fletcher A. Cutler, all of San Francisco, for respondents.

SEAWELL, Justice.

The District Court of Appeal, First District, Division 2, by writ of mandate has directed the respondent superior court of San Francisco to dismiss an action pending in said court for failure of plaintiff to bring said action to trial within five years after answer filed. Section 583, Code Civ. Proc. The proceeding is before us upon hearing granted after decision by the appellate court.

Said action was brought by one Andrew Flink against petitioner herein, A. Paladini, Incorporated, to recover damages in the amount of $75,000 for personal injuries resulting in total blindness sustained by him on the high seas while employed as a marine engi-

neer on a tugboat of said corporation. After filing suit against the corporation, Flink commenced a separate stockholders' liability suit in respondent superior court against all the stockholders to recover for the same injuries. Subsequently the five stockholders owning all the stock of A. Paladini, Incorporated, instituted a proceeding in the federal District Court under Admiralty Rule 51 (28 USCA § 723) to limit their liability on account of said injuries to the value of the tugboat, fixed by the federal court at $5,000. At the time of application to the appellate court for writ of mandate to compel dismissal of the state court action against the corporation, said limitation proceeding was still pending. A motion to dismiss the state court action against the corporation, made under section 583, Code of Civil Procedure, was denied by respondent superior court on the ground that the stockholders' federal limitation suit had stayed further prosecution of the state court action against the corporation. No dismissal of the separate stockholders' liability suit in the state court is sought.

If as a matter of law the federal limitation suit stayed further proceedings in the suit against the corporation in the state court, then the five-year period prescribed by section 583 would not run during the time plaintiff was prevented thereby from bringing his action to trial. The main contention of petitioner is that the federal limitation proceeding initiated by the stockholders to limit their stockholders' liability did not operate to stay the action against the corporation, whose liability under the California law was separate and independent from that of its stockholders. To clarify the matter, it is pertinent here to describe briefly the nature of the limitation suit provided for by Admiralty Rules 51–57 (28 USCA § 723).

[1-4] Plaintiff Flink acted within his rights in electing to sue in the state court, which has concurrent jurisdiction with the federal courts of actions in personam to recover a personal money judgment for maritime injuries. 1 C. J. p. 1253, § 24, and cases there cited. Section 24 (3) of the Judicial Code, 28 USCA § 41 (3), confers upon the District Courts of the United States admiralty and maritime jurisdiction, "saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it." Langnes v. Green, 282 U. S. 531, 51 S. Ct. 243, 75 L. Ed. 520. It was also proper for Flink to bring separate actions in the state court against the corporation and its stockholders. Ellsworth v. Bradford, 186 Cal. 316, 199 P. 335. The right of damage claimants to bring suits in the state court cannot, however, operate to deprive the vessel owners of the right guaranteed to them by act of Congress to limit their liability for losses comprehended within said act to the value of their respective interests in the vessel. 46 USCA §§ 183, 184, 185. Admiralty Rules 51–57, adopted and promulgated by the United States Supreme Court, provide a special proceeding whereby shipowners may avail themselves of the benefits of the Limited Liability Act. Admiralty Rules 51–57. The federal courts have exclusive jurisdiction of a suit brought under said rules.

[5-9] It is settled that the Limited Liability Act applies to claims against shipowners for personal injury and death, as well as to claims for loss of or injury to property. Craig v. Continental Ins. Co., 141 U. S. 638, 12 S. Ct. 97, 35 L. Ed. 886; In re Eastern Transp. Co. (D. C.) 37 F.(2d) 355. It is also well established that a corporation which owns a ship, like other owners, is entitled to limit its liability under said act. Pocomoke Guano Co. v. Eastern Transp. Co. (C. C. A.) 285 F. 7. And in Flink v. Paladini, 279 U. S. 59, 49 S. Ct. 255, 73 L. Ed. 613, the Supreme Court of the United States has held that stockholders of a corporation are entitled to limit their separate personal liabilities as stockholders under the California law as it stood prior to 1931.

The question to be decided in the instant case is whether a proceeding initiated by the stockholders to limit their statutory stockholders' liability stays a state court action against the corporation on account of its independent liability. We are impelled to the conclusion that the action against the corporation is not stayed.

The procedure in a limitation suit brought under Admiralty Rules 51-57 is as follows: Upon the filing of a petition for limitation of liability by the owner or owners, the court makes an order for appraisement of the value of the respective interests of the owners seeking limitation of liability, and for payment into court of the appraised value, or giving a stipulation therefor, with sureties. Or the court may, at the election of the owners, order transfer of the vessel to a trustee appointed by the court. All persons having claims against the owners petitioning for limitation are given notice by monition to file them within a fixed time. The shipowners may also claim exemption from liability. Damage claimants may contest the right of the owners to exemption or limitation. If the limitation of liability is allowed, the sum deposited in court or secured to be paid, or the amount realized from the sale of the vessel in the event of transfer, becomes a fund for distribution pro rata among claimants, as ordered by the court, and the owners are discharged from further liability, and cannot thereafter be proceeded against in state or federal courts.

It follows from the very nature of a suit brought under Admiralty Rule 51, of which the federal courts have exclusive jurisdiction, and which by the express terms of said rule

may be commenced after suits have been filed in the state courts, that further proceedings in state or federal courts against owners petitioning for limitation upon claims within the limitation proceeding must cease, and the act so provides. 46 USCA § 185. Payment of the value of the vessel into court or giving a bond therefor has the same effect. Although rule 51 provides for issuance of an express injunction, a stay is created by force and effect of the statute without the necessity for an injunction. Metropolitan Redwood Lbr. Co. v. Doe (The San Pedro), 223 U. S. 365, 32 S. Ct. 275, 56 L. Ed. 473, Ann. Cas. 1913D, 1221; Providence & N. Y. Steamship Co. v. Hill Man. Co., 109 U. S. 578, 3 S. Ct. 379, 617, 27 L. Ed. 1038. To permit a state court to render and enforce a judgment in an action for damages brought against the shipowners to recover for personal injuries would defeat the owners' right to have their liability limited to the value of the vessel, and the sum deposited by them, or secured to be paid, distributed pro rata among all claimants in full discharge of their liability in the single unified proceeding provided for by rule 51. This right is secured by federal enactment.

The effect of the federal limitation proceeding is not to remove the cause once and for all from the state court to the federal court, but merely to stay further proceedings in state court actions. Although the federal court has jurisdiction to make a complete disposition of all claims for damages in the event it denies the owners' right to limit liability, Hartford Accident & Indemnity Co. v. S. P. Co., 273 U. S. 207, 47 S. Ct. 357, 71 L. Ed. 612; Spencer Kellogg & Sons, Inc., v. Hicks (The Linseed King), 285 U. S. 502, 52 S. Ct. 450, 76 L. Ed. 903, in the exercise of a sound discretion it may return the parties to the state court action filed prior to the limitation proceeding where it disallows the right of limitation, and also in certain other cases, Langnes v. Green, 282 U. S. 531, 51 S. Ct. 243, 75 L. Ed. 520; Petition of Liverpool, Brazil, etc., Nav. Co. (C. C. A.) 57 F.(2d) 176; In re Putnam (C. C. A.) 55 F.(2d) 73. In the instant case it does not appear from the record before us that it has been determined that the injuries occurred without the "knowledge or privity" of the corporation, and this is a condition to its right to limit liability. 46 USCA § 183; Admiralty Rule 51 (28 USCA § 723).

[10] The theory of the appellate court in ordering a dismissal of the action against the corporation for failure to bring to trial was that no stay of actions against either the corporation or its stockholders was shown to exist, for the reason that there was no proof that the vessel had been surrendered, or her value paid or secured to be paid into the federal court in the limitation suit. The return to the petition for writ of mandate contained a certified copy of the monition or summons to file claims, which by express provision of rule 51 is authorized to be issued only upon compliance with the court's order for payment, filing of a stipulation, or surrender of the vessel. Said monition is an order of the federal District Court. It cannot be presumed to defeat its injunctive effect that it was issued by the court in violation of the clear and explicit requirement of the admiralty rule. Since the transfer to this court, there has been filed, with leave of this court, a certified copy of the federal District Court's order directing issuance of the monition, from which it appears that the five stockholders of the A. Paladini corporation have filed a stipulation for the total value of the tugboat in the sum of $5,000.

Having set forth the nature of a federal suit to limit liability, we now pass to explain further our conclusion, indicated above, that a limitation suit filed by stockholders to limit their statutory stockholders' liability does not stay state court actions against the corporation on account of its liability.

An express injunction is contained in the order directing issuance of the monition. Said injunction restrains prosecution of any and all suits against the five stockholders, naming them. The purpose of the express injunction in these cases is but to declare the stay created by the force and effect of the statute and admiralty rules. The San Pedro, supra. The fact that the express injunction, issued under the hand of the judge and seal of the court, makes no reference to suits against the corporation, is strongly persuasive of the conclusion that said federal judge was of the view that the stockholders' limitation suit did not operate to stay state court actions against the corporation. This conclusion is further borne out by the monition, which directs filing of claims against the stockholders, naming them, and does not direct filing of claims against the corporation.

The federal District Court subsequently set aside this express injunction. Upon appeal taken by the stockholders, the Circuit Court of Appeals and the Supreme Court in reversing the District Court held that the object of the Limited Liability Act is to protect those who invest in shipbuilding and shipping enterprises, and, in the light of this purpose, the term "owners" as used in the act should be taken in a "broad and popular" sense to enable those who invest through purchase of stock to limit their individual and personal stockholders' liability under the California law. Flink v. Paladini, 279 U. S. 59, 49 S. Ct. 255, 73 L. Ed. 613, Id. (C. C. A.) 26 F.(2d) 21. But said opinions contain no intimation that the effect of the stockholders' petition is to stay suits against the corporation.

[11-13] Under the law of this state as it stood prior to the 1931 amendment of our cor-

poration law, each stockholder was individually and personally liable for such proportion of all debts of the corporation as the stock owned by him bore to the subscribed capital stock. The liabilities of the stockholders and the liability of the corporation were separate and independent. Morrow v. Superior Court, 64 Cal. 383, 1 P. 354, 6 Cal. Jur., p. 982, §§ 367–414. The consequences of this principle are manifest in the decisions. Separate actions are maintainable against the corporation and stockholders. Ellsworth v. Bradford, supra; Buttner v. Adams (C. C. A.) 236 F. 105; Greenleaf v. Jacks, 133 Cal. 506, 65 P. 1039; The Griffin, etc., Co. v. Magnolia, etc., Co., 107 Cal. 378, 40 P. 495; 6 Cal. Jur. 1028. A judgment obtained against the corporation binds its assets and property, but is not enforceable against the stockholders and their property. Even where the action is based on an unliquidated liability, an action may be brought against the stockholders before suit against the corporation. Douglas v. Orth, 44 Cal. App. 95, 185 P. 1005; Damiano v. Bunting, 40 Cal. App. 566, 181 P. 232. A judgment obtained against the corporation is admissible as evidence in a subsequent action against the stockholders, but is not conclusive against them as to the existence or amount of the liability. Ellsworth v. Bradford, supra.

[14-17] The corporation in defending an action against itself does not act on behalf of its stockholders as regards their individual stockholders' liability, nor do said stockholders represent the corporation in actions brought against them. Ellsworth v. Bradford, supra. There can be but one satisfaction of the debt, of course. The right of the corporation to control the prosecution of actions against it resides in its board of directors. It is the right of each stockholder to act for himself as to his proportionate liability, which is several as regards the liability of other stockholders and the corporation. It may be the will of the corporation not to avail itself of its right to bring a federal limitation suit, but to take its chances of success in defeating liability in the state court action; or the corporation may not be entitled to claim limitation upon claims as to which the stockholders may limit their proportionate liability. To illustrate, it is a condition of the right to claim limitation that the loss shall have occurred without the "knowledge or privity" of the petitioner for limitation. The fault or participation of the managing officers of a corporation is chargeable to the corporation to destroy its claim to limitation (In re East. Transp. Co., supra; Pocomoke Guano Co. v. East Transp. Co., supra), but a stockholder who is personally free from fault is nevertheless entitled to limit his liability.

[18, 19] The right secured to the corporation to limit its liability, and the corresponding right in the stockholders as to their several personal liabilities, does not include a right in either to compel the other to become a party to a federal limitation suit. As we view the matter, the corporation is no more a necessary party to a limitation suit brought by the stockholders to limit their personal stockholders' liabilities, which are primary liabilities, than to other suits brought by or against the stockholders. The decision of the Supreme Court in Flink v. Paladini, supra, does not abrogate the distinction between the corporation and its stockholders, but expressly states that said distinction "cannot be overlooked even in extreme cases." The corporation which owns a vessel must pay or secure the payment of the total value of the ship to limit its liability. The stockholder pays only the value of his interest in the ship, which for this purpose is in the same ratio as his ownership of stock in the corporation. He thereby limits his personal proportionate liability, not the independent liability of the corporation for the entire debt.

[20] A state court action against the corporation may proceed concurrently with a federal limitation suit brought by stockholders, since the liabilities are separate and independent. A judgment recovered against the corporation will be enforceable only against its property, and will not destroy or affect the right of any stockholder to limit his personal liability. The right secured to each stockholder as a "part owner" is to have his personal liability to all claimants limited and discharged in a single action where he shall pay or secure to be paid a sum fixed by the court as the value of his interest. This sum will be ordered distributed pro rata among all who have claims against him, and thereby such "part owner" or stockholder will be protected from multiplicity of separate suits against him.

[21] We conclude that further prosecution of the action against the corporation in the state court was not stayed, but plaintiff Flink should have brought said action to trial. It must now be dismissed under section 583, Code of Civil Procedure. Flink is not without remedy, but is confined to his rights against the stockholders, who have filed a bond for $5,000 in the limitation suit.

The writ of mandate is granted.

We concur: PRESTON, J.; IRA F. THOMPSON, J.; LANGDON, J.; CURTIS, J.; SHENK, J.

218 Cal. 153

BENNETT et al. v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

L. A. 13874.

Supreme Court of California.

May 1, 1933.

Rehearing Denied May 29, 1933.

1. Attachment ⇐4.

Purchasers suing for rescission of land contract on ground of vendor's nonperformance, and for return of purchase money paid *held* entitled, on filing of proper affidavit therefor, to writ of attachment against vendor's property (Civ. Code, §§ 1688, 1689, 1691).

Purchasers were entitled to issuance of writ of attachment, since the suit was upon contract for return of specific sum of money by reason of failure of consideration, and fact that purchasers prayed for rescission of agreement did not make case exclusively one of equitable cognizance.

2. Attachment ⇐5.

Attachment will issue if complaint shows that action is for recovery of specific sum of money, regardless of whether equitable powers of court are incidentally involved.

3. Contracts ⇐274.

Contract may be rescinded by act of party, who is thereupon entitled to aid of court in securing fruits of rescission (Civ. Code, §§ 1688, 1689, 1691).

4. Money received ⇐6(4).

Implied promise to repay money paid under rescinded agreement arises, where consideration has totally failed, and action for repayment is action ex contractu.

5. Attachment ⇐11.

Existence of vendee's lien *held* not to preclude attachment in vendee's action to rescind and recover back purchase payments, where by counter affidavit, on motion to discharge attachment, vendee alleged that lien, if it existed, had become valueless and was subordinate to mortgage given good-faith incumbrancer (Code Civ. Proc. § 558).

In Bank.

Application by Logan H. Bennett and another for writ of prohibition to be directed to the Superior Court in and for Los Angeles County, and Hon. Lewis Howell Smith, Judge thereof.

Writ granted, with directions.

Prior opinion, 12 P.(2d) 960.

Rehearing denied; SHENK and LANGDON, JJ., dissenting.

De Forrest Home and Eugene Kelly, both of Los Angeles, for petitioners.

McAdoo, Neblett & Clagett, Everett W. Mattoon, Co. Counsel, and S. V. O. Prichard, Deputy Co. Counsel, all of Los Angeles, for respondents.

SEAWELL, Justice.

This matter is before us on petition for hearing after decision by the District Court of Appeal, Second Appellate District, Division 2 [see 12 P.(2d) 960], sustaining respondent court's demurrer to the petition, and denying petitioners' petition for a writ of prohibition, by the aid of which petitioners sought to prohibit the superior court of the county of Los Angeles, in the case of Logan H. Bennett and Annie H. Bennett v. F. P. Newport Company, a Corporation, F. P. Newport Corporation, Ltd., a Corporation, et al., from carrying out its threatened and declared intention of discharging, upon defendants' motion, a writ of attachment which was issued in said action at the behest of plaintiffs and directed against defendants.

Upon agreed procedure the motion was merely submitted to the court, and, upon the announcement by the court of its intention of making an order discharging the attachment, petitioners applied for and obtained from said District Court of Appeal an alternative writ of prohibition restraining said superior court from rendering its decision as indicated. There being no decision or action of the trial court to review, this court might, in the circumstances of the case, be warranted in regarding the entire matter as presenting a moot question. In cases in which a great emergency existed, or in cases where the trial court was clearly without jurisdiction to render an adverse decision against the party petitioning for a writ of prohibition, and when such a decision would have caused a great hardship or resulted in great and irreparable injury to the applicant, this court has countenanced a procedure which speedily brought the cause to this court for immediate determination rather than required the petitioners to pursue the usual remedy provided by appeal. But the instant case does not present facts or circumstances which justify the procedural departure which this court under some unusual circumstances has indulged.

The somewhat alarming tendencies of the practice to short-cut trial courts on the way to courts of last resort on the plea that cases which in fact are but ordinary cases are causes of "first impression," or that questions of unusual importance and great moment are involved which demand that they be advanced over hundreds of other cases of the same class and grade of importance, impels us to emphasize, in the interest of affording equality of opportunity to all litigants to have their causes decided in the order of presentation, the necessity of a strict adherence to the rule, with a few rare exceptions, that causes be tried in the particular courts provided by

the Constitution to try them, and that the procedure adopted by the Legislature governing the trial of such causes be followed in every case unless some extraordinary reason requires a departure therefrom. While we have decided to entertain this petition, before entering upon a consideration of its merits, we feel that an excerpt from Agassiz v. Superior Court, 90 Cal. 101, 27 P. 49, 50, printed in respondent's brief, is en rapport with what we have said with respect to the growing tendency to have causes transferred from nisi prius courts, where they should be tried, to courts of appeal for decision in the first instance. Many of them, no doubt, if heard in their proper forum, would not reach a court of appeal. The language of the above-cited case is so apposite to the practice herein commented upon that we feel justified in giving space to the following excerpts:

"Petitioners had the right to appeal from the order refusing to dissolve the attachment, and would have an appeal from any final judgment in the case; and such appeal, being a 'plain, speedy, and adequate remedy in the ordinary course of law,' within the meaning of section 1103 of the Code of Civil Procedure, prohibition does not lie. A remedy does not fail to be speedy and adequate because, by pursuing it through the 'ordinary course of law,' more time would probably be consumed than in the proceeding here sought to be used. And it makes no difference that in this instance a question of jurisdiction incidentally depends upon the validity of an attachment. If that were so, then, in every ordinary civil action, whenever a defendant chose to raise a point of jurisdiction, either of the person or of the subject-matter, he could, by prohibition, stop the ordinary progress of the action towards a judgment, until this court had passed upon the intermediate question; and thus this tribunal would, in innumerable cases, be converted from an appellate to a nisi prius court. * * *

"The substantially correct rule is stated in High's Extraordinary Legal Remedies as follows: 'Like all other extraordinary remedies, prohibition is to be resorted to only in cases where the usual and ordinary forms of remedy are insufficient to afford redress; and it is a principal of universal application, and one which lies at the very foundation of the law of prohibition, that the jurisdiction is strictly confined to cases where no other remedy exists, and it is always a sufficient reason for withholding the writ that the party aggrieved has another and complete remedy at law.' Section 770. And, further, the same author says: 'Thus, where the defendant, in an action instituted in an inferior court, pleads to the jurisdiction of such court, and his plea is overruled, no sufficient cause is presented for granting a prohibition, since ample remedy may be had by an appeal from the final judgment in the cause. Nor will the writ go to restrain an inferior court from proceeding with certain attachments, upon the ground of the insufficiency of the affidavit on which the attachments were issued, since the court itself may afford relief, or the party aggrieved may resort to an appeal.' Section 771."

The complaint upon which the attachment issued contained three counts. The first count alleges that the F. P. Newport Corporation, Limited, is the successor in interest of the F. P. Newport Company; that on July 8, 1924, plaintiffs entered into a written agreement whereby said F. P. Newport Company agreed to sell and plaintiffs agreed to purchase certain described lots of land, to be used for residence purposes, situate in the city of Glendale, county of Los Angeles, at the price of $4,200. It is provided by said contract of sale that the covenants, restrictions, and conditions therein set forth shall inure to and bind the personal representatives, successors, and assignees of the respective parties to said contract, and time is expressly made the essence thereof. Upon the execution of the contract, plaintiffs paid to F. P. Newport Company the sum of $200, and agreed to pay the balance in fixed monthly installments until the entire principal sum and interest should be paid. Upon full compliance by the purchasers, the seller agreed to deliver to said purchasers a good and sufficient deed transferring said lots free and clear of all incumbrances, and to furnish a certificate showing title in the grantor to be free and clear of incumbrances. Full compliance with the provisions of said agreement on the part of plaintiffs, and a failure and refusal on the part of defendants to deliver to plaintiffs a good and sufficient deed transferring said title free and clear of all incumbrances, or any deed whatsoever, and a failure and refusal to deliver said certificate of title showing said title free and clear of incumbrances, or to deliver to them any certificate of title, upon demand, are fully alleged.

On March 7, 1932, notice of rescission of said agreement on the ground of failure of consideration, demanding repayment of all moneys laid out and expended by plaintiffs in connection with said transaction, and offering to return and deliver back to defendants everything of value received under said agreement, was served upon defendants.

Counts 2 and 3 contain allegations of failure of consideration and refusal of defendants to grade a certain street for the benefit of said lots and install other street improvements at their own cost, and their failure to pay the principal and accruing interest on certain street improvement bonds in the sum of $134.89, the payment of which was also an obligation defendants assumed as one of the conditions of said sales agreement, but which payments, upon refusal of defendants

to make them, were made by plaintiffs. It is also alleged that defendants have failed and refused to reimburse plaintiffs therefor. Each count makes Exhibit C a part of said count. Exhibit C is a detailed statement setting out the moneys paid to defendants on account of the purchase price, and such other sums as were paid out on account of said improvements which defendants covenanted to pay, but failed to do so.

The prayer of the complaint is for the cancellation, termination, and rescission of said agreement and for judgment in the sum of $5,414.35, with interest at the rate of 7 per cent. per annum on the specific monthly amounts paid by plaintiffs to defendants, and said other amounts paid on account of said street improvements by reason of defendants' default as above set forth, as by said agreement provided. Each installment and item, specific as to amounts and dates, is set forth in the prayer of the complaint.

[1] Upon the filing of the complaint plaintiffs prepared and filed an affidavit demanding the issuance of a writ of attachment, in which it was averred that the action was founded upon an implied contract for the direct payment of money "to be repaid to plaintiffs on a rescinded contract for the sale of real property and that such contract, was made or is payable in this state, and that the payment of the same has not been secured by any mortgage or lien upon real estate or personal property, or any pledge of personal property." Thereupon a writ of attachment was issued and certain personal property belonging to defendant F. P. Newport Corporation, Limited, also sued as Newport Company, was levied upon. Defendant F. P. Newport Corporation, Limited, in due time moved that the writ of attachment be dissolved on the grounds that said writ was irregularly and improperly issued, in this, to wit, that it was not issued in an action based upon a contract, express or implied, for the direct payment of money; that the causes of action set forth in plaintiffs' complaint are but different methods of pleading one transaction; that the character of each count set forth in plaintiffs' complaint is for equitable relief; that paragraph 1 of the complaint prays for the cancellation, termination, and rescission of said agreement and for a decree adjudging it to be null and void, thereby praying for equitable relief.

In a word, it may be said that the motion is based solely upon the ground that the court was without jurisdiction to issue the attachment, inasmuch as the complaint and prayer invoke the aid of the equity side of the court. The motion coming on for hearing, the judge announced his intention to make an order discharging the attachment, but withheld his order to give plaintiffs opportunity to stay his hands by making application for the issuance of the writ of prohibition, which was accordingly issued. The District Court of Appeal, which denied the writ of prohibition, held that the complaint set forth a cause of action for equitable relief, and, under the authority of Stone v. Superior Court, 214 Cal. 272, 4 P.(2d) 777, 77 A. L. R. 743, and two more recent cases which lean upon Stone v. Superior Court, Ingalls v. Superior Court, 121 Cal. App. 453, 9 P.(2d) 266, and Fair View Farms Co. v. Superior Court, 123 Cal. App. 9, 10 P.(2d) 1011, such a complaint, even if it contains a common count for money had and received, cannot become the basis for a writ of attachment, since the cause of action is the same in both counts, and is founded upon the same facts set forth in detail.

Stone v. Superior Court, supra, involved the element of fraud and holds no more than that, where the gravamen of the complaint is fraud the plaintiff is not entitled to a writ of attachment, and the action is not changed where a second count is framed for money had and received if said count is based upon the same facts constituting the action on fraud. The Stone Case held strictly to the rule that an action on fraud is ex delicto, and no implied contract for the direct payment of money, or any other honest implication, could possibly be ingrafted upon a transaction that was fraudulent ab initio. In fact, fraud vitiates everything, and there can be no contractual relations between the defrauder and the defrauded. The transaction in the instant case is strictly one arising out of contract. No claim is made that the contract was vitiated by fraud, or that fraud entered into the transaction in the slightest degree. It is a question solely of failure of consideration. Plaintiffs paid to defendants directly a definite sum of money in consideration that defendants would convey to them by good and sufficient deed and deliver to them a certificate of title, and paid definite sums of money to protect the property from liens, which defendants under the terms of their agreement were bounden to pay, but failed to do so. The entire transaction sounds in contract. The ex delicto doctrine has no application to the case. This being so, is there not an implied obligation upon the defendants to return the moneys which were paid to them, and also moneys paid to the city of Glendale to prevent liens from attaching to said real property, a charge which defendants had contracted to pay?

The weight of the decisions of this state is to the effect that, where the foundation of the action is a demand for equitable relief the attachment will not issue, but, as the authorities state, where some exercise of equitable powers, as in settling accounts and striking a balance, is incidentally involved in the action, the writ will issue if the pleadings warrant it. Hallidie v. Enginger, 175 Cal. 505, 166 P. 1; De Leonis v. Etchepare, 120 Cal. 407, 52 P. 718; Kohler v. Agassiz, 99 Cal. 9, 33 P. 741.

Stanford Hotel v. Schwind Co., 180 Cal. 348, 181 P. 780, 782, disposed of questions very similar to those presented in the instant case. One of the reasons assigned as grounds for discharging the attachment was that it was an action in equity. In that case the prayer of the complaint was for a temporary restraining order enjoining defendants from selling or otherwise disposing of the property involved in the bill of sale, and that the sale be declared void, and that it be decreed that the defendant held the property charged with the payment of plaintiff's claim in the sum of $3,617.60, that the property be sold, and for further and proper relief. The court points out that in that case, as in the instant case, there was no suggestion that fraud entered into the making of the contract. In discussing whether or not an attachment would lie, the court said: "If a recovery upon such a contract is the purpose of the suit, so far as the right of attachment is concerned, it is immaterial whether the action be regarded as strictly legal or strictly equitable, or partly legal and partly equitable. The subdivision does not in terms prescribe that the action must be one in law, or that it may not be one in equity, or that it may not be one of either law or equity, or of both. Hence it is not necessary in order to uphold the writ of attachment to establish the proposition that the action is either legal or equitable. What must be established is that the action is based upon contract, either express or implied, for the direct payment of money. It is clear that this action addresses itself to both the legal and the equitable powers of the court. But that circumstance will not operate to deny the plaintiff a writ of attachment if he is seeking recovery upon the breach of such contract. * * * Consequently, even if such an action may properly be regarded as partially legal and partially equitable, it will make no difference. The plaintiff is nevertheless entitled to a writ of attachment by virtue of the fact that he is suing for a recovery upon the contract which is the gravamen of the action."

[2] To the same effect are Weintraub v. Superior Court, 91 Cal. App. 763, 267 P. 733, and a number of other cases. The rule is established upon well-considered authority that, if upon the examination of the complaint the gravamen of the action forces the conclusion that it is an action for the recovery of a specific sum of money upon a contract, express or implied, an attachment will issue regardless of the fact that the exercise of equitable powers of the court are also incidentally involved. In the instant case the suit is upon a contract, so far as the right of attachment is concerned, for the return of a specific sum of money by reason of failure of consideration.

[3, 4] The fact that plaintiffs prayed for a rescission of the agreement does not make the case exclusively one of equitable cognizance. Sections 1688, 1689, and 1691, Civil Code, provide the methods by which an agreement may be rescinded. Plaintiffs by their act extinguished the contract, and there was no occasion to invoke the equity side of the court. "The interposition of a court of equity to set the contract aside was not necessary to rescission. A contract may be rescinded by the act of the party entitled and desiring to rescind." McNeese v. McNeese, 190 Cal. 402, 404, 213 P. 36, 37; Loaiza v. Superior Court, 85 Cal. 11, 24 P. 707, 9 L. R. A. 376, 20 Am. St. Rep. 197. The rescission being complete, the persons rescinding are entitled to the aid of the court in securing to themselves the results and fruits of the rescission. So, too, it is settled law that, where the consideration has totally failed, an implied promise to repay the money paid under said rescinded agreement arises, and an action brought for the repayment is an action ex contractu. Mahony v. Standard Gas Engine Co., 187 Cal. 399, 202 P. 146; Richter v. Union Land Co., 129 Cal. 367, 62 P. 39. Both of said cases hold that, where there has been a total failure of consideration as to one party, the law implies a promise on the part of the other to repay what has been received by him under the contract. It is pointed out in the latter case that an attachment was proper.

Santa Clara Valley Peat Fuel Co. v. Tuck, 53 Cal. 304, is another authority directly in point as to the right of a plaintiff to an attachment after rescission for failure of consideration. See, also, generally, Willett & Burr v. Alpert, 181 Cal. 652, 185 P. 976; Doud v. Jackson, 102 Cal. App. 213, 283 P. 107; Powers v. Freeland, 114 Cal. App. 146, 299 P. 736.

[5] We do not regard Stone v. Superior Court, supra, as being in conflict with the cases last above cited, inasmuch as the question whether an attachment will lie in an action brought after rescission to recover back money paid under a contract wherein the consideration had failed was not in that case. Any case which cites it as an authority for such a doctrine has misapprehended the real question at issue in the Stone Case.

In a supplement to their brief the defendants raised for the first time the additional objection to the sufficiency of the affidavit upon which the writ of attachment was issued, that petitioners are given a vendees' lien under the provisions of section 3050, Civil Code, and therefore an attachment will not lie in the case. The original affidavit averred that the payment of the money demanded by the complaint had not been secured by any mortgage or lien upon real or personal property, or any pledge of personal property, as provided by section 537, subd. 1, of the Code of Civil Procedure, but it contained no averment that the security, if any, had become

valueless. Respondent relies upon Benson v. Shotwell, 87 Cal. 49, 25 P. 249, 681, Gessner v. Palmateer, 89 Cal. 89, 24 P. 608, 26 P. 789, 13 L. R. A. 187, Richvale Land Co. v. Johnson, 28 Cal. App. 296, 152 P. 312, and Montgomery v. Meyerstein, 186 Cal. 459, 199 P. 800, to sustain its contention that the vendees were secured by the lien upon real property given by section 3050 of the Civil Code. The question whether said vendees' lien was intended to be regarded as such security as would defeat an attachment against other property of the debtor need not be considered in this action. By a counter affidavit filed by petitioners in the trial court at the hearing of the motion to discharge the attachment it is averred that plaintiffs held no lien, and, if such a lien ever existed, the same had become valueless without any act or fault of petitioners. It is also averred that any lien that may otherwise have existed is subordinate to a prior incumbrance, in that on March 8, 1925, the real property in suit was mortgaged to an incumbrancer in good faith and for value. These averments do not appear to be disputed. That an affidavit may be amended by inserting an averment that the security has become valueless is expressly conceded in Corum v. Superior Court, 114 Cal. App. 741, 300 P. 837. Section 558, Code Civ. Proc.

Whether a demurrer was filed to the complaint in the trial court or what objections, if any, were made against the complaint in the trial court does not appear. It appears to be sufficient in all respects upon its face, but, if deficient in form, it would be subject to amendment without disturbing the attachment.

We are of the view that the attachment should not be discharged. The writ of prohibition is granted, and the lower court is directed to deny the motion to discharge the attachment.

We concur: WASTE, C. J.; TYLER, Justice pro tem.; CURTIS, J.; SHENK, J.

LANGDON, Justice (concurring).

I concur in the conclusion reached in this opinion, but I think it should do expressly what it does in effect, namely, overrule the case of Stone v. Superior Court, 214 Cal. 272, 4 P.(2d) 777, 77 A. L. R. 743. The Stone Case is, in its essential features, identical with the instant case, and the present decision destroys the former one as authority. Both are actions to recover money paid as consideration under a contract which was previously rescinded by the aggrieved party, for a ground specified in Civil Code, § 1689. The only difference between them is a wholly unimportant one. In the Stone Case the grounds for rescission were two, fraud and failure of consideration; in the instant case, a single ground is alleged, failure of consideration. Irrespective of the grounds, the obligation remaining after a completed rescission is the same in each case, and it is this obligation which is sued upon, and which the court herein holds to be a proper basis for attachment. That such a result is sound cannot be doubted, and I need not here repeat the reasons discussed in my dissent in the former decision.

The Stone Case laid down at least two principles which were directly in conflict with numerous decisions in this state, and were also contrary to the great weight of authority elsewhere. See cases cited in dissenting opinion, 214 Cal. 276, 4 P.(2d) 777, 779. See, also, notes, 21 Cal. L. Rev. 130; 20 Cal. L. Rev. 541; 5 So. Cal. L. Rev. 440; 77 A. L. R. 748. It has been followed by the District Court of Appeal, Second Appellate District, Division 1, in several cases. See Fair View Farms Co. v. Superior Court, 123 Cal. App. 9, 10 P.(2d) 1011; Ingalls v. Superior Court, 121 Cal. App. 453, 9 P.(2d) 266; Ryker v. Lindenberg (Cal. App.) 20 P. (2d) 763. The appellate department of the superior court in Los Angeles county, in an elaborate opinion which makes an immaterial distinction, did not follow it. Jensen v. Culver & Co. (Cal. Super.) 15 P.(2d) 907. The District Court of Appeal, Second Appellate District, Division 2, approved the decision in Jensen v. Culver & Co., supra. Culver & Co. v. Superior Court (Cal. App.) 19 P.(2d) 43. This intolerable confusion has resulted from the simple fact that the Stone Case, while plainly contrary to prior decisions of this court, did not expressly disapprove of such decisions, with the result that two appellate courts have felt at liberty to rely upon them. The majority opinion in the instant case relies upon these earlier decisions, but fails to disapprove of the Stone Case, and hence invites further confusion. It is in the hope that this confusion may be avoided, and the rule clearly stated for the guidance of the courts of this state, that I proceed to analyze briefly the holding of the Stone Case and the effect of this opinion upon the principles therein announced.

The first principle laid down in that case is that, where an action is brought to recover the consideration paid under a contract, on the ground of fraud in the inducement thereof, such action "sounds in tort," notwithstanding the fact of prior rescission. The important result of this principle was that no attachment could be had in such an action. Examining this conclusion, we find that it was based largely on the case of San Francisco Iron & Metal Co. v. Abraham, 211 Cal. 552, 296 P. 82, 83, in which the action was based upon fraud, but no prior rescission was alleged or proved. It is clear enough that an action based upon the facts constituting the fraud is not an action on "a contract, express or implied," within the meaning of the attachment statute, despite a

pleading in the form of an action for "money had and received." San Francisco Iron & Metal Co. v. Abraham, supra. But, where a contract is entered into between the parties, and upon proper grounds the plaintiff gives notice of rescission and offers to restore the consideration he has received, it is settled by innumerable decisions that a quasi contractual obligation arises on the part of the defendant to restore what he has received. This obligation comes within the meaning of "a contract, express or implied," for purposes of attachment. It surely can make no difference what the grounds for rescission may have been—fraud, mistake, duress, menace, undue influence, partial failure of consideration, total failure of consideration, breach of warranty in a contract of sale, insanity of the contracting party. See Cal. Civ. Code, §§ 1689, 1789, 39. Indeed, suppose the aggrieved party misconceived his case and gave notice of rescission upon an erroneous and unsupportable ground. This would not affect the validity of his rescission. Hull v. Ray, 211 Cal. 164, 294 P. 700. It is immaterial, therefore, what cause for rescission is relied upon, where the plaintiff seeks simply the recovery of his consideration. The action is not being brought upon the grounds for rescission, or upon any cause existing prior to rescission, but rather upon the new obligation which arises after the completed rescission. How can the obligation to restore the consideration be contractual in the one case and tortious in another? The majority opinion in the instant case holds that, in an action upon such obligation, an attachment is proper. It necessarily follows that the first rule of the Stone Case is incorrect, and that the Stone Case is overruled by the instant case on that point.

The second and more basic misconception of the Stone Case is in the nature of rescission itself. The opinion takes the position that the allegation of completed rescission is immaterial, and implies that the action was to secure a judgment of rescission. Under this view there would be no quasi contractual obligation upon which to sue, and the only cause of action would be based upon the fraud therein alleged. The necessary implication from the decision was that there could not be a rescission by the act of one party, but only an adjudication of rescission by an action brought in a competent court, and that this action was in equity. The result of this ruling was that actions to recover the consideration paid under a contract, after completed rescission by notice and restoration of all things received, were treated as suits in equity; jurisdiction being vested exclusively in the superior court, regardless of the amount in controversy. There is no justification in our statute or decisions for such a conclusion, as pointed out in the dissenting opinion in the Stone Case, and in the majority opinion in the instant case. It follows that, in so far as the Stone Case suggests this conclusion, it is overruled by the instant case, and so are Fair View Farms Co. v. Superior Court, supra; Ingalls v. Superior Court, supra; and Ryker v. Lindenberg, supra. The result reached in Jensen v. Culver & Co., supra, and Culver & Co. v. Superior Court, supra, is correct.

I concur: PRESTON, J.

218 Cal. 173

RAPHAEL v. MOARES et al.

S. F. 14610.

Supreme Court of California.

May 11, 1933.

As Modified May 24, 1933.

1. Appeal and error ⇐989.

That evidence would have supported contrary findings is immaterial, provided decision made is supported by sufficient evidence.

2. Easements ⇐36(3).

Finding that owner of adjoining property acquired easement in plaintiff's roadway by adverse use *held* justified under evidence in landowner's action for injunction and damages.

The evidence disclosed that the roadway formed connecting link between defendant's ranch and county road and afforded defendant only practical means of egress from his ranch by vehicle. Defendant testified that he used the road on an average of once a week for over twenty years and never considered it necessary to secure permission and that he had repaired and worked on the road over plaintiff's protest.

In Bank.

Appeal from Superior Court, Contra Costa County; A. B. McKenzie, Judge.

Action by John Raphael against John Moares, also known as John Morris, and others. Judgment for defendants, and plaintiff appeals.

Affirmed.

Frank M. Carr, of Oakland, for appellant.

J. E. Rodgers and A. F. Bray, both of Martinez, for respondents.

PRESTON, Justice.

Plaintiff Raphael and defendant Moares own respectively adjoining ranch properties. Plaintiff instituted this action to perpetually

restrain said defendant from entering upon his premises and plowing, scraping, or constructing any roadway thereon; also for $5,000 damages for past trespasses. Defendant answered, claiming a right of way and easement over plaintiff's land, appurtenant to his land. Findings and judgment were rendered in his favor. Plaintiff appealed.

The sole question is whether the evidence supports the findings and judgment, or to state the matter another way, did the evidence, which showed that defendant had used this roadway for more than twenty years, also sufficiently establish that such use was adverse, under a communicated claim of right, and not merely permissive, or a matter of neighborly accommodation?

During the opening hours of the trial the court below took the precaution to admonish counsel that mere evidence of general use of the roadway over a long period of years by defendant and other neighbors and persons would not constitute a sufficient proof that defendant's use thereof was adverse rather than permissive. Plaintiff, defendant, and numerous other witnesses thereafter gave testimony bearing upon the character of defendant's right, which evidence was indeed highly conflicting.

[1, 2] The court, however, found that defendant had used the roadway for many years for transporting farming implements and hay to and from his lands to the county road and for pedestrian and vehicular purposes and that this use was during all of said times under a claim of right, open, actual, exclusive, notorious, continuous, and adverse, and that defendant claimed to own said easement against plaintiff and the whole world. The record supports these findings. It would also have supported findings to the contrary. However, the latter fact is immaterial as we need only determine whether the decision made is supported by sufficient evidence and we believe that it is.

A résumé of the proof would serve no purpose. We might say, however, that said roadway over the land of plaintiff is well defined and graded and forms the connecting link between defendant's ranch and the county road. Other than a roundabout way, so steep as to be impractical for vehicular travel, said easement affords defendant the only means of egress from his ranch. He testified that he used the road on an average of once a week for over twenty years; that he never considered it necessary to secure permission so to do. Other witnesses testified that the road had existed and been in use for more than forty years. At times, when small sections of it were ploughed and planted, or a volunteer crop sprang up, people would drive across the cultivated portion or temporarily go around it. Further, defendant testified to having repaired and worked on the road, over the protest of plaintiff, on occasions dating back twelve or fifteen years. The account of these occurrences, when credited by the court below, afforded ample reason for the conclusion reached therein.

The question of whether a presumption that defendant's claim was adverse arose by reason of the unhindered use of the road over so long a period, and similar matters, require no comment in view of our aforesaid conclusion that the findings and judgment have sufficient direct support in the evidence.

The judgment is affirmed.

We concur: LANGDON, J.; CURTIS, J.; SHENK, J.; SEAWELL, J.; THOMPSON, J.

218 Cal. 99

VIDAL v. BACKS, County Clerk.

S. F. 14881.

Supreme Court of California.

May 1, 1933.

1. Constitutional law ⇐52, 79.

Constitutional courts cannot be limited in discharge of functions by legislative or executive branches.

2. Holidays ⇐1.

Term "holiday" has reference to day set apart for worship, reverence to memory of great leader and benefactor, to rejoice over some great national or historical event, or to rekindle flame of an ideal.

Word "holiday" means a consecrated day, a religious festival, a day on which the ordinary occupations are suspended, a day of exemption, that is, cessation from work, a day of festivity, recreation, or amusement.

[Ed. Note.—For other definitions of "Holiday," see Words and Phrases.]

3. Holidays ⇐1.

"Legal holiday" is a day designated by legislative enactment for purpose within meaning of term "holiday."

[Ed. Note.—For other definitions of "Legal Holidays," see Words and Phrases.]

4. Holidays ⇐5.

Term "nonjudicial day" within constitutional provision requiring courts to be always open, legal holidays and nonjudicial days excepted, means day on which process cannot

ordinarily issue or be executed or returned, and on which courts do not usually sit (Const. art. 6, § 5).

[Ed. Note.—For other definitions of "Nonjudicial Day," see Words and Phrases.]

5. Holidays ⊂⊃5.

Bank holiday proclaimed by President *held* not "special holiday" so as to render judgment of foreclosure obtained during holiday invalid on theory that court was not open for transaction of judicial business (Pol. Code, § 10, as amended by Act March 6, 1933; Code Civ. Proc. § 134; Const. art. 6, § 5; Trading with the Enemy Act, § 5(b), as amended, 50 USCA Appendix § 5(b).

In Bank.

Original application by Marie Vidal for a writ of mandate prayed to be directed to J. M. Backs, County Clerk of Orange County, to compel the issuance of a writ of execution on a judgment claimed to have been rendered on a nonjudicial day.

Writ of mandate ordered to issue.

Rutan & Mize, of Santa Ana, and O'Melveny, Tuller & Myers, Louis W. Myers, and Jackson W. Chance, all of Los Angeles, for petitioner.

S. B. Kaufman, Dist. Atty., Forgy, Reinhaus & Forgy, S. M. Reinhaus, and A. M. Bradley, all of Santa Ana, for respondent.

IRA F. THOMPSON, Justice.

A judgment of foreclosure and sale was rendered by the superior court of Orange county on the 8th day of March, 1933, in favor of the petitioner herein. The respondent county clerk has refused to issue a writ on the judgment, and it is sought by this proceeding to compel him so to do. The sole contention of respondent is that the judgment was rendered on a nonjudicial day, and for that reason is void. The question arises by virtue of the proclamation of the President of the United States declaring certain bank holidays and our statutes respecting judicial work which may be done on general or special holidays.

First of all, it is well to note that in section 5 of article 6 of our state Constitution it is provided as follows: "Superior courts, municipal courts and justices' courts in cities having a population of more than forty thousand inhabitants, shall always be open, legal holidays and nonjudicial days excepted."

Section 10 of the Political Code, as amended March 6, 1933, so far as material to this case, reads as follows: "Holidays within the meaning of this code, are every Sunday, the first of January, twelfth of February, to be known as 'Lincoln day,' twenty-second day of February, thirtieth day of May, fourth day of July, ninth day of September, first Monday in September, twelfth day of October to be known as 'Columbus day,' twenty-fifth day of December, eleventh day of November known as 'Armistice day,' every day on which an election is held throughout the state, and every day appointed by the president of the United States or by the governor of this state for a public fast, thanksgiving, or general or special holiday (except that on any day appointed by the governor as a special holiday, all public offices and courts and all public schools of or under this state, or any city, county, city and county, township, district or political subdivision thereof, shall be open for the transaction of business as on days which are not holidays)."

Section 134 of the Code of Civil Procedure prior to March 10, 1933, read in part as follows: "No court, other than the supreme court, must be open for the transaction of judicial business on any of the holidays mentioned in section 10 [referring to section 10, Pol. Code, already quoted in part], except for the following purposes: [Here follow the exceptions, which are not material in the present proceeding.]" While not governing in the instant case, it may be well to note that on March 10, 1933, the language we have just quoted from section 134, Code of Civil Procedure, was amended by inserting after the word "holidays" and before the word "mentioned" the words "other than special holidays," and section 135 was amended to read as follows: "On all special holidays, as the term 'special holiday' is used in section 10 of the Political Code, the courts of this state shall be open for the transaction of any and all judicial business. If any day mentioned in section 10 of the Political Code, other than such a special holiday, happen to be the day appointed for the holding or sitting of a court, or to which it is adjourned, it shall be deemed appointed for or adjourned to the next day." We are not here concerned with the general holidays which the Governor of this state declared from March 2d to the 6th, inclusive, nor with the special holidays declared by him from March 7th to the 11th, inclusive, because it is apparent from what we have already quoted that the Legislature has provided that, so far as special holidays are concerned, no interference with the regular processes of the court shall be permitted or attempted. However, on March 6, 1933, the President of the United States, acting under the authority of the Act of Congress of October 6, 1917 (40 Stats. at Large, 411, 415, § 5(b), as amended by Act Cong. Sept. 24, 1918, § 5, 50 USCA Appendix § 5(b), empowering him to "prohibit, under such rules and regulations as he may prescribe, by means of licenses or otherwise, any transactions in foreign exchange and the export, hoarding, melt-

ing or earmarkings of gold or silver coin or bullion or currency, * * *" and by reason of the national emergency then existing which had caused the governors of the various states to declare holidays in order to protect the financial structure, declared that "from Monday, the sixth day of March, to Thursday, the ninth day of March, nineteen hundred and thirty-three, both dates inclusive," there should "be maintained and observed by all banking institutions and all branches thereof located in the United States of America * * * a bank holiday, and that during such period, all banking transactions shall be suspended." On March 9th the President by proclamation continued the "bank holidays" in effect until further proclamation by the President.

It will thus be seen that the question with which we are first concerned is whether "bank holidays" are "special holidays" within the meaning and intent of section 10 of the Political Code; attention being called to the fact that such special holidays as may be proclaimed by the President are not excepted with respect to judicial and public business and the schools, as are the special holidays proclaimed by the Governor of this state. In approaching the question, we are confronted, first of all, by the principle as enunciated in Didsbury v. Van Tassel, 56 Hun, 423, 10 N. Y. S. 32, 33: "The avenues of approach to the courts should be open on all secular days; and great inconvenience, and positive loss and injury, will result from their diminution. We cannot, therefore, impute to the legislature an intention to diminish the number of judicial days, without unequivocal language expressive of such a design. * * *" A very enlightening and instructive case (to which we refer solely for the purpose of illustrating the thought that the courts should ordinarily be open to redress grievances) is that of Langabier v. Fairbury, Pontiac & Northwestern R. R. Co., 64 Ill. 243, 16 Am. Rep. 550, which involved the validity of an injunction issued on Sunday to prevent the railroad company, which had taken possession of a street after 12 o'clock on a Saturday night with the intention of finishing their track through its entire length before Monday morning, counting upon the intervening dies non juridicus by which to evade an injunction and the process of the court. The Supreme Court of Illinois, after pointing out that prior to the year 517, in which year a canon was promulgated exempting Sundays, the early Christians "used all days alike for the hearing of causes," and that thereafter Sunday became accepted by the common law as a nonjudicial day, says with respect to the question then being considered as follows:

"Here, this dies non juridicus was selected by the railway company as the proper day to commit a great outrage upon private and public rights, believing the arm of the law could not be extended on that day to arrest them in their high-handed and unlawful design. To the complainant the acts they were organized to perpetrate on that day were fraught with irreparable injury. Feeble indeed would be the judicial arm if it could not reach such miscreants.

"To save a debt of twenty dollars, judicial acts can be performed on Sunday, and maintained as well. To prevent the ruin of an individual, such an act must not be done! 'Lame and impotent conclusion.'

"In Comyn's Digest, title 'Temps,' under the head, Dies non Juridicus, it is said, the chancery is always open. So the Exchequer may sit upon a Sunday or out of term. P. 333 (C.5). There is nothing, to an intelligent mind, revolting in this.

"Suppose, in times of high political excitement, a citizen is indicted for treason, and judgment of death pronounced against him by a servile judge, who, not a slave of the Crown, as were Tressilian, Scroggs and Jefferies, but yet the slave of an enraged populace, on an indictment never returned into court, or found by a grand jury, and defective in every essential, and this judgment pronounced on Saturday, and the time of its execution fixed on the following Monday. To arrest this proposed judicial murder, an application is made to a member of the appellate court on the intervening Sabbath: who would justify the judge, should he fold his arms and, on the plea the day was not a judicial day, suffer the victim to be led to execution?

"The necessity of the case would be the law of the case. The judge who has no respect for this principle, is unworthy the ermine and an unfit conservator of the rights of the citizen.

"The case before us is not one of life or death, but it involves irreparable injury to property. An imperious necessity demanded the prompt interposition of chancery. On that principle the act is fully justified. This is the dictate of right, of reason, of common justice and common sense."

[1] To the same general effect we are squarely faced by that portion of section 5 of article 6 of our Constitution which we have already quoted, indicating a determination on the part of the people, expressed in their fundamental law, that the trial courts shall always be open for business, with the minor exceptions of legal holidays and nonjudicial days as those expressions have heretofore been generally understood and accepted. Again, we must bear in mind a fundamental principle of government applying to constitutional courts to the effect that they

constitute an independent branch of government which cannot be hampered or limited in the discharge of its functions by either of the other two branches.

[2, 3] With these thoughts in mind, we return to the question, convinced that sound public policy requires a strict interpretation, so far at least as the courts are concerned, of the words "bank holiday." It is certain that the bank holidays do not fall within the orbit of our general understanding of the word "holiday." That term is defined in 29 C. J. 761, as follows: "(1) a consecrated day, a religious festival, (2) a day on which the ordinary occupations are suspended, a day of exemption, i. e., cessation from work, a day of festivity, recreation, or amusement; and a legal holiday is a day designated and set apart by legislative enactment for one or more of such purposes." For similar statements of its meaning reference may be had to State v. Shelton, 38 Ind. App. 80, 77 N. E. 1052; St. Louis B. & M. R. R. v. Hicks (Tex. Civ. App.) 158 S. W. 192; 15 Am. & Eng. Encyc. of Law, 512. Indeed, we need only to consult our own conception of a holiday to realize that it has reference to a day set apart for worship, for reverence to the memory of a great leader and benefactor of humanity, to rejoice over some great national or historical event, or rekindle the flame of an ideal.

[4] As the term "non-judicial day" is used in the Constitution we cannot find that it is different from the expression "legal holiday." Originally the phrase dies non juridicus was used to describe Sundays and some particular festivals which the church by proclamation ordained should not be "profaned by the tumult of forensic litigation." (See Article Dies Non Juridicus, 7 So. Law Rev. 697.) To-day it simply means those days "on which process cannot ordinarily issue or be executed or returned, and on which courts do not usually sit." Whitney v. Blackburn, 17 Or. 564, 21 P. 874, 11 Am. St. Rep. 857. And, to like effect, is the term defined in Bouvier's Law Dictionary under the heading dies non.

[5] We have already seen that the bank holiday was proclaimed, not for any of the purposes generally denoted or connoted by the word "holiday," but for the purpose of preventing the hoarding of gold, silver, and currency. It was limited in its effect to the banks. The proclamation did not in any sense of the word pretend to call upon the people generally for an observance of any kind, nature, or description, but was designed to close the banks and prevent the paying out of coin and currency. Had the period been designated a special holiday by the President, there might be more question, but, not having been so designated, we are compelled by all the reasons heretofore mentioned to conclude that the period of the bank holiday is not a period of special holidays within the meaning and intent of section 10 of the Political Code.

It follows that the peremptory writ of mandate should issue as prayed, and it is so ordered.

We concur: WASTE, C. J.; CURTIS, J.; SEAWELL, J.; LANGDON, J.; PRESTON, J.; SHENK, J.

131 Cal.App. 525

PEOPLE v. LOMBARD et al.

Cr. 82.

District Court of Appeal, Fourth District, California.

April 28, 1933.

1. Kidnapping ⇐5.

Evidence justified verdict finding defendants guilty of attempt to kidnap for purpose of extortion (Pen. Code, § 209).

2. Criminal law ⇐44.

"Attempt to commit a crime" is an act done with the intention of committing a crime, and tending to, but falling short of the thing intended.

[Ed. Note.—For other definitions of "Attempt to Commit Crime," see Words and Phrases.]

3. Criminal law ⇐44.

Acts amounting to mere preparation for commission of crime, if unaccompanied by some overt act toward actual commission, do not amount to an "attempt" and cannot be punished as such.

4. Criminal law ⇐510.

Testimony of feigned accomplice required no corroboration in order to support conviction.

5. Criminal law ⇐878(4).

Verdict finding defendant guilty of attempt to kidnap for purpose of extortion and not guilty of attempt to extort money *held* not inconsistent since offenses are not identical in that they are separately defined in Penal Code, different penalty is prescribed for each, and offenses are not classed as "included offenses" by Code (Pen. Code, §§ 209, 524).

6. Indictment and Information ⇐125(3).

Information was not demurrable because more than one offense was charged in second count where preliminary statement preceding third and fourth counts, that each was different statement of same cause of action set

forth in second count of information charging different offenses, constituted third and fourth counts separate counts and not portions of second count.

7. Witnesses ⊂⇒277(1).

Prosecution can question accused to elicit answers which contradict evidence adduced on direct examination, or which weaken or modify its effect.

8. Witnesses ⊂⇒347, 387.

Prosecution can cross-examine accused on any relevant and material matter testified to on his direct examination, for purpose of showing conduct or statements inconsistent with direct testimony.

9. Criminal law ⊂⇒829(1).

Refusal of instruction, subject-matter of which was covered by given instruction, *held* not error.

10. Criminal law ⊂⇒829(10).

Refusal of instruction that any statements made by either defendant concerning offenses, after their commission and out of hearing of other defendant, could not be considered by jury as evidence against other defendant, *held* not prejudicial, where jury was repeatedly so admonished during trial.

Appeals from Superior Court, San Bernardino County; Charles L. Allison, Judge.

Charles Lombard and William Snyder were convicted of attempt to kidnap for purposes of extortion, and they appeal.

Affirmed.

P. E. Bingman, of San Bernardino, for appellant Charles Lombard.

C. O. Thompson, of San Bernardino, for appellant William Snyder.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

CAMPBELL, Justice pro tem.

Appellants were jointly charged in four separate counts in an information filed by the district attorney of San Bernardino county of the crime of (1) criminal conspiracy; (2) attempt to extort money or property; (3) attempt to kidnap for purpose of extortion, and (4) criminal conspiracy. Counts 2, 3, and 4 were based on another and different transaction from that set forth in count 1. At the close of the people's case the two criminal conspiracy charges were dismissed by the court on motion of the district attorney. The jury were left to consider the guilt of each defendant on the charges of (1) attempt to kidnap for purposes of extortion, and (2) attempt to extort money or property. The jury were instructed by the court that they could not find the defendants or either of them guilty of both charges, but could, if the evidence warranted, find them guilty of one or the other. By their verdict the jury found them guilty of the crime of attempt to kidnap for purposes of extortion. From the judgments of conviction and the orders denying their motions for a new trial the appellants prosecute this appeal upon the grounds: (1) That the verdict is contrary to the evidence and the weight of evidence; (2) that the verdict is contrary to law and the evidence; and (3) the verdict is inconsistent.

[1] It appears from the evidence that prior to October 13, 1932, information reached the public authorities of San Bernardino county that an attempt was about to be made to kidnap, for the purposes of extortion, one or more persons in the city of Redlands, located in that county. This information was received from one Eddie Dow, and also from Helen Griffith. Acting on this information officers of San Bernardino county went to the city of Redlands on the evening of October 13, 1932, arriving there about 6 p. m. The officers were instructed to watch for a certain make of car bearing a designated license number. Before the officers left for Redlands and while they were parked a few blocks from the apartment house in San Bernardino where Snyder and Lombard were staying, a car answering that description and bearing said license number came into view and the officers noted that Eddie Dow was driving and appellants Snyder and Lombard were seated in the car. The officers followed the car to Redlands. After spending some time in Redlands, the automobile bearing Eddie Dow and the appellants made the return trip to San Bernardino with the officers following them. As the two cars were nearing San Bernardino the officers noted something that looked like scraps of paper being thrown out of the car occupied by appellants. These slips of paper were recovered by a deputy sheriff and proved to be an extortion note. Appellant Lombard was seen by an officer entering the premises of the intended victim. When the officers searched the car following the arrest of Lombard and Snyder upon their return to San Bernardino, the officers found a ball of heavy twine, two sheets and a couple of pillow cases in the rear of the car; also a writing tablet was found and two pieces of paper which had been torn from the writing tablet. On one of these papers were found indentations or impressions of hand printing which, when examined carefully, revealed that they were imprints or impressions made by the one who wrote or printed the extortion note which the appellant Lombard had prepared. After his arrest, and while at the county jail the appellant Lombard prepared for the officers at their request, samples of his handwriting and printing. These, when compared with the

ransom note proved that Lombard was the writer thereof. Appellant Snyder accompanied officers to a cabin located at Santa Susanna the day following his arrest and told the officers that he and Dow were going to take care of the intended victim at this cabin and that the appellant Lombard was to be the go-between and make the contact with the intended victim's family. Eddie Dow, who played the part of a feigned accomplice in this transaction, testified that he drove Snyder and Lombard to Redlands and that he and Snyder stayed in the car while Lombard went to "scout his house; I didn't know where the house was only from what he had said; and he had a note, and made out the note, and was going over to the house to scout there to see if everything was clear and who was at home." After an interval, Lombard returned and said: "The place is hot; let us get out of here." They left and returned to San Bernardino. Dow further related that on the way to Redlands that night plans were outlined by appellants Lombard and Snyder as to how they were going to obtain the intended victim and how they were going to handle him. The plans were detailed in full by the testimony of Dow. Helen Griffith, who owned the apartment house where appellants Snyder and Lombard stayed for some time prior to October 13th, testified that prior to October 13th she had frequently heard appellants Snyder and Lombard discuss the proposition of kidnapping some one in Redlands.

This brief résumé of the facts of the case is sufficient to disclose that the evidence was ample to justify the verdict of the jury and the judgments pronounced thereon.

[2] Appellant Snyder, testifying in his own behalf, denied any knowledge of the attempted kidnapping or any intentional participation therein. This merely created a conflict in the evidence which was resolved against the appellant, first by the verdict of the jury, and later by the court upon hearing his motion for a new trial. An "attempt" to commit a crime is generally defined as an act done with the intention of committing a crime, and tending to, but falling short of the thing intended. The endeavor to commit the crime must be carried beyond mere intention and mere abstract preparation, but falling short of the execution of the ultimate design.

In People v. Petros, 25 Cal. App. 236, 143 P. 246, 249, quoting from 2 Bishop on Criminal Procedure, par. 71, it is said: "An attempt to commit a crime is compounded of two elements: (1) The intent to commit it; and (2) a direct ineffectual act done towards its commission."

[3] Acts, amounting to mere preparation for the commission of a crime, if unaccompanied by some overt act toward the actual commission, do not amount to an attempt and cannot be punished as such. But if there is an intent and preparation, and at least one direct ineffectual act toward the actual commission of the offense after the preparations are made, then an attempt to commit the crime has been made. People v. Mann, 113 Cal. 76, 45 P. 182; In re Magidson, 32 Cal. App. 566, 163 P. 689; People v. Gilbert, 86 Cal.App. 8, 260 P. 558; People v. Lanzit, 70 Cal.App. 498, 233 P. 816.

The evidence here clearly establishes the intentions of the parties to kidnap the intended victim for the purpose of extorting money, and it amply shows the preparations that were made to carry out their intent, namely, the preparations made at the cabin in Santa Susanna Pass, the buying of groceries, the providing of the means of tying and gagging the victim while taking him there, and securing the use of Dow's car and his services as driver. In addition the extortion note was written. Added to this is the one overt act made to carry out the intent and to utilize the preparations made for the kidnapping, namely, the trip to Redlands for the avowed purpose of delivering the extortion note, and at the same time seizing and carrying away the intended victim.

[4] Appellants contend that the verdict is contrary to law and the evidence because a conviction cannot be had on the uncorroborated testimony of an accomplice. The witness, Eddie Dow, was unquestionably a feigned accomplice and his testimony as a matter of law required no corroboration. People v. Keseling, 35 Cal.App. 501, 170 P. 627; People v. Spaulding, 81 Cal. App. 615, 254 P. 614.

Appellants further contend that the verdicts were inconsistent in that the jury found the defendants guilty of the crime of attempt to kidnap for the purpose of extorting money and yet found them not guilty of the crime of attempt to extort money or property. They contend that such verdicts are inconsistent because the date of both such alleged offenses are the same and the person to be kidnapped for the purpose of extortion is the same as the one named as the intended victim in the extortion charge, and the amount of money involved in each is the same.

The offense of attempt to kidnap for the purpose of extortion is an "attempt" to commit the crime defined in section 209 of the Penal Code, which section provides as follows: "Every person who maliciously, forcibly, or fraudulently takes or entices away any person with intent to restrain such person and thereby to commit extortion or robbery, or exact from the relatives or friends of such person any money or valuable thing, is guilty of a felony, and shall be punished therefor by imprisonment in the state's prison

for life, or any number of years not less than ten."

The offense of attempt to extort money or property is defined in section 524 of the Penal Code as follows: "Every person who attempts, by means of any threat, such as is specified in section 519 of this code, to extort money or other property from another is punishable by imprisonment in the county jail not longer than one year or in the state prison not exceeding five years, or by fine not exceeding five thousand dollars, or by both such fine and imprisonment."

[5] It is to be noted that the penalty for the crime of the commission of the latter offense is not the same as that provided for the crime of attempt to kidnap for the purpose of extortion. These offenses being separately defined, a different penalty prescribed for each, and not being classed as "included offenses" by the Code are in no sense identical. Hence the verdicts herein were not inconsistent. People v. Powell, 50 Cal.App. 436, 195 P. 456; People v. Pickens, 61 Cal.App. 405, 214 P. 1027; People v. Day, 199 Cal. 78, 248 P. 250.

[6] Appellants contend that the information was demurrable upon the ground "that more than one offense is charged in count 2 of the information." There is no merit to this contention, however, because the preliminary statement preceding the charging of the third and fourth offenses set forth in the information, viz., "being a different statement of the same cause of action set forth in the second count of this information" clearly indicates, we think that this constitutes an added separate and distinct count, rather than a portion or subdivision of count 2. People v. Danford, 14 Cal. App. 442, 449, 112 P. 474.

Appellant Snyder contends that the court erred in overruling objections to the cross-examination of said appellant on the matters allegedly not covered by the direct examination. Said appellant testified on his own behalf in answer to questions propounded to him on direct examination. He stated his name, his age, denied he had any knowledge of the fact that the defendant Lombard intended to deliver a letter or document to the intended victim, denied any knowledge of the letter having been written, denied that he ever discussed with Dow or Lombard or any other person the matter of kidnapping the intended victim.

[7, 8] The defendant, testifying in his own behalf, is to be treated the same as any other witness and the prosecution has a right to question him in a manner that may elicit answers which tend to contradict the evidence adduced on direct examination, or which tend to weaken or modify its effect. It is proper in a criminal case to cross-examine a defendant upon any relevant and material matter testified to on his direct examination, for the purpose of showing conduct or statements inconsistent with his direct testimony. It appears from the record that the matters sought to be elicited by the cross-examination were sought in good faith for the purpose of contradiction of direct testimony of the said appellant on his direct examination and hence he cannot now make a valid complaint.

[9, 10] It is our opinion that the rulings of the court were proper.

Appellant Snyder contends that the court erred in refusing to give his requested instructions Nos. 1 and 17. These instructions are not reproduced in the brief nor is the subject matter presented. However, we have examined them and find that the subject-matter of instruction No. 17 was covered by an instruction given by the court in instruction No. 9 and that instruction No. 1, requested by defendant Snyder and refused, in effect instructed the jury that any statements made by either defendant concerning the alleged offenses, after the commission of the same, and out of the hearing of the other defendant, could not be considered by the jury as any evidence against the other defendant. This instruction is, in general, a correct statement of the law, but the jury was repeatedly admonished to that effect during the trial, whenever statements made by one defendant outside the presence of the other and after their arrest, were sought to be introduced in evidence. Hence the defendant Snyder suffered no prejudice through failure of the court to give his instruction No. 1, at the close of the trial.

The evidence being sufficient to sustain the verdicts and judgments and no error appearing in the record, the judgments and orders appealed from should be affirmed. It is so ordered.

We concur: BARNARD, P. J.; MARKS, J.

131 Cal.App. 643

The PEOPLE of the State of California, Plaintiff and Respondent, v. Guy CASCIO and Sarafino Cuilla, Defendants and Appellants.

Cr. 1246.

District Court of Appeal, Third District, California.

May 8, 1933.

Appeal from Superior Court, San Joaquin County; M. G. Woodward, Judge.

Ray T. Coughlin, of Sacramento, for appellants.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

PER CURIAM.

The appellants were convicted in the superior court of San Joaquin county of a felony, to wit, robbery of the first degree.

The transcript on appeal was filed in this court December 30, 1932. No brief has been filed in behalf of appellants. The cause was regularly placed on the calendar for oral argument on May 8, 1933. No appearance was made for appellants at the time the case was called for hearing.

Pursuant to the provisions of section 1253 of the Penal Code, the judgment and the order are affirmed.

131 Cal.App. 646

PEOPLE v. RUSSELL.

Cr. 1724.

District Court of Appeal, First District, Division 1, California.

May 9, 1933.

Rehearing Denied May 24, 1933.

Constitutional law ⇐266.
Criminal law ⇐1201.

Statute making certain records evidence of prior conviction *held* not to violate due process clauses of state and Federal Constitutions (Pen. Code, § 969b; Const. Cal. art. 1, § 13; Const. U. S. Amend. 14).

Appeal from Superior Court, Monterey County; H. G. Jorgensen, Judge.

Joe Russell was convicted of violating Pen. Code, § 288, after a prior conviction of a felony, and he appeals.

Affirmed.

Joe Russell, in pro. per.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, of San Francisco, for the People.

PER CURIAM.

Defendant was charged upon three counts with violations of section 288 of the Penal Code and with a prior conviction of a felony in the state of Texas. He was convicted on all the charges with the exception of one of the counts, and has appealed from an order denying his motion for a new trial and the judgment entered on the verdict.

No objection is made to the sufficiency of the evidence to support the charges of violations of the section of the Penal Code, but it is claimed that section 969b of that Code, making certain records evidence of a prior conviction, violates the due process clauses of the state and Federal Constitutions (Const. Cal. art. 1, § 13; Const. U. S. Amend. 14).

As shown by the following, there is no merit in this contention: 16 Cor. Jur. Criminal Law, §§ 3161, 3162, pp. 1343, 1344; 12 Cor. Jur. Constitutional Law, § 879, pp. 1205, 1206; People v. Sierp, 116 Cal. 249, 251, 48 P. 88; West v. Louisiana, 194 U. S. 258, 24 S. Ct. 650, 48 L. Ed. 965; Mobile, J. & K. C. R. Co. v. Turnipseed, 219 U. S. 35, 31 S. Ct. 136, 55 L. Ed. 78, 32 L. R. A. (N. S.) 226, Ann. Cas. 1912A, 463; People v. Sickles, 156 N. Y. 541, 51 N. E. 288.

The judgment and order are affirmed.

131 Cal.App. 642

The PEOPLE of the State of California, Plaintiff and Respondent, v. Dan O'TOOLE, Defendant and Appellant.

Cr. 1242.

District Court of Appeal, Third District, California.

May 8, 1933.

Appeal from Superior Court, San Joaquin County; M. G. Woodward, Judge.

Paul E. Gehres, of Stockton, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

PER CURIAM.

The appellant was convicted in the superior court of San Joaquin county of a felony, to wit, robbery of the first degree.

The transcript on appeal was filed in this court November 18, 1932. No brief has been filed in behalf of appellant. The cause was

regularly placed on the calendar for oral argument on May 8, 1933. No appearance was made for appellant at the time the case was called for hearing.

Pursuant to the provisions of section 1253 of the Penal Code, the judgment and the order are affirmed.

131 Cal.App. 660

SIMPSON v. STEINHOFF et al.

Civ. 776.

District Court of Appeal, Fourth District, California.

May 9, 1933.

Rehearing Denied June 7, 1933.

Hearing Denied by Supreme Court July 7, 1933.

1. Appeal and error ⇐901.

Appellant must show prejudicial error by record.

2. Appeal and error ⇐1050(1).

Admitting X-rays over objection that doctor taking them was not present for examination concerning patient's posture, if error, *held* harmless.

It appeared that, when photographs in question were handed to medical witness with statement to counsel that they had been taken by another doctor at witness' request, objection was made that no foundation had been laid, and that counsel wanted right to examine doctor who took X-rays as to posture of patient, and that witness replying to court's question said he could determine such posture, whereupon objection was overruled, and without further objection witness explained pictures to jury, and then without objection plaintiff was placed before jury and witness illustrated his statements by pointing out on body of plaintiff certain of conditions to which he had referred.

3. Trial ⇐29(2, 3).

Court's remark in overruling objection that counsel could offer suitable instructions if so desiring *held* not objectionable as comment on evidence or witness' veracity.

It appeared that plaintiff suing for injuries in automobile accident was asked on cross-examination whether she had received any sums from or in behalf of employer, and plaintiff's counsel objected on ground that question could refer only to compensation award, in which case law provided for first lien on any judgment recovered, and that matter was immaterial. This objection was overruled, and court remarked that counsel could offer suitable instructions if so desiring.

4. Damages ⇐210(1).

Instruction in automobile accident case that plaintiff had received compensation payments but that compensation fund would have lien on any judgment recovered and would be repaid *held* not objectionable as stating that plaintiff must reimburse fund, whether recovering judgment or not.

5. Trial ⇐244(4).

Instruction in automobile accident case that plaintiff had received compensation payments, but that compensation fund would be reimbursed from any judgment recovered, *held* not objectionable as singling out particular testimony.

It appeared that need for instruction on subject-matter of instruction in question was created by defendant-appellant himself, who had introduced immaterial matter by bringing out fact that plaintiff had received certain payments from state compensation insurance fund.

6. Appeal and error ⇐1064(1).

Negligence instructions criticized as basing required degree of care on circumstances themselves, not on what ordinarily prudent person would do, if erroneous, *held* harmless.

Instructions in question stated in part that negligence amounts to omission to observe that degree of care, precaution, and vigilance which circumstances justly require. It appeared, however, that these instructions were followed by instruction that, if defendant acted as ordinarily prudent man would have acted under like circumstances, verdict should be in his favor, and it appeared further that matter of negligence was fully covered in instructions as whole.

7. Automobiles ⇐246(1).
Trial ⇐240, 252(8).

Instructions in automobile accident case *held* properly refused as being partly argumentative, not based on evidence, and contrary to law (St. 1923, pp. 557, 558, §§ 122, 125, 126).

In general, effect of instructions in question would have been to tell jury that defendant driver had right to select such parts of road as best suited his convenience in ascertaining condition of highway in front of automobile ahead of him, without giving signal for benefit of any automobile which might be following him, that he had right to assume that no other automobile was in close proximity to his rear or in such position as to interfere with his free use of entire road until presence of such other automobile was affirmatively brought to his attention, and that he could not be guilty of negligence until he had actual knowledge that another automobile was about to pass him.

8. Automobiles ⇐245(15).

Audibility of horn sounded before attempting to pass another automobile, and negligence of driver thereof who turned abruptly to left, *held* for jury.

9. Automobiles ⇐245(24).

In guest's action, motorist's gross negligence is jury question, but evidence must justify finding and inferences which jury may make (St. 1923, p. 517, § 141¾, as added by St. 1929, p. 1580).

10. Trial ⇐139(1).

Where court would be obligated to set aside verdict for plaintiff as unsupported, nonsuit is proper (St. 1923, p. 517, § 141¾, as added by St. 1929, p. 1580).

11. Negligence ⇐11.

"Gross negligence" is more than ordinary negligence.

"Gross negligence" has been defined as want of slight diligence, as entire failure to exercise care, or exercise of so slight a degree of care as to justify belief that there was indifference to things and welfare of others, and as that want of care which would raise presumption of conscious indifference to consequences.

[Ed. Note.—For other definitions of "Gross Negligence," see Words and Phrases.]

12. Automobiles ⇐245(24).

Gross negligence of driver who, seeking to pass another automobile, allegedly increased speed to 50 miles an hour, and was forced off pavement when automobile ahead turned abruptly, *held* insufficient for jury.

Appeals from Superior Court, Tulare County; Frank Lamberson, Judge.

Action by Margaret Simpson against Charles W. Steinhoff and Genevieve Swain. A nonsuit having been granted as to the last-named defendant, plaintiff appeals, and, from a judgment for plaintiff against the first-named defendant, the first-named defendant appeals.

Affirmed.

Strother P. Walton, of Fresno, for appellant and respondent Simpson.

Conron & Conron, of Bakersfield, for appellant Steinhoff.

Ray W. Hays, of Fresno, for respondent Swain.

BARNARD, Presiding Justice.

This action was brought to recover for damages sustained by the plaintiff on November 8, 1930, while riding as a passenger in an automobile driven by the defendant Swain. As they were proceeding south on the Golden State highway about three miles south of Famosa, they overtook and attempted to pass another machine which was being driven in the same direction by the defendant Steinhoff. It appears from the evidence that Miss Swain, after following the other car for some distance, decided to pass, and turned to the left side of the road after sounding her horn, that about the time the front of her car was even with the rear of the other car the defendant Steinhoff, without giving any signal, turned abruptly to his left and into the line of travel of the Swain car, and that Miss Swain, in order to avoid hitting him, was compelled to swing farther to the left and in doing so went into the soft dirt at the side of the road, whereupon her car skidded and overturned, causing the injuries of which the plaintiff complains. In this action which followed, the defendant Steinhoff was charged with negligence and the defendant Swain with gross negligence. At the conclusion of plaintiff's case a nonsuit was granted as to the defendant Swain, and at the conclusion of the trial the jury brought in a verdict for the plaintiff as against the defendant Steinhoff. The plaintiff has appealed from the judgment of nonsuit entered in favor of the defendant Swain, and the defendant Steinhoff has appealed from the judgment entered against him following the verdict of the jury. Both appeals are presented upon the same transcript but are separately briefed and will be here separately considered.

[1, 2] In the appeal of the defendant Steinhoff, it is first contended that the court erred in admitting into evidence a group of three X-ray photographs taken by one Dr. Milholland. A witness, Dr. Sample, was on the stand, and after he had testified concerning certain other X-ray photographs which had previously been admitted, the photographs here in question were handed to him with the statement to counsel that they had been taken by Dr. Milholland at the request of Dr. Sample. An objection was made that no foundation had been laid and that "we want the right, of course, to examine the doctor who took them as to the posture of the patient." The court thereupon asked the witness if he could determine the posture the patient was in when the pictures were taken, to which the witness replied that he did not think there was any question, that it might vary a little one way or the other, but very little. The court overruled the objection. Without further objection the witness explained the pictures to the jury, and then, without objection, the plaintiff was placed before the jury and the witness illustrated what he had been saying by pointing out upon the body of the plaintiff certain of the conditions to which he had referred and the effect thereof. Later, when the pictures were

offered in evidence, the same objection was made and overruled. It is argued that the admission of these pictures was prejudicial because they showed a curvature of the spine or what is referred to by this appellant as a permanent deflection of the spinal column, and that there is no other evidence in the record showing this condition. The person of the plaintiff was exhibited to the jury with accompanying explanations by the doctor, and, in addition to the doctor's testimony, other pictures, to which no objection had been made, were admitted in evidence and shown to the jury. While this appellant here asserts that the pictures objected to did not correspond with the pictures to which no objection was made, none of the pictures appears in the record before us. The duty rests upon an appellant to show both error and prejudice by the record itself, and upon the record before us we are unable to say that prejudice resulted. Kimball v. Northern Electric Co., 159 Cal. 225, 113 P. 156. No contention is made that the judgment rendered is excessive.

[3] It is next urged that the court erred in commenting upon testimony in the presence of the jury. The plaintiff had testified that she had paid certain hospital, doctor, and nursing bills. On cross-examination, she testified that one or two of these bills had been paid by her mother. Counsel for this appellant then asked her whether she had been paid any sums, from and after one week following the injury, by her employer or in its behalf by any other agency. Her attorney objected to this question on the ground that it could only refer to any compensation that might have been paid by virtue of an award by the Industrial Accident Commission, that in such case the law provided for a first lien on any judgment that might be recovered, and that the matter was entirely immaterial in this action. The court overruled the objection, stating "and you can offer suitable instructions if you want to." An involved argument is presented, the net result of which is a contention that the statement of the court just quoted had the effect of telling the jury whether or not the witness was to be believed. The statement was made in connection with a ruling upon an objection, and it could not have been considered by the jury as either a comment upon the evidence or as a statement in regard to the veracity of the witness.

[4, 5] Complaint is next made of the following instruction: "It appears from the evidence that the plaintiff has received some payments from the State Compensation Insurance Fund. You are instructed that the State Fund will have a first lien upon any judgment plaintiff may recover, and will be repaid in full for any expenditures made to plaintiff. Therefore, if you find for the plaintiff, you will compensate her for her damages as the Court has instructed you, and will not deduct from the amount you believe she is entitled to because of any compensation she may have received from the State Fund."

It is argued that this instruction is incorrect in that it advised the jury that the plaintiff was in duty bound to repay any amount received from this fund whether or not she received a judgment, and that the instruction singled out a particular phase of the testimony for the special consideration of the jury. The plain meaning of the instruction is that the state fund would have a first lien upon any judgment that might be recovered and would be repaid from such judgment, if any. Instead of this matter being singled out by the court for emphasis, it appears that immaterial matter brought out by the appellant gave rise to a need for an instruction on the subject. There is no claim that the judgment is excessive, no prejudice is shown, and no reversible error appears.

[6] It is next contended that the court erred in giving inconsistent instructions upon the law of negligence. The instructions complained of are as follows:

"Negligence in the legal sense amounts to the failure to observe for the protection of the interest of another person, that degree of care, precaution and vigilance which the circumstances justly demand."

"If you find from the evidence in this case that the defendant, Charles W. Steinhoff, immediately preceding the accident which resulted in plaintiff's injuries, was driving and operating his automobile upon a public highway, and that, in so driving and operating said automobile he failed to observe for the protection of the interests of other people on said highway that degree of care, precaution and vigilance which the circumstances justly demand, then you are instructed that the said defendant, Charles W. Steinhoff, was guilty of driving and operating his said automobile in a careless and negligent manner."

Appellant contends that these instructions, and particularly the last one, are prejudicially inconsistent with other instructions given on the subject of negligence, admittedly full and accurate, in that they predicate the degree of care required upon the circumstances themselves rather than on what an ordinarily prudent person would do under such circumstances. These instructions were followed by one reading as follows:

"If you believe that the defendant, Charles Steinhoff, upon the occasion in question, drove and operated his car as an ordinarily prudent man would have operated said vehicle under like circumstances, then you are instructed to find for the defendant, Charles Steinhoff, by your verdict."

No reversible inconsistency appears, the matter of negligence was fully covered in

the instructions as a whole, and the instructions complained of could neither have been misleading to the jury nor could they have affected the result.

[7] It is next contended that the court erred in refusing six instructions offered by this appellant in relation to the duty owed by him to the occupants of the car that was attempting to pass. In general, the effect of these instructions would have been to tell the jury that this appellant had the right to select such parts of the road as best suited his convenience in ascertaining the condition of the highway in front of the car ahead of him, without giving any signals of his intention for the benefit of any car which might be following him, that he had a right to assume that no other car was in close proximity to his rear or in such a position as to interfere with his free use of the entire road until and unless the presence of such other car was affirmatively brought to his attention, and that he could not be guilty of negligence until such time as he had actual knowledge that another car was about to pass him. It is argued that the instructions so offered and refused merely state the law as set forth in sections 125 and 126 of the California Vehicle Act (St. 1923, pp. 557, 558), and that the same were, in fact, a simplification of the substance of those sections of that act. The instructions so offered were in part argumentative, in part not based upon the facts in evidence, and in part contrary to law. In so far as they contained correct principles of law they were covered by other instructions given in which the court read to the jury sections 122, 125, and 126 of the California Vehicle Act.

[8] The last contention made is that the verdict is not supported by the evidence, in that the evidence does not show whether or not the warning emitted from respondent's horn was audible or what was the position of the cars at the time the horn was sounded. This is apparently based upon the fact that, while the respondent testified that she sounded her horn when she started to pass the appellant's car, she was unable to technically describe the exact sound made by that instrument. The contention is without merit, and the evidence amply sustains the verdict in that regard. The entire question as to the audibility of the horn and the negligence of the appellant under the circumstances was one of fact for the jury.

[9-11] With respect to the plaintiff's appeal from the judgment of nonsuit in favor of the defendant Swain, the appellant contends that the question as to whether this respondent was guilty of gross negligence under the circumstances shown was one of fact for the jury. This accident occurred at a time when section 141¾ of the California Vehicle Act (as added by St. 1929, p. 1580) allowed recovery by a guest against the driver of an automobile upon a showing of gross negligence. While the question of gross negligence, like the question of negligence, is one of fact for the jury, a finding of gross negligence must be justified by the evidence. Even the inferences which a jury is entitled to draw must be based upon facts appearing in the evidence. A nonsuit is therefore proper in such a case when the evidence is such that it would not support a finding of gross negligence and where it would be the duty of the court to set aside a verdict, if one were rendered, as lacking in evidentiary support. Gross negligence is something more than ordinary negligence. In Krause v. Rarity, 210 Cal. 644, 293 P. 62, 66, 77 A. L. R. 1327, it is thus defined: "The term 'gross negligence' has been defined as 'the want of slight diligence,' as 'an entire failure to exercise care, or the exercise of so slight a degree of care as to justify the belief that there was an indifference to the things and welfare of others,' and as 'that want of care which would raise a presumption of the conscious indifference to consequences.'"

[12] The question to be here decided is whether the evidence presented by this appellant would have sustained a verdict against this respondent as being guilty of gross negligence.

As to the conditions immediately prior to the accident, the evidence shows that the occupants of respondent's car were riding along comfortably about thirty or thirty-five miles an hour; that they were not conversing; that they followed the Steinhoff car for a few moments; that that car was then to the right of the painted line in the middle of the pavement; that respondent turned to the left to pass the other car, increasing her speed from five to eight miles per hour and sounding her horn; that when the front wheels of her car were even with the rear wheels of the other car, that car turned abruptly to the left and into her line of travel; that no signal of any kind was given by the driver of the other car; that, in order to avoid a collision, the respondent was compelled to turn still more to her left; that in doing so her car went into the soft dirt and skidded; and that the other car went so far to the left-hand side of the road that the respondent would have hit it had she not turned off the pavement.

There is no conflict in the evidence up to the time of the actual passing of the cars. Steinhoff testified that he first saw respondent's car "after it was passing him"; that when he first saw it it was partly but not completely off the paved portion of the road; that after it had passed him and when he first saw it he pulled back to his right-hand side of the road; that he had pulled over to the left to see if the road was safe for him to go around a car which was in front of

him; that he gave no signal before pulling to the left and did not look back; that he was driving between thirty-five and forty miles an hour; that the respondent's car "was going pretty fast. I would say about fifty miles an hour"; that the respondent's car was swerving and jumping off and on the highway along the shoulder; and that it went between one hundred and two hundred feet after he saw it and before it upset. While Steinhoff said the respondent's car was going fast, placing it at about fifty miles an hour, it fully appears that it went only about one hundred or two hundred feet after he saw it and was then "jumping off and on the highway along the shoulder." This evidence of her speed is the only evidence of negligence on the part of this respondent. Leaving out any question as to its weight, and assuming it could reasonably be held sufficient to show negligence on a main highway in the open country [Kastel v. Stieber, 215 Cal. 37, 8 P.(2d) 474], we think it cannot be held sufficiently substantial to have supported a finding of gross negligence under the circumstances here appearing. We conclude that the evidence presented by this appellant and relied on as showing gross negligence on the part of this respondent is not sufficient to require the submission of such an issue to the jury.

Both judgments appealed from are affirmed.

I concur: JENNINGS, J.

131 Cal.App. 607

PEOPLE v. PINCUS.

Cr. 2313.

District Court of Appeal, Second District, Division 1, California.

May 4, 1933.

Hearing Denied by Supreme Court June 1, 1933.

1. Jury ⇐29(6).

Defendant, charged with issuing checks without sufficient funds, *held* personally to have waived right to jury trial.

It appeared that at commencement of trial, judge informed defendant that he was entitled to be tried by jury, or that he could waive jury and be tried by court without jury, and asked defendant what he wanted to do, whereupon defendant said, "I want to be tried before you."

2. Criminal law ⇐286.

Plea of not guilty by reason of insanity is not in effect "plea of guilty," and hence need not be made by defendant personally (Pen. Code, §§ 1016, 1018, 1026).

Plea of not guilty by reason of insanity is not admission of guilt, but is merely admission of commission of acts charged, coupled with denial of guilt, such denial resting on remaining defense of insanity.

[Ed. Note.—For other definitions of "Plea of Guilty," see Words and Phrases.]

Appeal from Superior Court, Los Angeles County; William Tell Aggeler, Judge.

Sidney L. Pincus having pleaded not guilty by reason of insanity and having admitted two prior convictions of felony, was found sane and convicted on a charge of issuing checks without sufficient funds, and he appeals.

Affirmed.

Lois B. Preston, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Bayard Rhone, of Los Angeles, for the People.

YORK, Justice.

Defendant was charged in two informations filed by the district attorney of Los Angeles county with nine counts of issuing checks without sufficient funds. Defendant pleaded not guilty and not guilty by reason of insanity, but later withdrew the plea of not guilty. When the case was called for trial, amended informations were filed to include two prior convictions of felony. Defendant being arraigned on the amended informations, pleaded not guilty by reason of insanity, and admitted the prior convictions. He was tried by the court without a jury on the issue of insanity, was found sane and convicted of the crime charged. This is an appeal from the judgment entered pursuant to the findings of the court and from an order denying defendant's motion for a new trial.

While defendant was present in the courtroom at the commencement of his trial, his attorney entered the plea of not guilty by reason of insanity, and at the same time defendant himself admitted the prior convictions.

[1] Appellant now contends that the plea of not guilty by reason of insanity is in reality a plea of guilty as to the offense charged, and therefore must be made by defendant personally. Appellant also contends that he did not personally waive his right to a trial by jury and that he was thus deprived of his constitutional right to a jury trial.

We believe there is no merit in this latter point in view of the circumstances that took place before the trial court at the commencement of the trial, to wit:

"The Court: Now, Mr. Pincus, this is the

time set for trial on these two amended informations. They have been consolidated, and we will try them together, go to trial on both informations. You are entitled to be tried by a jury of 12 persons, or you may waive the jury and be tried by the court without a jury. What do you want to do? Whatever you want to do we will agree to.

"The Defendant: I want to be tried before you.

"The Court: You want to be tried by the court without a jury. Now, Mr. Fox, do you waive a jury in behalf of your client?

"Mr. Fox: Yes, your Honor.

"The Court: Do you waive a jury in behalf of the state?

"Mr. Thomas: We will consent to the waiver, your Honor."

The answer of the defendant: "I want to be tried before you" in reply to the court's explanation was a sufficient waiver of the right to a trial by jury.

[2] Taking up appellant's first point as to his plea of not guilty by reason of insanity, section 1016 of the Penal Code, as amended in 1927, provides as follows: "* * * A defendant who pleads not guilty by reason of insanity, without also pleading not guilty, thereby admits the commission of the offense charged." Section 1026 of the Penal Code provides: "* * * If the verdict or finding be that the defendant was sane at the time the offense was committed, the court shall sentence the defendant as provided by law."

In the case of People v. Hickman, 204 Cal. 470 at page 476, 268 P. 909, 912, 270 P. 1117, the Supreme Court of this state, in reviewing the sections of the Penal Code above mentioned, says: "It was held, very early in our history, that there was no provision of the state Constitution, or of any statute, which prevented a defendant charged with murder from pleading guilty instead of having a trial by jury, and that if he elects to plead guilty to the indictment, the provision of the statute for determining the degree of guilt, for the purpose of fixing the punishment, does not deprive him of any right of trial by jury. People v. Noll, 20 Cal. 164; People v. Lennox, 67 Cal. 113, 7 P. 260, and People v. Chew Lan Ong, 141 Cal. 550, 99 Am. St. Rep. 88, 75 P. 186, are to the same effect. By a parity of reasoning, we are of the view that a statute which, in addition to the usual pleas, merely permits a defendant in a criminal case, if he is so advised, to plead guilty, in effect, by failing to deny the commission of the offense charged, but which preserves to him the right to submit to a jury the issue that he should not be punished because he was insane at the time he committed the act, in no way deprives him of his constitutional right to a jury trial."

Although it might appear from the above that the plea of not guilty by reason of insanity is an admission of guilt, and although it may plausibly be argued that such plea must be made by defendant himself in open court, as provided by section 1018 of the Penal Code; yet on closer analysis it becomes clear that such plea is only an admission of commission of the acts charged, coupled with a denial of guilt, such denial resting upon the remaining defense of insanity. It will be noted that the attorney for appellant did not say "I enter a plea of not guilty by reason of insanity," but stated "We enter a plea of not guilty by reason of insanity." This was immediately followed by the remarks made by the defendant himself, "I admit the prior conviction." This shows that it was really a plea by defendant himself, and that it did not result, by reason of the form in which it was made, in a miscarriage of justice, nor did it deprive defendant of any right that he is entitled to under the law.

The judgment and order are affirmed.

We concur: CONREY, P. J.; HOUSER, J.

PEOPLE v. HAINLINE.*

Cr. 2304.

District Court of Appeal, Second District, Division 1, California.

May 8, 1933.

Hearing Granted by Supreme Court June 7, 1933.

1. Criminal law ⇨982.

Statutory right to dismissal of burglary prosecution vested when defendant completed probation and pleaded not guilty (Pen. Code, § 1203).

It appeared that defendant had pleaded guilty to charge of burglary, and had been granted probation, and that, having served term of his probation, he was permitted to withdraw plea of guilty and enter plea of not guilty, whereupon court dismissed prosecution pursuant to Pen. Code, § 1203.

2. Criminal law ⇨1202(1).

Burglary to which defendant pleaded guilty *held* properly considered as prior conviction under amended statute, notwithstanding amendment was made after defendant had pleaded guilty and was on probation preliminary to acquisition of statutory right to dismissal of burglary prosecution (Pen. Code, § 1203, subsec. 4, as amended by St. 1927, p. 1493).

⇨For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes
*For subsequent opinion see 28 P.2d 16.

3. Criminal law ⊂⊃982.

"Probation" is not right, but is act of grace and clemency.

[Ed. Note.—For other definitions of "Probation," see Words and Phrases.]

Appeal from Superior Court, Los Angeles County; Fletcher Bowron, Judge.

Lester Hainline was convicted on an amended information charging burglary and prior conviction, and he appeals.

Affirmed.

W. C. Dalzell, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John D. Richer, Deputy Atty. Gen., for the People.

YORK, Justice.

On March 28, 1927, appellant pleaded guilty to a charge of burglary and was granted probation. Later—on April 20, 1928—the defendant having served the term of his probation, was permitted to withdraw his plea of guilty and enter a plea of not guilty, and the court then dismissed the action, pursuant to section 1203 of the Penal Code.

Subsequently, to wit, in the late summer of 1932, appellant and one Don Guzman were jointly charged in an information filed by the district attorney of Los Angeles with the crime of burglary; said information containing two counts. Both offenses were committed in the year 1932. An amended information was later filed charging the same defendants with the same offenses, but adding a prior conviction to each count with respect to appellant. Both defendants were arraigned on the original information, whereupon appellant waived time to plead and entered a plea of not guilty and his trial was set for October 5, 1932. On that day the amended information was filed, which information as amended contained the charge of prior conviction, and appellant was arraigned thereupon and entered his plea of not guilty and denied the prior conviction. Appellant was tried separately on October 6th, and verdicts were returned finding him guilty on both counts of the information, and also finding the allegation as to the prior conviction to be true. This is an appeal from the judgment rendered on the said verdicts.

Appellant now contends that a defendant cannot be tried upon any charge as to which no evidence was offered at the preliminary hearing; that the state must make out a prima facie case as to each charge in the preliminary.

There is nothing in the record before this court to show all that took place at the preliminary hearing, and we are therefore in no position to pass upon the question as to whether or not there was sufficient evidence adduced at such hearing to bind appellant over for trial.

As his second point, appellant maintains that the dismissal of the prior action had the effect of completely removing the stigma of such conviction so that it could not be used against him as a prior conviction in the instant proceeding, and that this is so owing to the fact that appellant was granted probation prior to the amendment of section 1203, subsection 4 of the Penal Code, which reads as follows: "* * * Provided, that in any subsequent prosecution of such defendant for any other offense such prior conviction may be pleaded and proved and shall have the same effect as if probation had not been granted or the accusation or information dismissed." Stats. 1927, pp. 1493, 1496; effective July 29, 1927. Appellant claims, in other words, that his rights became vested at the time probation was granted to him, and that the mere fact that the dismissal occurred after this amendment to section 1203 was passed, would not change these rights.

[1, 2] Appellant's right to a dismissal of the charge under section 1203 of the Penal Code vested at the time he completed the term of his probation and entered his plea of not guilty of the first offense. The defendant was given full advantage of the section. But the amendment to said section, which is hereinbefore quoted, was enacted before the probation was completed, or that action dismissed, as well as before defendant committed the later offenses. We fail to see why the defendant should be protected in any so-called right which would leave him free to commit another crime and which would prevent the court from considering the fact of his prior conviction of crime. No authority for a different conclusion has been cited to us.

[3] Probation is not a right of a defendant. It is "an act of grace and clemency." People v. Payne, 106 Cal. App. 609, 289 P. 909, 911. On the 29th day of July, 1927, when the above-quoted amendment of section 1203 became effective, the defendant Hainline was the beneficiary of such an act of grace, but his conviction of felony was still in force, with the possibility of a judgment which later might have been entered against him. It should be conceded, of course, that if the conditions of his probation should continue unaltered and be fully performed by him, he would be entitled to withdraw his plea of guilty, and to enter a plea of not guilty, and to have that action dismissed. But there is not, in our opinion, any sound reason for holding that the said amendment of 1927 is not applicable to this defendant. "The act to be punished is, however, only that act done by the prisoner after the Code took effect; and, therefore, in no sense can the Code be

said to become ex post facto when applied to the case of the prisoner. The true principle in this respect is well expressed by Judge Cooley in his invaluable work upon Constitutional Limitations, as follows: 'And a law is not objectionable as ex post facto which, in providing for the punishment of future offenses, authorizes the offender's conduct in the past to be taken into the account, and the punishment to be graduated accordingly. Heavier penalties are often provided by law for a second or any subsequent offense than for the first, and it has not been deemed objectionable that in providing for such heavier penalties the prior conviction authorized to be taken into account may have taken place before the law was passed. In such cases it is the second or subsequent offense that is punished, not the first,' etc." Ex parte Gutierrez, 45 Cal. 429; People v. Rosencrantz, 95 Cal. App. 92, 272 P. 786. The fact of former conviction, though purged from the record, remained a fact, and when proved, as the present law allows, it becomes evidence of the offender's conduct in the past; and this the law takes into account in estimating the punishment to be imposed for the present offense. This is not, in any way, an attempt to punish for the former crime.

"While there are decisions to the contrary, according to the weight of authority *the fact that accused was pardoned* for his prior offense does not exempt him from the increased punishment on a subsequent conviction." 16 Cor. Jur. 1342, and authorities there cited.

The judgment appealed from is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

131 Cal.App. 644

PEOPLE v. CARR.

Cr. 1716.

District Court of Appeal, First District, Division 1, California.

May 9, 1933.

Rehearing Denied May 24, 1933.

1. Assault and battery ⊂92.

Evidence supported conviction for assault with deadly weapon.

2. Assault and battery ⊂92.

Evidence that iron pipe 2 to 2½ feet long and ½ to ¾ inches in diameter was used by assailants, victim's description of instrument, and resulting injuries, justified finding that deadly weapon was used as charged in information for assault with deadly weapon.

Appeal from Superior Court, Alameda County; Frank M. Ogden, Judge.

Harold Carr was convicted of assault with deadly weapon, and he appeals.

Affirmed.

Leo A. Sullivan, of Oakland, and A. G. Thompson, of El Cerrito, for appellant.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, of San Francisco, for the People.

PER CURIAM.

Defendant was charged with the crime of assault with a deadly weapon. A trial by jury was duly waived. He was tried and convicted of the crime, and an appeal was taken from the order denying his motion for a new trial and from the judgment. The ground for the appeal is that the evidence was insufficient to support the judgment.

First, it is claimed that the implied finding that a deadly weapon was used is unsupported.

The victim of the assault was a cab driver. He received a telephone request to call at the Abbey Apartments in Oakland. He testified that shortly after his arrival there he was assaulted by three men, one of whom was the defendant; further, that he was struck several times with what appeared to be an iron pipe about two or two and a half feet long, its diameter being from one-half to three-quarters of an inch. His head and face were bruised and cut. The driver's testimony as to the circumstances was corroborated by the manager of the apartment house, who was present and who followed the attackers to the street. The latter entered an automobile, which was parked near the entrance, and as the witness approached the automobile one of its occupants threw an iron bar at him. This was produced at the trial. Another witness testified that the defendant was near the apartment house at the time but did not participate in the assault. Defendant also testified that he was in the vicinity but denied that he attacked the driver.

[1, 2] The testimony, which the court believed, was sufficient to support a finding that defendant participated in the assault. The iron bar admitted in evidence is not before us, but the references thereto during the trial, the description by the driver of the instrument used in making the assault, and evidence of the resulting injuries, justified the court in concluding that a deadly weapon was used as charged in the information.

The evidence was clearly sufficient to establish the guilt of the defendant, and no ground for reversal has been shown.

The judgment and order are affirmed.

131 Cal.App. 605

PEOPLE v. JACKSON.

Cr. 2230.

District Court of Appeal, Second District, Division 1, California.

May 4, 1933.

Hearing Denied by Supreme Court June 1, 1933.

1. Burglary ⇐4.

Entry into showcase, cemented to floor of store entrance, and sheltered by roof and side walls of building, with intent to commit larceny, constituted burglary (Pen. Code, § 459).

2. Burglary ⇐46(5).

Instruction that showcase within entrance to building and space covered by roof thereof is "building" within burglary statute *held* not prejudicial to defendant, where undisputed evidence clearly showed such facts (Pen. Code, § 459).

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

James Jackson was convicted of burglary, and he appeals.

Affirmed.

Hearing denied by Supreme Court; SEAWELL, J., dissenting.

Frederic H. Vercoe, Public Defender, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Alberta Belford, Deputy Atty. Gen., for the People.

YORK, Justice.

The defendant, James Jackson, was charged by information, tried before a jury, and found guilty of the crime of burglary. Defendant appealed from the judgment of conviction and from the order of the court denying his motion for a new trial, and makes as his sole ground of appeal the contention that the entering established by the evidence was not the entering of a house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse, or other building, tent, vessel, railroad car, mine, or any underground portion thereof, as denounced by section 459 of the Penal Code.

[1] The undisputed evidence is that the structure which was entered by means of breaking and the shattering of glass was a showcase which was cemented to the floor of the store entrance, within the property line, and sheltered by the roof and side walls of the building which constituted the store known as "Monroe Clothes" which was the store and building of one Morris Zalkover. This showcase was seven feet by six feet at the base, and only about five feet in height. It was padlocked and contained men's clothing. The entering was effected by breaking in the rear glass of the showcase, and certain articles of men's clothing were then extracted therefrom. Therefore the only question which we are called upon to decide is this: Whether or not the entering into this showcase with the intent to commit larceny, and which larceny was actually committed, constituted burglary within the language set forth in section 459 of the Penal Code. We think that it did. People v. Franco, 79 Cal. App. 682, 250 P. 698.

All the cases cited by appellant are cases wherein different facts as to the place entered were established; that is, in no case where it was held that burglary was not committed was the showcase or display box wholly within the premises and under the roof of the main building and actually affixed to the floor of the building. Therefore, none of the cases cited by appellant is in point.

[2] Another form of the same question was raised by appellant in his second assignment of error to the effect that the court was in error in giving the following instruction: "A showcase having four sections and a top situated within the lobby or entrance to the interior of a building and within the space covered by the roof of the building is in legal effect a building such as is contemplated and defined by the statute defining burglary." There is no question but that the showcase was affixed and attached to the floor of the building, said showcase being wholly within the lobby or entrance of the building and wholly under the roof of the building or store. The form of the instruction could work no prejudice to the rights of the defendant, as the undisputed evidence clearly showed the foregoing facts. It became a part of the store or the building by being so placed, and the store constituted the whole of such building.

The judgment and the order appealed from are affirmed.

We concur: CONREY, P. J.; HOUSER, J.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

DRESSLER v. JOHNSTON.

Civ. 4833.

District Court of Appeal, Third District, California.

May 10, 1933.

Hearing Denied by Supreme Court July 7, 1933.

1. Appeal and error ⇐1201(6).

After judgment has been reversed on appeal, without qualification, motion to amend pleading to conform to evidence adduced at original trial does not lie, where evidence contradicts facts admitted by pleading (Code Civ. Proc. § 473).

2. Pleading ⇐36(1).

Fact admitted by pleadings is controlling and precludes consideration of contrary evidence.

3. Appeal and error ⇐1195(3).

In action for breach of written contract, Supreme Court's construction of contract became law of case, controlling on retrial.

4. Appeal and error ⇐1201(6).

On retrial of action for breach of contract, after judgment was reversed on appeal, refusing amendment to answer to allege oral agreement shown by evidence on original trial without objection *held* not abuse of discretion, where answer on original trial denied execution of any contract but written one (Code Civ. Proc. § 473).

5. Appeal and error ⇐959(3), 1201(1).

Granting of motion to amend pleadings or to file cross complaint after reversal of judgment on appeal is within trial court's discretion, conclusive unless clearly abused (Code Civ. Proc. § 473).

6. Appeal and error ⇐1201(6).
Pleading ⇐237(3).

Courts should exercise great liberality in granting motions to amend pleadings to conform to evidence properly admitted, when made in good faith before judgment, but greater care should be exercised after cause has been reversed on appeal, to guard against fabrication of issue, total change of cause of action or defense, and lack of diligence (Code Civ. Proc. § 473).

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Action by H. W. Webber against J. E. Johnston, wherein, upon plaintiff's being adjudged to be a bankrupt, Leo A. Dressler, as trustee of the estate of H. W. Webber, was substituted as a party plaintiff. Judgment for plaintiff, and defendant appeals.

Affirmed.

Nutter & Hancock and A. P. Hayne, all of Stockton, for appellant.

H. A. Postlethwaite and Samuel W. Gardiner, both of San Francisco, and Daniel V. Marceau, of Stockton, for respondent.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

The plaintiff recovered judgment for damages for breach of a contract to accept and pay a stipulated sum for an agreed amount of crushed rock. The appellant contends the court abused its discretion in refusing to permit him to amend his answer, after a reversal of the judgment on appeal, to set up an oral agreement alleged to have been made subsequent to the execution of the written contract, and to reform the contract upon which the action was originally tried. The judgment is not otherwise assailed.

The complaint was filed in February, 1930. It was alleged that pursuant to the terms of a written contract marked "Exhibit B," and attached to the complaint, the defendant agreed to accept and pay for "15,000 cubic yards more or less of 1 inch crushed rock for surfacing said highway, * * * the exact quantity to be delivered shall be agreed upon between the parties hereto as the work progresses," at the rate of $1.55 per cubic yard. The answer admits the execution of the contract, and specifically denies "that any other, further or different contract was made between said parties, or any of them, than as is set forth in exhibit 'B'" of the complaint. It is conceded the defendant purchased and used in constructing the strip of highway which is involved in this suit the aggregate quantity of 20,258 cubic yards of crushed rock; that the plaintiff furnished pursuant to his contract and was paid for only 9590.9 cubic yards thereof. The defendant refused to accept from the plaintiff the balance of said rock which was used on the highway, to wit, 10,667 cubic yards, but procured that quantity from another party. For this breach of contract the plaintiff brought suit to recover the profit which he claims to have lost on account of the defendant's refusal to accept and pay for this last-mentioned quantity of rock.

The cause has been twice tried. At the first trial a jury rendered a verdict in favor of the defendant. A judgment was entered accordingly. Upon appeal that judgment was reversed. Webber v. Johnston, 214 Cal. 378, 5 P.(2d) 886, 887. In support of that judgment the defendant contended at the first trial and upon appeal that the above-quoted language of the written agreement "did not bind the defendant to receive any crushed rock to be used in the making of the improvement contemplated, unless the defendant saw fit to accept the same." In response to this assertion, the Supreme Court said: "This contention, however, is squarely in conflict with the pleadings, and especially the

admission of the defendant's answer. The answer of the defendant admits refusal to accept more than 9,590.9 cubic yards of crushed rock; it admits the use of 20,258 cubic yards in the construction of the highway mentioned in the contract. From what we have stated, the contract and the admissions of the pleadings in this case demonstrate that the plaintiff was entitled to judgment."

After reversal of the first judgment, when the cause came on for trial the second time in 1931, the defendant, for the first time, moved to strike from the answer his affirmative allegation above quoted, to the effect that no contract other than the written one which was incorporated in the complaint was ever made between the parties, and to insert in lieu thereof the following statement, that, "At the time of executing said contract it was mutually agreed by and between the plaintiff and defendant that plaintiff should begin delivering rock from the north end of said road to be constructed and defendant should begin delivering rock from the south end, and that each party should continue delivering rock from each of said respective ends until all rock necessary for the job was completely delivered to said job; that when this was done the amount of crushed rock plaintiff had delivered would be the exact quantity to be delivered within the meaning of said contract; that said agreement was made between plaintiff and defendant immediately prior to the execution of said contract, at the time of the execution of said contract, immediately after the execution of said contract, and upon numerous times during the progress of said work. * * *"

This application to amend the answer was made under the provisions of section 473 of the Code of Civil Procedure. It was supported by an affidavit signed by one of the defendant's attorneys. The affidavit avers that the defendant, Johnston, testified at the first trial without objection to facts in substantial harmony with the above-proposed amendment to the answer. No counter affidavit was filed upon this motion. The motion was duly presented to the court and denied.

Subsequently the defendant moved to file an amended answer and cross-complaint setting up, in addition to the allegations contained in his original answer, statements substantially the same as those which were incorporated in his motion to amend the answer. This motion to file an amended answer and cross-complaint was based upon the theory that the written contract contained in the complaint was executed by the respective parties through mutual mistake, and that it did not correctly express the intention of the parties with respect to the quantity of crushed rock which was to be furnished by the plaintiff. In the proposed amended answer the defendant asked for reformation of the contract to conform to the above-quoted language with respect to the quantity of rock agreed to be furnished. This motion to file an amended answer and cross-complaint was also supported by an appropriate affidavit averring similar facts. No counter affidavit was filed upon this motion. It was also duly presented and denied.

Pending this litigation the plaintiff, Webber, was adjudged to be a bankrupt. Upon proceedings duly had, the plaintiff Dressler was appointed trustee of his estate and substituted in this cause as a party plaintiff. This cause was then tried for the second time. The court adopted findings favorable to the plaintiff. Judgment was rendered accordingly. The defendant has appealed on the judgment roll only. The evidence which was adduced at the trial is not before us.

The appellant contends the court abused its discretion in refusing to permit him to amend his answer to conform to the evidence which was adduced at the first trial without objection. He cites the case of Born v. Castle, 22 Cal. App. 282, 286, 134 P. 347, as authority for the well-established rule that great liberality should be exercised in permitting amendments to be made to conform to the evidence. In that case, however, the application to amend the pleading was made during the trial and before judgment was rendered. It may be conceded that a trial court still retains a sound discretion to allow amendments to pleadings even after a mistrial of the cause (49 C. J. 484, § 625) or a reversal of the judgment on appeal. But in the interest of justice great care should be exercised upon such motions after a reversal of a judgment on appeal, to avoid a complete change of the original cause of action, or defense, and to discourage fabricated issues and endless litigation. In 49 C. J. 493, § 652, it is said: "A commonly recognized limitation upon the propriety of amendments to conform to the proof is that they must not introduce a new cause of action, or substantially change the claim or defense."

[1, 2] After a judgment has been reversed on appeal, without qualification, a motion to amend a pleading to conform to the evidence which was adduced at the original trial does not lie. Under such circumstances the evidence which was adduced becomes ineffectual for the purpose of furnishing a foundation upon which to base a motion to amend the pleading. The cause is then remanded for trial de novo. It may not be assumed the same error will again occur in a new trial. When the admitted evidence is incompetent because it is in direct conflict with the pleadings, there would be an abuse of discretion to allow an amendment to conform thereto. In the present case the proposed amendment is in conflict with the admitted fact that no other contract was ever made by the respective parties. Any evidence to the contrary, even though it was received without objec-

tion, was incompetent and improper to be considered for any purpose for the reason that it was in conflict with the stipulated fact as shown by the pleadings. A fact which is admitted by the pleadings is controlling upon that issue. It requires no evidence to support it. It forbids the consideration of evidence which tends to refute the stipulated fact. Chase v. Van Camp Sea Food Co., 109 Cal. App. 38, 44, 292 P. 179.

[3, 4] In the present case the Supreme Court decided as a matter of law that the written contract which is specifically admitted to have been executed is not susceptible of the construction placed upon it by the defendant's proposed amendment. In effect the Supreme Court held that by the terms of this written contract which was conceded to have been the only one which was ever executed by the parties, the defendant agreed to purchase from the plaintiff approximately 15,000 cubic yards of crushed rock. That construction of the contract has been adjudicated and becomes the law of this case. That construction must prevail in a retrial of the cause unless the issues which were originally presented by the pleadings are entirely changed. The only way in which the defendant may escape his obligation which inevitably follows that construction of the contract is to refute his former admission regarding the contract and radically alter his defense by alleging and proving a situation in entire conflict with his original admissions. His present theory of a defense, as disclosed by his proposed amendment, is entirely at variance and absolutely inconsistent with the admission of his original answer. In denying the motion to amend the answer, the trial court said: "The case was tried upon the theory, at least so far as the defendant was concerned, that said agreement constituted the sole agreement between the parties. * * * To permit defendant to fight to the court of last resort a case upon the theory that there was one and only one contract in the case, and, having finally lost, to right-about-face and amend his answer * * * would, in my opinion, be an abuse of discretion."

In his motion to amend the answer the defendant has never contended that his original verified statement therein was inadvertently made. Under the circumstances of this case it seems persuasive that the written contract was actually made in the exact form in which it appears in the pleadings and that the attempted change of defense is prompted as the only means of escaping from the result of the decision of the Supreme Court. It is apparent the defendant is not in accord with the construction placed upon the contract by the higher court. It sometimes happens that the decision of a court of last resort fails to convince a losing party of his error. It is probably a virtue worthy of approval that a zealous advocate often clings to his conviction in spite of an adverse decision. But that decision in the present case has become the law of this case, and a complete change of defense after a reversal on appeal may well be looked upon with suspicion. At least this situation furnishes proof that the trial court did not abuse its discretion in refusing to permit the amendment.

[5, 6] The granting of a motion to amend pleadings or to file a cross-complaint after the reversal of a judgment on appeal is discretionary. 21 Cal. Jur. 181, § 126; 1 Stand. Ency. of Proc. 897, § 5; 49 C. J. 472, § 597; 4 C. J. 799, § 2757; Billesbach v. Larkey, 161 Cal. 649, 120 P. 31. Except for a clear abuse of discretion in denying such motion, the order should not be disturbed. While courts, in the furtherance of justice, should exercise great liberality in granting motions to amend pleadings to conform to competent evidence which has been properly received at the trial, when the motion is made in good faith prior to the rendering of judgment, it is apparent that greater care should be exercised after the cause has been reversed on appeal, so as to guard against the fabrication of an issue, to prevent the total change of a cause of action, or a defense thereto, and to discourage a lack of diligence which may result in injustice. In passing on such a motion after a reversal of the judgment on appeal, a court may wisely discredit a proposed amendment which changes the entire theory of a claim or the defense thereto. After affirmatively asserting in a verified answer that the rights of the parties are to be determined from the unambiguous language of a written contract after declaring that no other agreement was made between them, and after relying solely upon the construction of that language, following the sustaining of an adverse decision on appeal, a court may reasonably look with suspicion upon a defendant's subsequent motion to amend his answer by setting up for the first time another oral agreement which is in absolute conflict with his former verified affirmative allegation with respect thereto. Under such circumstances the burden is certainly cast upon the defendant to satisfy the court of his good faith in seeking to adopt so belated and radical a change in the theory of his defense. To permit an entire change in the theory of a defense to a suit for damages based upon the breach of a written contract, after an unfavorable reversal of a judgment on appeal, would create a dangerous precedent which might encourage deception and injustice. The trial judge was familiar with the evidence adduced at the trial in this case. He had an opportunity to observe the witnesses on the stand. He was therefore much better qualified to determine the merits of a motion to amend the pleadings than the appellate court could possibly be. We are satisfied the orders of court denying defendant's motions to amend his

answer and to file an amended answer and cross-complaint were not erroneous, and the discretion of the court which was exercised in those matters should not be disturbed.

The judgment is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

131 Cal.App. 739

BIXBY v. PICKWICK STAGE CO. et al.

Civ. 7590.

District Court of Appeal, Second District, Division 1, California.

May 12, 1933.

Rehearing Denied June 9, 1933.

Hearing Denied by Supreme Court July 10, 1933.

1. Automobiles ⇐244(10).

Evidence in action for injuries in collision between automobile and defendant's stage *held* sufficient to support court's finding of defendant's negligence.

2. Appeal and error ⇐1008(1).

Automobile driver's contributory negligence in not halting and waiting for smoke to disperse before proceeding, *held* fact question for trial court in action for injuries in collision with stage.

3. Automobiles ⇐244(58).

Evidence *held* to justify court's finding that speed at which defendant's stage traversed smoke-covered area, rather than negligence of driver of approaching automobile, proximately caused collision between them.

4. Appeal and error ⇐1010(1).

Trial court's finding on fact question presented by evidence is conclusive on appeal.

Appeal from Superior Court, Los Angeles County; E. N. Rector, Judge.

Action by Stephen L. Bixby against the Pickwick Stage Company, a corporation, the Pickwick Stages System, a corporation, and others. From a judgment for plaintiff, defendants Pickwick Stages System and another appeal.

Affirmed.

B. P. Gibbs and Libby & Sherwin, all of Los Angeles (M. Tellefson, of Los Angeles, of counsel), for appellants.

O'Melveny, Tuller & Myers, and Pierce Works, all of Los Angeles, for respondent.

HENDERSON, Justice pro tem.

This is an action for damages for personal injuries and property damage arising out of a collision in the daytime between an automobile driven by plaintiff and the stage of the defendant Pickwick Stages System, a corporation, and its driver, C. W. Hensley. The answer in addition to denying the allegations of the complaint pleads contributory negligence and unavoidable accident. The cause was tried by the court and resulted in a judgment favorable to plaintiff, from which defendants appeal. They attack the findings that the negligence of the defendants was the proximate cause of the injury and damage: and that plaintiff was free from negligence proximately contributing to his injury.

[1] While the evidence was conflicting, the testimony in support of these particular findings is thus summarized: The stage of the defendant corporation was traveling westerly, and the plaintiff was operating his automobile in an easterly direction on the Long Beach-Santa Ana Highway, when the collision occurred. Shortly prior to the accident plaintiff saw a film of smoke over the highway. Pulling well over to his right side of the road at a speed of about twenty miles an hour, he entered the same and had a range of visibility of about thirty-four feet. After passing through the cloud, which was about sixty-five feet in extent, he observed another strata of smoke about one hundred feet away. It seemed to have the same appearance of density and visibility as the one first traversed. He entered the second smoke screen at a speed decreased to about eighteen miles an hour when "a billowing roll or swirl of very dense smoke" suddenly blew in front of him and completely obstructed his vision. He immediately applied his brakes, the wheels on the right side of his car being off the paved portion on the south side of the highway, and almost simultaneously he was struck by the westbound stage of defendant hitherto unseen by him. The stage, after entering the smoke cloud at a speed approximating forty miles an hour, struck a car immediately ahead of it, and then swerved to the left side of the road where the collision took place with plaintiff's car.

In view of the evidence just summarized, its sufficiency to support the finding of negligence on the part of defendants cannot be seriously questioned, nor are we called upon to review the alleged discrepancies in the testimony of the various witnesses for plaintiff.

[2] The defendants next complain that plaintiff was guilty of contributory negligence as a matter of law, since he could not stop his car within the range of his vision, and that under those circumstances it was incumbent upon him to halt and wait for the smoke to disperse before proceeding further.

The authorities in California and elsewhere do not seem to support this contention. It is almost uniformly the rule that whether the conduct of a person in driving into smoke,

fog, dust, or mist offends the doctrine of ordinary care is ordinarily a question to be determined by the court or jury. Marsh v. Burnham, 211 Mich. 675, 179 N. W. 300; Upton v. Hines, 197 Iowa, 566, 197 N. W. 453; Clinger v. Payne, 271 Pa. 88, 113 A. 830; Seibert v. A. Goldstein Co., 99 N. J. Law, 200, 122 A. 821; Devoto v. United Auto Transportation Co., 128 Wash. 604, 223 P. 1050; Mitsuda v. Isbell, 71 Cal. App. 221, 234 P. 928. In the case of Devoto v. United Auto Transportation Co., supra, the Supreme Court of Washington, in a case strikingly similar to the one here, said in part (page 1051 of 223 P., 128 Wash. 604): "One of the respondents testified to the effect that the fog lay in banks or strips—in places not so dense as to interfere with a reasonable view ahead, but proceeding they came into places where the fog was so dense that the white light of the headlights was mirrored back to the driver, and he could see nothing in advance of his automobile. Under such conditions shall a driver stop in the fog bank until the fog clears? If one does so all must do so, or the danger would be thereby increased, and if all stop how shall any one reach his destination? It seems to us in reason that traffic must be permitted to move on the highway at all times, but that in driving through a fog bank each driver must do so in a careful and prudent manner, with due regard for the safety of others, and what is careful and prudent under the particular conditions shown will usually be a question for the jury."

Similar in effect is the case of Mitsuda v. Isbell, supra, where plaintiff's car in following another failed to observe a wagon left on the highway, owing to the fact that the preceding automobile in swerving to the left raised such a cloud of dust that the wagon was incapable of being seen. Although the plaintiff made no effort to stop his car, the court held (page 237 of 71 Cal. App., 234 P. 928, 935): "The evidence is such that it was entirely with the trial court, as the arbiter of the issues of fact, to solve the question whether the plaintiff was or was not guilty of contributory negligence. There is nothing in the evidence which would justify the declaration, as a matter of law, that the plaintiff did not, under the circumstances, approach the point of collision with reasonable or the due amount of care."

There is nothing in the cases of Burgesser v. Bullock's, 190 Cal. 673, 214 P. 649, Skaggs v. Wiley, 108 Cal. App. 429, 292 P. 132, and Fisher v. Southern Pacific Co., 72 Cal. App. 649, 237 P. 787, cited by appellant, which would seem to indicate a contrary rule, when considered in relation to the facts of this case.

[3, 4] In view of the testimony hereinbefore reviewed, we are convinced that the trial court was justified in finding that the speed at which the defendants' stage was traversing the smoke covered area, rather than any act or omission of the plaintiff, was the proximate cause of the injury. Measured by the authorities previously considered the evidence merely presented for the trial court's solution a question of fact, whose finding is, therefore, conclusive on appeal. Mitsuda v. Isbell, supra.

The judgment is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

131 Cal.App. 164

LYNCH v. CUNNINGHAM et al.

Civ. 8668.

District Court of Appeal, First District, Division 2, California.

May 12, 1933.

Hearing Denied by Supreme Court June 7, 1933.

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

On rehearing.

Rehearing denied.

Prior opinion, 21 P.(2d) 154.

Aaron Levinson and Louis L. Swarthe, both of Los Angeles, for appellant.

Michael F. Shannon and Thomas A. Wood, both of Los Angeles, for respondents.

PER CURIAM.

On petition for rehearing, counsel for respondents assert that this court was in error in stating that the trustees under the Cunningham Estate Trust had the power "to invest and reinvest the proceeds" from sales of trust property. The portion of the opinion in which these words appear did not purport to quote the language of the deed of trust but to give its effect. That the trustees had the powers stated is made clear by the following portions of the deed of trust, which we quote verbatim: "Said Trustees shall have, and are hereby granted, the right and power to sell and dispose of any portion or portions of said real property (paragraph 2). * * * Said Trustees may purchase, take or lease or otherwise acquire any lands or hereditaments useful in connection with these trusts (paragraph 3). * * * All of the trust property at any time vested in the Trustees for any of the purposes of these presents shall be held by them upon the like trusts for sale and conversion and the like powers and provisions in respect of management, control, disbursements and distribution thereof and the application of the rents, revenues and income of the same, as are herein contained concerning the property or rights therein or thereto here-

by granted or assigned to the Trustees by the grantors herein for or on account of these trusts. (Paragraph 6.)"

It is plain that the trustees were given the power to sell and buy property and to hold property subsequently acquired with trust funds subject to the trust created. The effect of this was to give them the power to invest and reinvest.

The petition for rehearing is denied.

MUTUAL BUILDING & LOAN ASS'N v. CORUM et al. *

Civ. 8682.

District Court of Appeal, First District, Division 1, California.

May 11, 1933.

Rehearing Denied June 10, 1933.

Hearing Granted by Supreme Court July 10, 1933.

1. Trial ⇐9(1).

Statute referring to setting of case upon trial calendar does not require court to fix date for trial in first instance (Code Civ. Proc. § 631, subd. 4).

2. Jury ⇐25(6).

Court rule requiring demand for jury trial within five days after service of memorandum of motion to set cause for trial does not conflict with statute respecting waiver of jury trial (Code Civ. Proc. § 631, subd. 4; Judicial Council Rule 1).

Code Civ. Proc. § 631, provides that trial by jury may be waived by failing to announce that jury is required at time cause is first set upon trial calendar if it be set upon notice or stipulation. A "calendar" is defined as a list of cases pending or arraigned for trial or argument.

[Ed. Note.—For other definitions of "Calendar," see Words and Phrases.]

3. Corporations ⇐513(1).

In action on note, allegation that note was executed to plaintiff corporation, but that corporation was designated therein by former name, *held* sufficient as against demurrer, since change in name does not affect corporation's identity.

4. Mortgages ⇐375.

Under trust deed providing for recording of notice of election to accelerate maturity, complaint, in action for deficiency, alleging plaintiff recorded notice of default, *held* not insufficient because note had been taken in plaintiff beneficiary's former name where change of name was alleged (Civ. Code, § 2924).

5. Mortgages ⇐342.

Under trust deed making recordation of instrument substituting new trustees conclusive proof of proper substitution, that application to new trustees to sell property was made before recordation of substitution did not make application invalid.

6. Building and loan associations ⇐41(6).

Allegation and finding that plaintiff building and loan association elected to declare entire indebtedness secured by trust deed due *held* sufficient without allegation that board of directors did so (Civ. Code, § 639).

7. Pleading ⇐207.

In absence of special demurrer, allegations that trustees under trust deed sold property after giving notice of sale in manner and for time and according to terms and provisions and under authority of trust deed *held* sufficient as against objection allegations were legal conclusions.

8. Pleading ⇐433(3).

In action for deficiency judgment, defect, if any, in allegations regarding giving of notice of sale under trust deed, as being legal conclusions, *held* cured by judgment for plaintiff.

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Action by the Mutual Building & Loan Association against Augusta Corum and others, in which defendant named filed a cross-complaint. From a judgment for plaintiff, defendants appeal.

Affirmed.

George D. Collins, Jr., and A. J. Hennessy, both of San Francisco, for appellants.

Jones & Douglas, of San Jose, and Fitzgerald, Abbott & Beardsley, of Oakland, for respondent.

PER CURIAM.

An appeal by defendants taken on the judgment roll and a bill of exceptions from a judgment entered in favor of plaintiff corporation.

The action was upon a promissory note originally secured by a deed of trust. The security had been sold for less than the amount of the note, and plaintiff sought to recover the deficiency. The note, which was for $65,000, was executed by defendants on November 21, 1925, the payee named therein being "Mutual Building and Loan Association of San Jose and College Park," designated therein as a corporation, with its office in San Jose. The deed of trust securing the same was executed by defendant Corum to trustees; the California Mutual Building & Loan Association, a corporation, having

its principal place of business at San Jose, being named as beneficiary thereunder. It appears that on November 29, 1924, the name of the payee of the note was by decree of the superior court of Santa Clara county changed to "California Mutual Building and Loan Association." On February 2, 1927, the note was indorsed by California Mutual Building & Loan Association to plaintiff. The security was sold for $50,000, and the deficiency, consisting of principal, interest and outlays made pursuant to the deed, and for which judgment was entered, amounted to $28,474.83.

As grounds for the appeal it is urged that the trial court erred in denying a jury trial and in sustaining plaintiff's demurrer to defendant Corum's cross-complaint; also, that plaintiff's amended complaint failed to state a cause of action, and that the findings do not support the judgment.

[1, 2] The action being for the recovery of a money judgment the issues were triable by a jury unless such trial was waived. Code Civ. Proc. § 592. On September 28, 1931, plaintiff served upon defendants' attorneys a memorandum of motion to set the cause for trial, and filed the same with an affidavit of service with the clerk of the court. The memorandum was in the form prescribed by rule 1 of the "Rules adopted by the Judicial Council of California, effective February 1, 1929," and no demand for a jury trial was therein made. On December 31, 1931, defendant Corum served and filed a written demand for a jury trial, and again on January 4, 1932, the date when the cause came before the presiding judge for the purpose of fixing a definite date for the trial, the demand was renewed. Prior to the last demand defendant Corum had deposited with the court an amount sufficient for the jury fees for one day. The demand was denied, and the cause set for trial without a jury for January 28, 1932.

Section 631 of the Code of Civil Procedure provides that a trial by jury may be waived "* * * 4. By failing to announce that a jury is required, at the time the cause is first set upon the trial calendar if it be set upon notice or stipulation. * * *"

The Constitution (Const. art. 6, § 1 a) provides that the Judicial Council may "* * * (5) Adopt or amend rules of practice and procedure for the several courts not inconsistent with laws that are now or that may hereafter be in force. * * *"

Said rule 1 of the Judicial Council provides for the service and filing of the memorandum mentioned, and also that "in case a jury trial is not demanded by the party filing such memorandum any other party to the cause shall have five days after service of such memorandum within which to file his written demand for a jury trial, subject, however, to the provisions of section 1013 of the Code of Civil Procedure." The latter section has no application here.

Defendants claim that this rule conflicts with the provisions of section 631 of the Code of Civil Procedure above quoted, and that the demand for a jury trial having been made at the time the cause was first set upon the trial calendar, namely, January 4, 1932, and the jury fees having been deposited more than ten days before the date set for the trial, as provided by the section, it was error to deny the demand.

Plaintiff concedes that the rule must give way if it is inconsistent with the statute.

Rule 2, adopted by the Judicial Council, provides that in all counties wherein the superior court is composed of nine or more judges the clerk of said court shall at stated times prepare a list of civil cases not yet set for trial and wherein a memorandum to set the same has been theretofore served and filed; further, that a copy of this list—which is known as the civil active list—shall be posted in the office of the clerk for examination by attorneys. Rule 3 of the Judicial Council provides that in such counties, on certain days designated, there shall be set for trial under the supervision of the presiding judge during the next succeeding calendar month as many civil cases as can reasonably be disposed of by the court during said period, which cases shall be taken from the civil active list.

A calendar has been defined as a list of cases pending or arraigned for trial or argument. Bouvier Law Dictionary; Anderson's Law Dictionary. The first reference in our statutes to a calendar is found in section 156 of the Practice Act, which required the clerk to enter causes upon the calendar of the court according to the date of the issue; and provided that when placed upon the calendar for a general or special term they should so remain from court to court until finally disposed of. And section 157 of the same act provided that either party might bring the issue to trial, and, in the absence of the adverse party and unless the court for good cause otherwise directed, might proceed to take a dismissal or verdict or judgment as the case might require. These sections were re-enacted as sections 593 and 594 of the Code of Civil Procedure (Stats. 1872). Said section 593 was repealed in 1931 (St. 1931, p. 409). At the times of these enactments there were fixed terms for the transaction of judicial business by the trial courts of California (7 Cal. Jur. § 23, p. 606), and no notice of trial was necessary (24 Cal. Jur., Trial, § 8, p. 723). This system having been abolished by the Constitution of 1879 (Const. art. 6, § 5), which provided that superior courts should be always open, legal holidays, and nonjudicial days excepted, the fixing of a date for and a notice of the trial of issues of fact became necessary. This was provided

for by amendment to said section 594, requiring that proof be made to the satisfaction of the court that the adverse party had received five days' notice of trial (St. 1899, p. 5). Section 631 of the Code of Civil Procedure was a re-enactment of section 179 of the Practice Act (Stats. 1872). The amendment of 1915 (St. 1915, p. 649) added subdivision 4 thereto, and then for the first time, so far as appears, was there a statutory reference to a trial calendar. The term is not defined by statute. Doubtless the Legislature contemplated something different from the calendar referred to in section 593 of the Code of Civil Procedure but no special provision therefor was made. It has been the practice in many of the courts of the state to fix a date for the trial, in the first instance, this order being equivalent to placing the case on the trial calendar. The statute, however, does not require this, as subdivision 4 of section 631, Code of Civil Procedure, refers merely to the setting of the case upon the trial calendar and not to the fixing of a trial date. The making up of such a calendar or list of cases ready for trial might have been provided for by rule of court without conflicting with the statute (Code Civ. Proc. §§ 129, 187); and this was the purpose and effect of the rules adopted by the Judicial Council. There is nothing therein which is inconsistent with the statutory provisions.

The validity of these rules has been impliedly affirmed in the following cases: Stern v. Hillman, 115 Cal. App. 156, 300 P. 972; McGregor v. Wright, 117 Cal. App. 186, 3 P. (2d) 624. And we see no reason for disturbing this conclusion.

[3] As stated, the note was made payable to the Mutual Building & Loan Association of San Jose and College Park; and it appeared that the name of this corporation had previously been changed to California Mutual Building & Loan Association. The complaint alleged that the note was executed to California Mutual Building & Loan Association, but that it was designated therein by its former name, and the court so found. This we think was sufficient as against either a general or special demurrer, as a change of name does not affect the identity of a corporation, although it may have the effect of requiring additional averments in pleading for the purpose of showing such identity. 14 Cor. Jur., Corporations, § 386, pp. 321, 322. Here the averments were sufficient to identify the corporation.

[4] Other objections made to the sufficiency of the complaint are as follows: The trust deed provided that if default should be made in any payment on the note, whether of principal or interest, the beneficiary might consider the note as immediately due and payable, and record in the office of the recorder of the county wherein the property is situated "a notice of such breach and of its election to cause said property to be sold to satisfy said obligations." The complaint alleged and the court found that the plaintiff did elect to consider the entire principal and interest of the note due and payable, and recorded "a notice of default and election to cause said property to be sold to satisfy said obligation." Defendants contend that in the absence of an allegation that a notice of breach for nonpayment of the entire debt as accelerated to maturity was recorded, the complaint failed to state a cause of action.

Section 2924 of the Civil Code provided that when a power of sale was conferred upon a trustee or any other person, to be exercised after the breach of the obligation secured, there should be recorded a notice of such breach and of his election to sell or cause to be sold such property to satisfy the obligation. The recorded notice does not appear in the record, but the complaint shows sufficiently a compliance with the provisions of the deed and the Code section.

The complaint alleged that plaintiff recorded the notice of default, and it is contended that this was insufficient as there was nothing therein to show that plaintiff acquired title to the note and deed from the Mutual Building & Loan Association of San Jose and College Park, the allegation being that title was acquired from California Mutual Building & Loan Association. As heretofore stated, the change of name by the payee corporation was alleged, and the fact that the note was taken by its former name was not material.

[5] There was a substitution of trustees under the deed, and the complaint alleged an application to the new trustees to sell the property after default. The point is made that the application was made before the recordation of the substitution of trustees, and that consequently the application was invalid.

It appears that an instrument was duly executed substituting new trustees before the application was made and that this instrument was subsequently recorded. Under the trust deed the recordation of the instrument was made conclusive proof of proper substitution, and its validity was not dependent thereon. Under the deed its due execution was sufficient.

[6] There was no allegation that plaintiff's board of directors exercised the option to declare the entire indebtedness due. Section 639 of the Civil Code provided that the directors of a building and loan association might so elect in case of default. Here it was alleged and found that plaintiff elected to declare the entire indebtedness due. This was sufficient as an allegation and finding of ultimate fact.

[7, 8] The complaint alleged that the trustees "sold said property after first giving no-

tice of said sale in the manner and for the time and according to the terms and provisions and under the authority of said trust deed." The court so found; and defendants claim that these allegations were mere legal conclusions and for that reason insufficient. In the absence of a special demurrer allegations of this character have been held sufficient. Pacific Paving Co. v. Diggins, 4 Cal. App. 240, 87 P. 415. Moreover, the defects, if any, were cured by the judgment. Penrose v. Winter, 135 Cal. 289, 67 P. 772.

As grounds for a decree adjudging the sale under the trust deed to be void defendant Corum filed a cross-complaint, alleging substantially the same matters as those which have been urged as objections to the sufficiency of the complaint. The general and special demurrer filed thereto by plaintiff was sustained. The trial court appears to have been of the opinion that there being no offer by cross-complainant to do equity by paying the amounts due under the note the pleading was insufficient. The defendants contend that the rule requiring such an offer does not apply where the object of the proceeding is merely to set aside the particular sale alleged to be void, leaving the incumbrance intact. There is some authority supporting this; but however this may be, if our conclusions regarding the objections made to the complaint are correct, then the allegations of the cross-complaint were insufficient to warrant a decree setting the sale aside, and the general demurrer thereto was properly sustained.

There is no merit in the claim that the findings fail to support the judgment.

The conclusions of the trial court were fully sustained, and nothing has been shown to warrant the conclusion that there was a miscarriage of justice.

The judgment is affirmed.

131 Cal.App. 628

FARMER v. ORME.

Civ. 7743.

District Court of Appeal, Second District, Division 2, California.

May 5, 1933.

1. Evidence ⇐348(2).

Certificate executed by United States vice consul accompanying foreign judgment sufficiently vouched for fact that person making another certificate was chief justice, and that his hand attached signature to certificate (Code Civ. Proc. § 1906).

Certificate of vice consul of the United States stated that person whose name was subscribed to paper thereto annexed was at time of subscribing same chief justice of Canadian province, and that vice consul was well acquainted with his signature and handwriting and that signature was genuine.

2. Evidence ⇐348(2).

Where vice consul vouched for one signing certificate accompanying foreign judgment as chief justice and his certificate vouched for registrar who also executed certificate and official seal of court accompanied certificate, judgment was properly received in evidence (Code Civ. Proc. § 1906).

Facts disclosed that, although certificate of clerk of court or registrar which accompanied judgment gave registrar's full name, whereas instrument was signed merely by using his first initial and last name, certificate of chief justice recited that person whose signature was subscribed to annexed certificate was senior registrar of Supreme Court of the province, and was legal keeper of records of court, that the chief justice was well acquainted with his signature, and that his signature attached to certificate was genuine, and that attestation of certificate by such senior registrar was in due form.

3. Judgment ⇐929.

In action on foreign judgment, that judgment was not final was matter of defense.

4. Trial ⇐377(2).

Where after cause on foreign judgment was submitted for decision, it was determined that some documentary evidence was insufficient, court did not abuse discretion in reopening cause to procure further evidence supporting deficiency, though it was long time before new evidence was offered to court.

5. Judgment ⇐946.

In action on Canadian judgment, court was required to ascertain value in United States money of amount of judgment in Canadian money as of date of judgment in trial court, and render judgment for such value, with costs and interest from date of Canadian judgment in trial court.

Appeal from Superior Court, Los Angeles County; Fletcher Bowron, Judge.

Action by Russell D. Garner against George H. Orme, in which L. S. Farmer was substituted as plaintiff. From the judgment, defendant appeals.

Reversed, with directions.

Leonard J. Meyberg, of Los Angeles, for appellant.

Freston & Files, of Los Angeles, for respondent.

WORKS, Presiding Justice.

The original plaintiff was the assignee of a judgment against defendant, rendered by the Supreme Court of the province of Ontario, Canada. The present action was based upon this judgment. The decision was for plaintiff and defendant appeals.

[1, 2] Appellant objects that the Canadian judgment was improperly received in evidence. An attempt was made by respondent to lay a foundation for the introduction of the judgment in compliance with the provisions of section 1906 of the Code of Civil Procedure and we think it was a successful one. Appellant objects to the reception of the judgment on the ground that the certificate of the clerk of the court, or registrar, which accompanied it, named "Edmund Hurley" as the registrar, while the instrument was signed merely "E. Hurley." This certificate was accompanied by one purported to have been made by "the Right Honorable Sir William Mulock, Chief Justice of the Province of Ontario," but it was signed simply "W. Mulock." The reception of the judgment in evidence is assailed also because of this variance. The two certificates mentioned were accompanied by one executed by the vice consul of the United States at Toronto. In this certificate it was said, "Sir William Mulock, whose name is subscribed to the paper hereto annexed, was at the time of subscribing the same, chief justice of the province of Ontario, * * * and that I am well acquainted with his signature and handwriting and that the signature is genuine." This language sufficiently vouches for the fact that Sir William was chief justice and that his hand attached the signature to the certificate purporting to come from him. Sir William's certificate recited that "Edmund Hurley, whose signature is subscribed to the annexed certificate, is the senior registrar of the Supreme Court of Ontario, and is the legal keeper of the records of said court, * * * and that I am well acquainted with his signature, and that his signature attached to the said certificate is genuine, * * * and that the attestation of the said certificate by the said senior registrar is in due form." Sir William having been vouched for by the vice consul, the certificate of the former legally settles the question that Edmund Hurley was the registrar of the court and that the signature at the close of his certificate was made by him. It should be remarked also that the official seal of the court accompanied the certificate issued by Hurley, as required by section 1906, The provisions of the section were complied with and the judgment was properly received in evidence.

[3] Appellant contends that there was nothing in the papers received in evidence to show that the Canadian judgment was final, but if it was not final that was a matter of defense for appellant. Carter v. Paige, 80 Cal. 390, 22 P. 188.

Appellant says that a deposition received in evidence was not properly attested by the commissioner who was designated by the trial court to take it. We think it was, but if it was not the matter is of no moment. The deposition was not necessary to the proof of respondent's case, and appellant introduced no evidence at the trial.

[4] After the cause was submitted for decision it was determined by the court from briefs presented by the parties, that some of the documentary evidence was insufficient. Thereafter and on motion of respondent the cause was reopened, over the objection of appellant, for the purpose of procuring further evidence from Canada, to supply the deficiency referred to. Although it was a long time before this new evidence was offered to the court, we think there was no abuse of discretion when the order to reopen was made, especially as the order conduced to a trial on the merits and resulted in a judgment for the party who was undoubtedly entitled to it.

[5] The Canadian judgment was for the total sum of $1,702.81, and in the present action respondent demanded judgment for that amount. Judgment was rendered accordingly, with costs and with interest from the date of the foreign judgment. It is contended that certain findings of the trial court are not sustained by the evidence for the reason that there was no evidence as to the value of Canadian money as compared with the money of the United States. We think the contention must be sustained. It cannot be assumed, from the mere fact that the dollar is the standard of value both in the United States and Canada, that the value of the respective standards is the same. The cause will necessarily be sent back to the trial court, but solely for the purpose of taking evidence on this question. The trial court will ascertain the value, in money of the United States, of $1,702.81 in Canadian money, as of July 23, 1929, the date of the judgment in the trial court, and render judgment accordingly. The new judgment will be based upon a finding as to such value, will carry costs, and as before, will carry interest from the date of the Canadian judgment.

Appellant makes some other points, but they do not merit a particular consideration.

Judgment reversed, with directions to the trial court to proceed in accordance with the views expressed in this opinion.

We concur: STEPHENS, J.; ARCHBALD, Justice pro tem.

FRANCIS v. LEAVY, Controller of the City and County of San Francisco.

Civ. 8893.

District Court of Appeal, First District, Division 2, California.

May 5, 1933.

Hearing Denied by Supreme Court June 30, 1933.

1. Municipal corporations ⇐162(7), 164, 220 (2, 3).

Under San Francisco charter, power to fix compensation for city officers and employees and to increase or decrease it rested in board of supervisors.

Charter provided that, excepting officers and employees whose compensation was expressly fixed in body of charter, power to fix salaries was in standardization ordinance to be enacted classifying officers and employees and fixing their compensation, and that annually, between certain dates, budget ordinances would be passed, including salaries and compensation of officers and employees, and that at same time an appropriation ordinance and a salary ordinance would be passed, that, pending adoption of salary standards as charter provided, salary for positions subject to standardization should be as recommended by officers, board, or commission having appointing power for positions, and fixed by budget and salary ordinance, but that any compensation paid as of January 1, 1931, to incumbent who legally held position at that time could not be reduced so long as incumbents legally held position.

2. Municipal corporations ⇐220(3).

Where salary of manager of city airport was reduced as matter of bookkeeping, but salary was not reduced by board of supervisors having power to reduce it, salary was not legally reduced.

3. Municipal corporations ⇐220(3).

Under charter provisions giving board of supervisors power to fix compensation of city employees, Public Utilities Commission could not reduce salary of airport manager because commission could discharge him at any time.

4. Municipal corporations ⇐220(3).

Where city airport manager's salary was not legally reduced, but he indorsed warrants for reduced salary, stating they were accepted in payment of services, there was no waiver or estoppel.

Evidence disclosed that under charter board of supervisors had power to fix or change compensation of city employees, and that Public Utilities Commission discussed matter of reducing salary of airport manager, but no resolution was ever passed to that effect, that it was duty of manager of airport to prepare time sheet bimonthly, and that on each time sheet prepared monthly compensation appeared at reduced rate, and that such time sheets were signed by manager, that pay roll was signed by manager, and that on back of each warrant manager indorsed his name under a recital that indorsement by payee constituted receipt as well as acknowledgment that amount thereof was accepted in payment of services mentioned thereon.

Appeal from Superior Court, City and County of San Francisco; Edmund P. Mogan, Judge.

Petition by Roy N. Francis against Leonard S. Leavy, Controller of the City and County of San Francisco, for a writ of mandamus. From a judgment for petitioner, defendant appeals.

Affirmed.

John J. O'Toole, City Atty., and Dion R. Holm, Asst. City Atty., both of San Francisco, for appellant.

C. A. S. Frost and Garton D. Keyston, both of San Francisco, for respondent.

STURTEVANT, Justice.

The respondent applied to the trial court for a writ of mandamus directing the appellant, as controller of the city and county of San Francisco, to draw his warrant in favor of respondent in the sum of $600 for alleged back pay. The appellant answered, and a trial was had before the trial court sitting without a jury. The court made findings in favor of the respondent, and from the judgment entered thereon the appellant has appealed.

[1, 2] Prior to January 1, 1932, the respondent was employed as manager of the San Francisco Airport. His compensation was fixed in the sum of $500 per month. The record is entirely silent under what provision of the old charter and under what provisions of any ordinances then in effect the appointment was made. However, the respondent alleged his appointment and the amount of his salary, and those allegations were not denied. The new charter of San Francisco took effect on the 8th day of January, 1932. Under the provisions of that charter, the airport is placed under the jurisdiction of the Public Utilities Commission. Shortly after the enactment of the charter, the members of the Public Utilities Commission were named, and thereafter organized and commenced the transaction of business. It was soon ascertained that its funds were running so low that the pay roll must be reduced. The matter of the reduction of the salary of the respondent was discussed

by the members of the Public Utilities Commission. Something is said in the briefs regarding a resolution passed by the commission reducing the salary of the respondent from $500 to $300. However, the record shows clearly that no such resolution was passed. As manager of the airport it was the duty of the respondent to prepare the time sheets bimonthly. He did so for the months of March, April, and May. On each time sheet his monthly compensation appeared as $300. The time sheets were signed by the respondent. Before each pay day a pay roll for each department was prepared and authenticated by the signature of the manager thereof. That practice was followed by the airport, and each pay roll was signed by the respondent. Each employee was paid by a warrant written in his favor. On the back of each warrant above the line for the signature of the payee appeared:

"The endorsement of this warrant by the payee named herein constitutes a receipt hereof to the controller, as well as an acknowledgment that the amount thereof is accepted in payment of the services mentioned hereon.
_____"

Endorse here.

Each one of the warrants drawn in his favor was indorsed by the respondent. He never at any time objected to the amount or claimed any irregularity. The evidence is distinctly conflicting, but there is evidence to the effect that about the end of February the respondent was told that his salary would be reduced and that he replied, "I expected it." At the end of May the respondent resigned. Thereafter on July 2, 1932, he commenced this proceeding. By his pleading the respondent claims that for the months of March, April, and May he was paid $300 per month, and that for each month there remains due and unpaid the further sum of $200, or a total sum of $600. in all. The appellant replies that the respondent's compensation was reduced to $300 effective March 1, 1932, and that all of it has been paid. The appellant further contends that whether the reduction was valid or otherwise the respondent waived any objection. To that reply the respondent avers that no reduction was in fact attempted, and that under the charter and the ordinances no reduction could have been made, and that he has never waived the point. That a reduction was attempted as a matter of bookkeeping is uncontroverted. The record discloses that the respondent was employed by a committee of the board of supervisors, and that his compensation was fixed by the board of supervisors. There is no evidence that the board of supervisors ever attempted to reduce the respondent's compensation. The new charter took effect January 8, 1932. As of that date the airport went under the jurisdiction of the Public Utilities Commission. The manager of the public utilities, with the consent and approval of the commission, has the authority to appoint heads of departments. The salaries of the manager and heads of separate utilities and bureaus shall not exceed prevailing salaries paid those holding similar positions in comparable private employment (section 124). Employees of the municipal airport hold their positions at the pleasure of the manager of utilities (section 125). Excepting officers or employees whose compensation is expressly fixed in the body of the charter, the power to fix salaries of officers and employees and the manner and exercise of that power is as follows: (1) A standardization ordinance is to be enacted classifying officers and employees and fixing their compensation (section 151); (2) annually, not earlier than May 15th and not later than June 1st, a budget ordinance will be passed, including, among other things, salaries and compensation of officers and employees of each department (section 72); (3) at the same time an appropriation ordinance will be passed (section 72); and (4) at the same time a salary ordinance will be passed (section 73). It was alleged and not denied that on January 6, 1932, two days before the new charter took effect, the board of supervisors passed an "annual salary ordinance" which fixed respondent's compensation in the sum of $500. As, according to the provisions of section 72 and 73, the budget and appropriation ordinances could not be enacted until some time after the 15th day of May in any given year, it is not clear that the ordinance of January 6, 1932, had any force or effect prior to May 15th. The record does not show that any other ordinance was passed. It follows that the compensation of the respondent was never altered from the day of his appointment. That appears from what we have said, and is fortified by two passages continued in the charter. Section 71, among other things, provides: "* * * Pending the adoption of salary standards as in this charter provided, the salary and wage rates for positions subject to such standardization shall be as recommended by the officer, board or commission having appointing power for such positions and fixed by the budget and annual salary ordinance; provided that any compensation paid as of January 1, 1931, to an incumbent who legally held a position in the city and county service at that time, shall not be reduced so long as such incumbent legally holds such position. * * *" Section 73 provides: "* * * Rates of compensation enumerated shall be those established by salary standardization schedules, and shall not be listed for individuals or individual positions, except where the compensation of incumbents is more than the rate fixed by salary standardization, which compensations shall not be reduced so long as the incumbents legally hold such positions. * * *" From these provisions it is clear that the power to fix compensation for officers and employees

and to increase or decrease it rests in the board of supervisors. Nothing to the contrary appearing in the record, the compensation of the respondent was not reduced.

[3] In the trial court the appellant contended, and in this court he contends, that as respondent's tenure rested in the discretion of the Public Utilities Commission, he could be discharged at any time (section 121), and therefore his compensation could be fixed or changed by the commission. The same contention was made under similar statutes in Pitt v. Board of Education, 216 N. Y. 304, 110 N. E. 612. On page 613 of 110 N. E., addressing itself to a parallel case (Hogan v. Board of Education of N. Y., 200 N. Y. 370, 93 N. E. 951), the Supreme Court of New York said: "Under the resolution adopted by the board of aldermen the salary due plaintiff and payable to him at the end of each month was at the rate of $35 a week. The defendant was powerless to fix or regulate the compensation to be paid." 43 C. J. 906.

[4] The question remains as to whether the acts of the respondent constituted a waiver. That question is not an open one. It has been held that such facts as we have recited do not constitute either a waiver or an estoppel. Whiting v. Plumas County, 64 Cal. 65, 28 P. 445; Ellis v. Jefferds, 130 Cal. 478, 62 P. 734. But it may be said that those cases involved the compensation of officials, and that the respondent was not an official but an employee, and that the rules applicable to the two different capacities are not necessarily the same. People v. Wheeler, 136 Cal. 652, 69 P. 435. But the rule does not rest solely on an official relation. In Riley v. Mayor, etc., of N. Y., 96 N. Y. 331, on page 339, that court stated the rule as follows: "When a fixed salary or compensation is provided by law to be paid for services rendered by an individual to the public, or the right to fix such compensation is given to a class of persons, who have performed that duty, it is not competent for another officer whose duty is solely to engage persons to perform the services, to stipulate with them for a smaller rate than that provided by the established regulations"—citing cases.

In Pitt v. Board of Education, supra, the plaintiff had executed a formal release, a document as broad as the indorsement written on the checks by this respondent. The court held it was no waiver. In Lukens v. Nye, 156 Cal. 498, 105 P. 593, 36 L. R. A. (N. S.) 244, 20 Ann. Cas. 158, the court cited and followed the New York cases. In that case the Legislature had passed a statute appropriating $45,616.30 in payment of the claim of John Mullan. The governor of the state was about to veto the bill. Thereupon the claimant came forward and executed a release of nearly one-half of the sum so appropriated by the Legislature. The Governor signed the bill. The claimant collected the portion not released, and then commenced an action in mandamus to compel the payment of the remaining portion. In holding that the facts did not constitute an estoppel, at page 506 of 156 Cal., 105 P. 593, 596, the court said: "The consequence of holding this agreement effectual as an estoppel would be to make it valid, notwithstanding the entire lack of power in the Governor to demand or accept it, and despite its infringement of the express terms of the statute. Such contracts could always be set up as an estoppel, and the public policy which prohibits them would be defeated." Resting their opinions on the same reasoning, the courts have held that under such facts as are presented in this record no waiver was created. People v. Mantei, 134 Misc. 529, 236 N. Y. S. 122, 125; Metz Co. v. Boston & M. R. R., 227 Mass. 307, 116 N. E. 475, 476; 40 Cyc. 255.

We find no error in the record. The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

IRWIN v. PICKWICK STAGES SYSTEM, Inc., et al. (four cases).*

Civ. 7819–7822.

District Court of Appeal, Second District, Division 2, California.

May 8, 1933.

Rehearing Granted June 7, 1933.

1. Carriers ⇐318(12).

Proof that, at time of accident, bus containing passengers was registered with state motor vehicle department in defendant corporation's name as its legal owner, made prima facie case that corporation owned bus and that driver was employed by it and acting within scope of employment.

2. Carriers ⇐320(31).

To warrant directed verdict for corporation, evidence rebutting passengers' prima facie case that at time of accident corporation owned bus, and that driver was employed by it and acting within scope of employment, must be uncontradicted, clear, and free from reasonable suspicion (Code Civ. Proc. § 2061, subd. 7).

3. Appeal and error ⇐1011(1).

Where substantial conflict in evidence exists, trial court's decision on fact question is conclusive.

4. Evidence ⇐158(26).

Corporation records were best evidence to establish fact that it did not operate bus-

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes
*For subsequent opinion see 25 P.2d 998.

ses over route where accident occurred (Code Civ. Proc. § 2061, subd. 7).

5. Evidence ⇐594.

Courts need not accept as true uncontradicted statement of witness.

6. Carriers ⇐320(31).

Evidence to rebut passengers' prima facie case that at time of accident corporation owned bus, and that driver was employed by it and acting within scope of employment, *held* insufficient to warrant directed verdict for corporation (Code Civ. Proc. § 2061, subd. 7).

7. Carriers ⇐283(1).

Driver *held* agent of corporation which owned bus and franchise by virtue of which it was being operated at time of accident, regardless who paid driver his wages and who was his immediate employer (Const. art. 12, § 10).

8. Trial ⇐228(1).

Each instruction need not contain all of the law bearing on particular phase of case.

9. Trial ⇐296(7).

Instruction on res ipsa loquitur doctrine that, if plaintiff made prima facie case, burden of proof was thrown on defendants to show that injuries were sustained without defendants' negligence, or by unavoidable accident, *held* not prejudicially erroneous, where jury were informed in other instructions that plaintiff must prove all material and affirmative allegations of complaint by preponderance of evidence.

Appeals from Superior Court, Los Angeles County; Warren V. Tryon, Judge.

Actions by William Richard Irwin, by Annie A. Irwin, by Florence B. Irwin, a minor, by Annie A. Irwin, her guardian ad litem, and by Betty B. Irwin, a minor, by Annie A. Irwin, her guardian ad litem, against the Pickwick Stages System, Inc., and another. From the judgments, defendants appeal.

Affirmed.

See, also, 115 Cal. App. 372, 766, 1 P.(2d) 1030; 115 Cal. App. 767, 768, 1 P.(2d) 1031.

B. P. Gibbs and George P. Kinkle, both of Los Angeles, for appellants.

George Appell and Earl Newmire, both of Los Angeles, for respondents.

CRAIG, Justice.

These are actions to recover damages for personal injuries claimed to have been suffered by the several plaintiffs through alleged negligence of Pickwick Stages System, a corporation, and R. I. Bailey, who was the driver of the stage known as "St. Charles" in which the plaintiffs were riding at the time of the accident. This took place November 23, 1929, in San Bernardino county, Cal., near a point called Baker. It appears that the plaintiffs were regular and paid passengers of the stage. The stage was being driven over a straight highway which was on a practically level grade, and that as it was coming up out of a slight dip in the road it veered abruptly to the left and went off the highway and turned over. The plaintiffs sustained severe injuries. The answers in effect deny ownership or operation of the stage.

The principal issues involve the sufficiency of the evidence of ownership of the bus by the defendant corporation, and employment by it of defendant Bailey. These matters were first presented on motion for nonsuit; then by motion for a directed verdict for the defendant corporation, and later on motion for new trial and the appeal from the judgments.

[1] At the time of the motion for nonsuit, plaintiff had placed in evidence proof that at the time of the accident the stage bus St. Charles was registered with the motor vehicle department of the state of California in the name of Pickwick Stages System as its legal owner. When the injuries to plaintiffs were sustained, it was established and stipulated that the plaintiffs were then passengers on said stage. We think this was a sufficient showing to constitute prima facie proof of the defendant corporation's ownership of the bus and that the driver, Bailey, was then employed by it, and acting within the scope of his employment. Hence the motion for nonsuit was properly denied.

We proceed to consider the more difficult question as to whether these inferences were sufficiently overcome by evidence introduced after plaintiffs' case had been rested.

It is conceded by the appellant that "this evidence on behalf of respondents created an inference that the driver of the bus, appellant R. I. Bailey, was acting as an agent and servant of the appellant Pickwick Stages System, Inc.," but with striking inconsistency it is declared in appellants' brief "that there was a total failure of proof that the appellant R. I. Bailey, driver of the bus involved in this case, at the time of the accident, was an agent, servant or employee of the appellant, Pickwick Stages System." If the first statement quoted is true, the second cannot be. It is conceded in many authorities cited by both the respondents and appellants that the inference above admitted to exist would amount to proof sufficient to be a prima facie showing on the point in question. Maupin v. Solomon, 41 Cal. App. 323, 183 P. 198; Judson v. Bee Hive Auto Service Co., 136 Or. 1, 294 P. 588, 297 P. 1050, 74 A. L. R. 944, and cases there cited.

[2, 3] The injuries were sustained on the 23d day of November, 1929. Plaintiffs' Exhibit I, which is a certificate of registration

with the motor vehicle department of the state of California, indicates that the Pickwick Stages System was the legal owner of the stage St. Charles beginning with the 22d day of August, 1929, and that it was registered to that corporation for the year 1929. In many cases cited by the appellants, where a prima facie case was made out by the plaintiff as was done here, the defendant produced evidence conclusively showing that, notwithstanding the apparent ownership of the defendant, and in spite of the initial showing that the person whose negligence caused the injury was the employee of the defendant and acting within the scope of his employment, one or both of these essentials in truth did not exist when the accident occurred. Among such cases are Maupin v. Solomon, supra; Brown v. Chevrolet Motor Co., 39 Cal. App. 738, 179 P. 697; Rock v. Orlando, 100 Cal. App. 498, 280 P. 377; Preo v. Roed, 99 Cal. App. 372, 278 P. 928; Fahey v. Madden, 56 Cal. App. 593, 206 P. 128; Burns v. Southern Pacific Co., 43 Cal. App. 667, 185 P. 875; Judson v. Bee Hive Auto Service Co., supra. However, in each of these decisions the evidence introduced by the defendant was uncontradicted and free from reasonable suspicion, was so clear and convincing as to dispel the inferences created by the plaintiffs' prima facie showing, and to leave the state of evidence such that there was in law no conflict for the jury to weigh and no course for the trial court to pursue except to instruct the jury to render a verdict for the defendant. Such must be the type of evidence given by a defendant, otherwise an appellate court is bound by the familiar rule that, where there is a substantial conflict in the evidence, the decision of the trial court on a question of fact will not be disturbed.

[4] The witness Libby was called by the defendant and testified that he was secretary and general counsel for the Pickwick Stages System; that he kept the corporation records, and of his own knowledge knew that at the time of the accident Pickwick Stages System did not operate a fleet of busses between Salt Lake City, Utah, and Los Angeles. Of course, the records of the corporation would have been the best evidence to establish this fact if it were true; but its weight was further affected by Plaintiffs' Exhibit 21, which was introduced in connection with the cross-examination of the witness Libby. This exhibit is an application of the Pickwick Stages System to transfer a certificate of convenience and necessity theretofore granting the Pickwick Stages System to the Pacific Greyhound of California, Limited, and an order thereon permitting such transfer. From this exhibit it appears that such a certificate of convenience and necessity had been granted the defendant corporation before the date of such exhibit, to wit, in January, 1929; that it had been granted a franchise to operate busses over a route including where this accident occurred. The order permitting the transfer of this franchise is dated January 20, 1930, so that from this it seems that the Pickwick Stages System owned the franchise at the date of the plaintiffs' injury. While this transaction is not full and complete proof that at the time of the accident the Pickwick Stages System still held the franchise referred to in this application and order and was operating stages in its exercise, it is clear that, if the Pickwick Stages System had transferred said franchise to the Pickwick Stage Lines, Inc., in whose employ the appellant contends the driver was, and which corporation it is claimed was the owner of the St. Charles stage at the time of the accident, such transfer of franchise would have been a violation of the order of the Railroad Commission, as appears from the following quotation from said order:

"3. The rights and privileges herein authorized may not be discontinued, sold, leased, transferred, nor assigned, unless the written consent of the railroad commission to such discontinuance, sale, lease, transfer, or assignment has first been secured."

"4. No vehicle may be operated by applicant herein unless such vehicle is owned by applicant, or is leased by them under a contract or agreement satisfactory to the railroad commission."

With the evidence in this state we have a record in which the showing is not comparable with that presented in numerous cases cited by appellant in which there was held to be presented for the defense clear, positive, and uncontradicted evidence, free from suspicion to disprove agency or present ownership, and that as against such proof the inference based upon former ownership was overcome and failed to create a substantial conflict in the evidence of a character sufficient to sustain a judgment for the plaintiff.

[5-7] Throughout the decisions we find this to be the test: Was the proof against the inference in question uncontradicted, was it clear, positive and decisive? and, further, was it free from suspicion? And this is logically so, otherwise the law would stultify itself by compelling presumed belief on testimony which the minds of jury or judge could not reasonably accept and believe. It is elementary that courts are not forced to accept as true a statement of a witness merely because it is uncontradicted. It may be highly improbable and yet incapable of contradiction. If the evidence submitted permits of suspicion as to its verity, if it is apparent that better, and more conclusive, evidence might have been offered, evidence which it was apparently within the power of the party relying upon weaker and less satisfactory evidence to produce, thoughtful and reasonable minds have a right to suspect that, had the best evidence been offered, it would not have sustained the inferior

proof. The best evidence would have been clear and conclusive. Such was the case of Judson v. Bee Hive Auto Service Co., supra, principally stressed by appellants where the original written contract sustaining defendants' contention was before the jury. In each of the cited cases such direct, final, and best proof was in evidence. In these instances there was no room for the application of the wise presumption made a part of our law of evidence by subdivision 7 of section 2061, Code of Civil Procedure: "That if weaker and less satisfactory evidence is offered, when it appears that stronger and more satisfactory was within the power of the party, the evidence offered should be viewed with distrust."

We think the evidence given to overcome the inferences arising from the certificate of registration and the franchise from the Railroad Commission was not above suspicion nor of that complete and final nature requiring or justifying a directed verdict in favor of the defendant. Again, regardless of who paid the driver his wages and of who was his immediate employer (and there was evidence that Pickwick Stage Lines, Inc., of Nevada, paid him and that the Pickwick Stages System was not his immediate employer), since the jury had the right to believe that at the time of the injury to plaintiffs the defendant corporation owned the bus St. Charles and the franchise by virtue of which it was being operated, the law created the driver its agent. Lee v. Southern Pac. R. R. Co., 116 Cal. 97, 100, 47 P. 932; Johnson v. Southern Pac. R. R. Co., 154 Cal. 285, 97 P. 520, 524; Const art. 12, § 10.

If some other person or corporation was lawfully operating the defendant corporation's stage or using its franchise in such manner as to relieve it from liability for their negligence, it was incumbent on it to place before the court a frank, open, complete picture of its transactions in that behalf if it would make its case so far above suspicion as to require a directed verdict. As was said in Johnson v. Southern Pacific R. R. Co., supra: "It can only relieve itself from responsibility for injuries resulting from such operating by showing a lease made to the operating company under statutory authority." This it did not choose to do.

[8, 9] It is contended that an instruction given by the court upon the doctrine of res ipsa loquitur was erroneous, in that it indicated that, if the plaintiff had made a prima facie case as to injury, ownership of the conveyance, and agency, the burden of proof was thrown on defendants to show that such injuries were sustained without the negligence of the defendants or by unavoidable or inevitable accident. In other instructions given the jury, the jury were fully informed as to the necessity that the plaintiff prove all material and affirmative allegations of the complaint by a preponderance of the evidence. It is not necessary that each instruction contain all of the law bearing on a particular phase of the case. In this instance no prejudicial error occurred. Bonneau v. North Shore Railroad Co., 152 Cal. 406, 409, 93 P. 106, 125 Am. St. Rep. 68. As to the other instructions criticized by appellant, in view of our holding heretofore stated on the law governing the particular facts shown in this record, we think no error is shown.

The judgments are affirmed.

We concur: WORKS, P. J.; STEPHENS, J.

131 Cal.App. 631

MAPLE et al. v. WALSER, Sheriff, et al.

Civ. 751.

District Court of Appeal, Fourth District, California.

May 5, 1933.

1. Appearance ⇐24(13). Judgment ⇐419.

Question of personal jurisdiction raised by motion to quash service of summons *held* waived, where, after denial of such motion, defendants appeared generally and proceeded to trial on merits, and hence enforcement of judgment therein was improperly enjoined (Code Civ. Proc. § 1014).

2. Appeal and error ⇐102.

Order overruling demurrer is not appealable.

Appeal from Superior Court, Kern County; Erwin W. Owen, Judge.

Action by F. E. Maple and another against J. C. Walser, as Sheriff of Kern County, and others. From an order overruling a demurrer to the complaint and granting a temporary restraining order pendente lite, defendants appeal.

As to that portion of the order overruling the demurrer, appeal dismissed, and order in so far as it granted a temporary restraining order reversed.

Max B. Jamison, of Porterville, for appellants.

Samuel Taylor, of Bakersfield, for respondents.

JENNINGS, Justice.

This action was instituted by plaintiffs in the superior court of Kern county to enjoin

the enforcement of a certain judgment alleged to have been rendered in favor of the defendant, People's Finance & Thrift Company of Porterville, a corporation, in the justice's court of Porterville township, Tulare county, in an action wherein said People's Finance & Thrift Company was plaintiff and the plaintiffs herein were defendants, and to have the judgment so rendered in said justice's court declared void. Upon the filing of the complaint in the present action, the superior court made an order requiring the defendant Walser, as sheriff of Kern county, to show cause why he should not be restrained, during the pendency of the action, from paying to People's Finance & Thrift Company of Porterville the sum of $288.76, or any other sum of money, and pending the hearing on the order to show cause that said defendant sheriff be restrained and enjoined from turning over to said corporation the said sum of $288.76 or any other sum of money collected from the plaintiffs. To the complaint thus filed the defendants interposed a general and special demurrer. The order to show cause and the demurrer to the complaint came on for hearing at the same time. Upon the conclusion of the hearing, the court ordered that the demurrer be overruled and that a temporary restraining order be granted pendente lite. From the order thus made, the defendants have prosecuted this appeal.

The record herein shows that, upon the hearing of the order to show cause why a temporary injunction pendente lite should not issue, the defendants, in opposition to the granting of the injunction, presented to the court, an affidavit of the justice of the peace of Porterville township, Tulare county. It appears that other than this affidavit the only evidence which was submitted consisted of the allegations of the verified complaint of plaintiffs.

The aforementioned affidavit contains a copy of the docket of the justice's court of Porterville township in the case in which People's Finance & Thrift Company of Porterville was plaintiff and F. E. Maple, C. E. Dewey, Charles Foster, and Roy R. Foster were defendants. It appears therefrom that on May 6, 1930, complaint in the action was filed and summons issued, and that on June 2, 1930, notice of motion to quash service of summons was filed. It further appears that on June 14, 1930, counsel for the defendants appeared before the court and presented an argument in support of the motion to quash service of summons, and that on September 10, 1930, the motion to quash service of summons on F. E. Maple and C. A. Dewey was denied. On September 29, 1930, the aforesaid defendants F. E. Maple and C. A. Dewey filed a written answer in the action. On October 23, 1930, the case came on for trial, and the entry in the docket for this date shows that counsel for the respective parties to the action were present and announced that they were ready to proceed with the trial. It also appears that certain named witnesses testified on behalf of the plaintiff and other named witnesses testified on behalf of the defendants, and that certain documentary evidence was received. It further appears that upon the conclusion of the trial the court took the case under advisement, and on October 27, 1930, rendered judgment in plaintiff's favor for $257.70. On January 3, 1931, a notice of appeal was filed. The complaint in the present action alleges that the plaintiffs herein, who were defendants in the action in the justice's court, presented to the justice of the peace a motion to quash service of summons on the ground that they were residents of Kern county, and that the allegation contained in the complaint in the justice's court to the effect that the moving parties had agreed in writing to pay the amount specified in the contract upon which the action was brought at Porterville was untrue. The complaint further alleges that the motion was denied, and that thereafter judgment was rendered in favor of plaintiff in said action and against the plaintiffs in the present action, and a writ of execution was issued by said justice's court directed to the sheriff of Kern county, and in pursuance thereof the sheriff levied upon personal property of said plaintiffs herein and now holds the sum of $288.76 belonging to said plaintiffs which he threatens to turn over to the plaintiff in the said action in the justice's court of Porterville township.

[1] From the foregoing recital it is apparent that it was conclusively shown to the superior court of Kern county that, after the motion to quash service of summons in the justice's court of Porterville township was denied, the plaintiffs herein, defendants in said action in said justice's court, made a general appearance in said action, and proceeded to a trial of the case wherein evidence on their behalf was presented to said court, and that upon the conclusion of the trial judgment was rendered against them. By thus entering a general appearance in the action and proceeding to trial on the merits, they necessarily waived the question of personal jurisdiction which was the foundation of their motion to quash the service of summons and thereby submitted themselves to the jurisdiction of the court. Code Civ. Proc. § 1014; Security, etc., Co. v. Boston, etc., Co., 126 Cal. 418, 58 P. 941, 59 P. 296; Zobel v. Zobel, 151 Cal. 98, 90 P. 191; Olcese v. Justice's Court, 156 Cal. 82, 103 P. 317; Remsberg v. Hackney Manufacturing Co., 174 Cal. 799, 164 P. 792; Jardine v. Superior Court, 213 Cal. 301, 2 P.(2d) 756, 79 A. L. R. 291. Having thus waived their dilatory plea of informality of service of process, and having participated in a trial of the action on its merits, they were clearly not entitled to an injunction pendente lite to restrain the

enforcement of the judgment rendered against them, and the court erred in granting their motion for such relief.

Incidentally, although it is not involved in this appeal, it may properly be noted that plaintiffs herein made an abortive attempt to appeal to the superior court of Tulare county from the judgment rendered against them in the justice's court, and, the attempted appeal having been dismissed by said superior court, they then sought to have the action of the superior court in dismissing the appeal reviewed by a writ of certiorari. In this effort they were unsuccessful, and the writ was ordered discharged. Maple v. Allen, 114 Cal. App. 109, 299 P. 571.

[2] The appeal from that portion of the court's order overruling the demurrer interposed by the defendants herein is entitled to no consideration. The record shows that, after the order overruling the demurrer was made, the defendants herein filed an answer to the complaint. It is conclusively established that an appeal does not lie from an order overruling a demurrer. Harmon v. De Turk, 176 Cal. 758, 169 P. 680; Garroway v. Jennings, 189 Cal. 97, 207 P. 554; Adams v. Christopher, 112 Cal. App. 37, 296 P. 85.

It is therefore ordered that the appeal from that portion of the court's order overruling the demurrer be, and the same is hereby, dismissed, and that the order in so far as it grants a temporary restraining order pendente lite be, and it is hereby, reversed.

I concur: BARNARD, P. J.

131 Cal.App. 569

REDWING v. MONCRAVIE.

Civ. 7751.

District Court of Appeal, Second District, Division 2, California.

May 2, 1933.

1. Husband and wife ⇐209(2).

Damages for personal injuries to wife are not recoverable, unless she is party plaintiff in cause instituted therefor.

2. Husband and wife ⇐229(2).

Allegation that husband suffered $50,000 damages because of injuries to wife was immaterial in cause in which husband was sole plaintiff.

3. Husband and wife ⇐209(3).

Husband, as sole plaintiff, could sue only for consequential or special damages suffered by him as proximate result of injuries to wife.

4. Husband and wife ⇐209(3).

Where wife was injured, husband could not recover damages because injuries prevented wife's appearing as actress in husband's future motion picture productions where he had no contract with wife.

5. Damages ⇐141.

Prayer for judgment in certain sum could not be considered as ad damnum allegation.

6. Trial ⇐333.

Where husband, though alleging wife's injuries and loss of her services as actress, could not recover therefor, and prayed $10,000 damages for medical and hospital services, verdict for $25,000, merely as matter of pleading, was excessive by $15,000.

7. Automobiles ⇐181(2).

Wife could become "guest" passenger of man other than husband on automobile tour without husband's consent within meaning of guest statute (St. 1923, p. 517, § 141¾, as added by St. 1929, p. 1580).

[Ed. Note.—For other definitions of "Guest," see Words and Phrases.]

8. Automobiles ⇐181(2).
Negligence ⇐93(1).

That woman guest and man driving automobile were engaged in common pleasure enterprise would not make driver's negligence imputable to woman and prevent her being "guest" passenger.

9. Automobiles ⇐181(2).

Whether one is "guest" passenger in automobile depends on whether compensation was paid for ride, either directly or indirectly.

10. Automobiles ⇐181(2).

If automobile driver asked woman to ride with him, and she consented, or if she asked driver to take her for drive and he consented, from time drive commenced she was under protection of common-law right to recover damages for driver's negligence as limited by guest statute (St. 1923, p. 517, § 141¾, as added by St. 1929, p. 1580).

11. Evidence ⇐110.

In automobile accident case, admitting evidence that defendant on taking injured guest to hospital gave name other than his own *held* error.

12. Automobiles ⇐246(20).

In guest's personal injury suit, instruction motorist must drive at speed and in manner enabling him to stop or check speed "in event it is necessary to do so" *held* too general.

13. Damages ⇐210(1).

Where husband sued for loss of wife's service as actress, instruction regarding hus-

band's right to damages for loss of wife's services *held* error.

14. Damages ⇐216(2).

Instruction that jury could make estimate of damages from facts and circumstances in proof and by considering them in connection with their knowledge and experience *held* improper, where injured woman's husband was suing for consequential or special damages which were susceptible of proof in money.

15. Trial ⇐260(1).

Refusing instructions covered by instructions given *held* not error.

Appeal from Superior Court, Los Angeles County; Arthur Keetch, Judge.

Action by Robert Redwing against Charles Moncravie. From a judgment for plaintiff, defendant appeals.

Reversed.

Kidd, Schell & Delamer and Sam E. Edwards, all of Los Angeles, for appellant.

Russell H. Pray, of Long Beach (Delmar W. Doddridge, of Los Angeles, and Wahlfred Jacobson, of Long Beach, of counsel), for respondent.

WORKS, Presiding Justice.

This is an action for the recovery of special damages resulting from personal injuries to a guest passenger in an automobile, alleged to have been suffered by her because of the intoxication, willful misconduct, or gross negligence of the driver of the car. The action was commenced in this form because of the statute (St. 1923, p. 517, § 141¾, as added by St. 1929, p. 1580), in force at the time the action was begun, limiting the common-law right of guest passengers to recover against their host drivers to cases of intoxication, willful misconduct or gross negligence. The question of intoxication was eliminated from the cause at the trial. The injured woman, Rose Marie Redwing, was married, but her husband is the sole plaintiff in the action. He had judgment for $25,000, and defendant appeals. The cause was tried by a jury.

As the judgment must be reversed, and as the action may be tried again, it becomes our duty to place a construction upon the pleadings in order that on a retrial the hearing may be had upon theories different from those upon which it has already been tried and which were erroneous.

[1-3] The injuries alleged to have been suffered by respondent's wife resulted from appellant's car, while being driven by him, colliding with the rear end of a truck, under circumstances which need not be detailed here. It is alleged in the complaint, as a result of the catastrophe: "That the lower lip of said Rose Marie Redwing was completely cut off, her right eyelid was completely cut off, the inside of her mouth was cut and lacerated to such an extent that thirty or forty stitches were necessary; she received concussion of the brain and fracture of the skull, her hands were cut and her body was bruised and contused and she was injured internally and her face was disfigured, scarred and marred permanently, all to plaintiff's damage in the sum of fifty thousand dollars ($50,000.-00)." It is well settled that damages for personal injuries to a wife are not recoverable unless she is a party plaintiff in the cause instituted to recover such damages. Matthew v. Central Pac. R. Co., 63 Cal. 450; McKune v. Santa Clara, etc., Lumber Co., 110 Cal. 480, 42 P. 980; Moody v. Southern Pacific Co., 167 Cal. 786, 141 P. 388. Therefore the allegation that respondent had suffered $50,000 damages because of the injuries to his wife was immaterial in a cause in which he was the sole plaintiff. Not only were the injuries in question, as a matter of law, suffered by her and not by him, but she was damaged by them and not he. He, as the sole plaintiff, could sue only for consequential or special damages suffered by him as the proximate result of the injuries to her.

[4] The complaint also contains these allegations: "This plaintiff further alleges that he is a full-blooded American Indian, and that he is a producer of motion pictures and that he has been engaged in the production of motion pictures for a period of four years immediately preceding the filing of this complaint. Plaintiff further alleges that he specializes in the production of Indian legends and educational pictures involving Indian lore for public schools and colleges and that he has spent the two years immediately preceding the filing of this complaint in developing the said Rose Marie Redwing as a motion picture actress in said Indian productions. That the said Rose Marie Redwing is an Osage Indian and has been featured as a leading actress in the productions of this plaintiff during the year immediately preceding the filing of this complaint. That the facial features of the said Rose Marie Redwing have been an asset and were of great value to this plaintiff in his business of producing motion pictures. That because of the negligence hereinabove set forth of said defendant, the said Rose Marie Redwing, wife of this plaintiff, has had her facial features ruined and her face has been scarred, marred and disfigured for life and permanently and to such an extent that her acting in motion pictures in the future will be impossible, and because of the facts as herein alleged, this plaintiff will be prevented from using the said Rose Marie Redwing, his wife, in future mo-

tion picture productions, and in these respects this plaintiff has been damaged in the sum of one hundred thousand dollars ($100,000.00)." Under the law respondent could not have been damaged, under these allegations, in any sum whatever. The fact that Rose Marie was his wife did not place her under such a condition of servitude to him as entitled him to demand or to expect her services as a motion picture actress. If she were willing at any time to enter into any employment other than that of a housewife, she might elect to be either a stenographer, an opera singer, or a beach lifeguard. Further, if she desired to remain a motion picture actress, she might choose to disport herself before the camera under some producer other than her husband. It is plain that appellant if it be conceded that any injury to Rose Marie was due to his willful misconduct or gross negligence, cannot be made to pay damages to respondent for a wholly imagined and speculative damage to him because of the allegations in this paragraph above quoted. The point here determined is not suggested by appellant, but, while it is our duty, if possible, to affirm judgments on appeal, we think we owe it even to an appellant to declare that a claim for damages which is without foundation in the law shall not be presented to a jury for determination. Upon a retrial of this action, therefore, the ad damnum allegation of the complaint to the effect that respondent has suffered damages in the sum of $100,000 will be disregarded by the trial court. In passing, it may be observed that the complaint alleges no contract whatever between respondent and Rose Marie for the rendition by her of services as a motion picture actress. Nor do we decide whether or not, if such a contract had been pleaded, respondent could recover damages from appellant because thereof.

It is alleged in respondent's pleading, further: "That because of said injuries herein and above referred to received by the said Rose Marie Redwing, it will be necessary that this plaintiff employ doctors, medical attendance, supplies and hospital services for the said Rose Marie Redwing, and this plaintiff alleges, on information and belief, that it will be necessary that he incur expense in this regard in the future and that future medical expense and hospital services will be necessary for the said Rose Marie Redwing, and in these respects this plaintiff alleges he has been damaged in the sum of ten thousand dollars ($10,000.00)."

[5, 6] It is too plain for argument that under these various allegations of his complaint respondent, as the sole plaintiff in the action, could have recovered no more than $10,000, although in the prayer of the pleading judgment was demanded for the sum of $160,000. This prayer cannot be considered as an ad damnum allegation. Kelly v. McDonald, 98 Cal. App. 121, 276 P. 404. It is obvious, then, merely as a matter of pleading, that the verdict for $25,000 was excessive to the extent of three-fifths of the amount named by the jury.

[7] It is also alleged in the complaint that "the defendant, against the will and without the consent of this plaintiff, induced the wife of this plaintiff, the said Rose Marie Redwing, to accompany the said defendant in an automobile operated by said defendant" on the trip which resulted in the casualty referred to in the pleading. Appellant in his answer denied this immaterial allegation. We say the allegation was immaterial because the complaint plainly indicates, as we have already remarked, that a recovery was sought upon the theory that respondent's wife was a "guest passenger" with appellant. Certainly a wife, within the meaning of the statute as to guest passengers, may become a guest of a man other than her husband upon an automobile tour irrespective of the husband's consent. That is a question between her and the driver of the car. The lack of consent may ultimately end in difficulty between the husband and the wife, but it bears no relation whatever to the question whether, as between the passenger and the operator of the car, the former was the guest of the latter. If the husband, because of the lack of consent, seeks solace under the law, he must find it under some form of action other than the present one. Therefore, if another trial of this cause should occur, no evidence will be received by the trial court upon the question whether respondent consented to his wife's free ride with appellant.

[8-10] It is alleged in the answer: "That immediately prior to and at the time of the occurrence of the accident referred to in the complaint defendant and said Rose Marie Redwing were engaged upon a common or joint pleasure enterprise and that if in fact this defendant immediately prior to or at the time of the occurrence of the accident referred to in the complaint was negligent, and if in fact at the time of the occurrence of said accident said Rose Marie Redwing was the wife of plaintiff (which admissions are made solely for the purposes of this pleading and without admitting such to be the fact) the said negligence is by law imputable to said Rose Marie Redwing and to plaintiff herein, and bars plaintiff's recovery herein." We think this is an immaterial allegation. If it were not so, no person could become a guest passenger of another in his car, when the two were driving in pursuit of a common desire to view scenic beauty—a sunset at sea or some picturesque sylvan or mountain locality. When a man and a woman drive together, unless one accompanies the other upon a business errand of interest only to that other, or perhaps to both—and this exception is excluded by the form of the allega-

tion in the answer—they proceed upon "a common or joint pleasure enterprise," to adopt the language of that pleading. If the language of the answer could be given any effect whatever, it must be taken as an allegation that respondent's wife was not a guest passenger with appellant, and was therefore under the common law entitled to an award of damages from him resulting from his ordinary negligence. But the pleading is not susceptible of such a construction, for it does not allege that respondent's wife paid to appellant any compensation for her ride, either directly or indirectly, and that is the determining factor in solving the question whether a passenger in a vehicle is a guest of the driver. Moreover, the cause was tried, on the part of the court and of counsel on both sides, upon the theory that Rose Marie Redwing was a guest passenger. Under all the circumstances shown by the pleadings, if appellant asked her to drive with him and she consented, or if she asked him to take her for a drive and he consented, from the moment she was assisted into his car and he "stepped on the gas" she was under the protection of the common-law right to recover damages for his negligence in operating the car, as limited by the statute concerning guest passengers. We know of no authority upon this plain question, and have searched for none. If there be a second trial of the cause the trial court will receive no evidence under this affirmative allegation of the answer.

Appellant contends, under various headings and upon numerous specifications that the evidence was insufficient to support the verdict of the jury. As the cause may be tried again, and as upon a retrial different evidence may be introduced, we shall not determine the points thus suggested.

Several errors were committed by the trial court, some of which were inconsequential. We shall consider only those which we think, without the others, show the necessity for a reversal of the judgment or which pertain to questions that may arise upon a new trial.

[11] After the accident out of which respondent's cause of action arises had occurred, appellant accompanied Rose Marie to a hospital. A physician in charge of the institution testified to a conversation with appellant at the time of his arrival there. The witness said, during his recital, that he asked appellant his name, and that appellant gave a name which was not Moncravie, although the witness could not remember what the name was. A motion to strike out this portion of the conversation was denied. When appellant was on the witness stand, he was asked if, at the hospital, he gave a name other than Moncravie, and, over objection, he answered that he did. Each of the rulings referred to in this paragraph was error.

[12] It is contended that the trial court erred in giving the following instruction to the jury: "You are instructed that it is the duty of an operator of an automobile to operate the same at such a rate of speed and in such manner as will enable him to stop it or check its speed in the event it is necessary to do so." The last nine words of the instruction either render the whole meaningless or they make the instruction apply to the case of any emergency that might arise in the life of a motorist. The instruction is so general as to bear no relation whatever to the problems which were to have been solved by the jury. We think it was not particularly harmful, but it should not be given again.

[13] The court instructed the jury: "You are instructed that the husband is entitled to the services of his wife. If he loses those services or any part of them through the negligence of another, and the wife is not guilty of contributory negligence, then to the extent of his loss in money he is entitled to be compensated in money. And if you find that she is still suffering from an injury received in this accident, and is reasonably certain to continue to suffer in the future, then, to the extent that he is damaged through the loss of her services, he is entitled to recover for loss in the future." The giving of this instruction was error. There was nothing in the complaint which shows the semblance of a cause of action for damages for the loss of service of the wife. Respondent sued for the loss of service of a motion picture actress.

The court gave another instruction on the same subject. It is set forth in appellant's brief immediately following the instruction last above quoted, and its insertion here would serve no useful purpose. This instruction was also erroneous.

[14] The court further instructed the jury as follows: "You are instructed that if you find that the plaintiff is entitled to recover in this action, the amount of the recovery is for you to determine from all the facts in this case. You cannot, of course, measure in dollars and cents the exact amount he is entitled to, but it is for you to say in the exercise of sound discretion, from all the facts in this case, after considering and weighing all the facts in this case, what amount of money will reasonably compensate him for the damage and injury he has suffered, not exceeding the sum of one hundred sixty thousand dollars ($160,000.00), as alleged in plaintiff's complaint. If you find for the plaintiff in this case, under the instructions given by the court, and that the plaintiff sustained damages as set forth in his complaint, to enable the jury to estimate the amount of damages, it is not necessary that any witness should have expressed an opinion as to the amount of such damage, but the jury may themselves

make an estimate from the facts and circumstances in proof, and by considering them in connection with their knowledge, observation and experience in the business affairs of life. If you find for the plaintiff in this case then, in assessing plaintiff's damages, you have a right to take into consideration the nature, extent and character of the injury and loss sustained by plaintiff, as shown by the evidence, and assess his damages at such sum as in your judgment will compensate him for the loss or damage, if any he has suffered." A thread of error runs entirely through this instruction, and we shall partially trace it. As already observed, plaintiff could not have recovered, under his complaint, the sum of $160,000, but no more than $10,000. The statement that "it is not necessary that any witness should have expressed an opinion as to the amount of such damage, but the jury may themselves make an estimate from the facts and circumstances in proof, and by considering them in connection with their knowledge, observation and experience in the business affairs of life" might be proper in an action by a husband to recover solely for the loss of service of his wife, but it had no place in this action. The damages sought by respondent were consequential or special, and were susceptible of proof in dollars and cents. The cause required such proof. The "knowledge, observation and experience" of the jurors, in the connection in which they were referred to in the instruction, could have been of no avail in this action.

[15] Appellant complains that several instructions requested by him were refused. We think they were either covered by instructions given or that the points presented by them are not likely to arise upon a new trial.

Judgment reversed.

We concur: STEPHENS, J.; ARCHBALD, Justice pro tem.

131 Cal.App. 722

RYAN et ux. v. VAWTER.

Civ. 7485.

District Court of Appeal, Second District, Division 1, California.

May 12, 1933.

1. Evidence ⇐186(6).

In action involving property exchange, paper represented as copy of listing possessed by defendant's agent *held* erroneously admitted; it not appearing that copy was correct or was seen by plaintiffs or their agent.

2. Fraud ⇐58(2).

In action involving property exchange, findings relating to fraud of defendant in representing value of property exchanged by him *held* unsupported by evidence.

Appeal from Superior Court, Los Angeles County; Samuel R. Blake, Judge.

Two separate actions by J. D. Ryan and wife against Eva M. Vawter, who filed a counterclaim, were consolidated for trial. Judgment for plaintiffs, and defendant appeals.

Reversed, and new trial ordered.

Leonard J. Meyberg and Paul M. Joseph, both of Los Angeles, for appellant.

Morris McLaughlin, of Los Angeles, for respondents.

DESMOND, Justice pro tem.

This is an appeal taken by defendant from a judgment entered against her in the sum of $57,483.21 which the court found to be due plaintiffs as the net result of a transaction in which plaintiffs traded their ranch in Modoc county with certain personal property thereon for the Lady Ann Apartments and furniture therein located on South Rampart boulevard, Los Angeles, property of the defendant.

Two actions were filed simultaneously by plaintiffs, husband and wife, the first claiming damages for deceit, the second damages under a warranty that furniture and other personal property in the apartment house were unincumbered. Defendant answered the allegations of the first complaint under the number properly belonging to the second and vice versa as to the second complaint. In answering the first complaint, defendant set up a counterclaim charging fraud by plaintiffs and damages resulting therefrom. The actions were consolidated for trial, the court took a broad and general survey of the entire transaction and reached the result noted above by finding that, by reason of fraud practiced upon plaintiffs, they were damaged in the sum of $64,000, but because of failure of plaintiffs to pay certain obligations which they had assumed in the amount of $6,516.79, the defendant should be credited with that amount making the net judgment against the defendant the sum first above noted.

After the trial closed and before findings were signed, the court permitted plaintiffs to file an "amended complaint to conform to the proof for damages for deceit." Defendant complains that findings based on the pleadings as amended are erroneous in various particulars, pointing out that the amended complaint does not conform to the proof, but as to certain items, goes beyond any

proof. One of the important findings is that the defendant practiced fraud upon the plaintiffs by representing: First, that the monthly income from her apartment house, summer and winter, at the time of the transaction and previously, was $3,000; second, that the annual income was $36,000; third, that the actual value of the house, land and furniture was $325,000; fourth, that the expense of operating the property amounted to $2,100 per year, plus cost of insurance. The court, among other things, also determined, "that the representations as to the value of said apartment house herein specifically found to have been made were not made as an expression of opinion, but as a representation of fact"; that income for the month in which negotiations opened, November, 1927, was $2,600; that the exchange was made on December 27, 1927; that Mrs. Mason, agent for defendant, informed plaintiffs that income for November and December and for each and every month of the year 1927 was $3,000 per month; that the Modoc county land and ranch of the plaintiffs was worth approximately $250,000.

As a conclusion of law the court decided "that the plaintiffs were entitled to recover of and from the defendant, Eva M. Vawter, the sum of $57,483.21, the said sum representing the difference between the actual value of said apartment house, land and furniture, to-wit: $88,100, and the value which said property would have had if the representations of the defendant were true, to-wit: the sum of $152,100, the sum of $6,516.79 being allowed to the defendant as and for the sums which the plaintiffs should have paid. * * *"

Commenting upon the findings above mentioned, we note that one of the plaintiffs, J. D. Ryan, testified that his agent, Mr. Gansneider, gave him certain information concerning the defendant's property as follows: * * * Who was present at that time? * * * I think Mr. Gansneider and myself. * * * All right; what was said by you and by him at that time? He told me about this apartment, and showed me a slip with the listing on it, stating how much it brought in a year, the taxes, and one thing and another, and the dimensions and size of the lot and I says, 'Well, if it is bringing in that much money,' I says 'You will have to take care of the second mortgage.' He said, 'We will do it with that income.' * * * He (Gansneider) said it was bringing in 3000 a month, thirty-six thousand a year. That was gross income, did he say? Yes, sir. * * * He said Mrs. Vawter asked $325,000 for it, and if it was bringing that income in, according to what she says, he felt the value was about right, and I says, 'Well, if it is bringing it in, I will make the deal, because I will get sufficient income to take care of the second mortgage, which they agreed to get.' So on that understanding, I went and looked at the property."

[1] Mr. Gansneider did not appear as a witness, nor was the slip to which reference was made in the above testimony offered as evidence. The court, however, admitted over the objection of defendant a slip designated as Exhibit 5, reading as follows:

"Lady Ann Apartments,

"447 South Rampart Blvd., Los Angeles.

"Five story brick building, Beauty Parlor in Basement.

"Price $325,000.

"1st Mtg. $125,000—7½ years to run at 7% straight.

"Trust Deed $17,000 payable $1000 per month. Interest 8%.

"42 Singles, 6 Doubles, Lobby and basement.

"Furnished.

"Furniture Clear.

"Lot 60x140, Lot worth $1000 per front foot.

"Income summer and winter $3000 per month.

"Expenses except insurance $2100.00 per year.

"Insurance $130,000. Du 0591."

Mr. Frederick F. Mason, son of Mrs. Nellie Mason, defendant's agent in this transaction, testified that he copied the data upon this document from a listing which had been in his mother's possession but which was not produced at the trial. He stated that the original from which these entries were copied was signed by the defendant whose signature he recognized from having seen her handwriting elsewhere. Mrs. Mason had testified at an earlier date in the trial that so far as she knew no copy had been made of the listing which she had received from the defendant, and was not permitted to testify as to its contents. Later, when she was recalled to the stand after her son had testified, no effort was made to have her identify the typewritten entries made by him as a correct copy of her lost listing. No evidence was produced to show that Mr. Gansneider, agent for Mr. Ryan, or either of the plaintiffs ever saw this typewritten slip. We feel, therefore, that this document should not have been received as an exhibit and that its contents should have been disregarded. That it was not so disregarded, but, on the contrary, was considered as vitally important as a basis for one and perhaps the most important of the findings of the trial court, appears from the following statement made by the learned trial judge at the conclusion of the testimony.

"The Court: Relative to one finding that I think I should make at this time, to let counsel know how the court is going to find which is a determining feature in the matter, is

the question of whether or not the representation relative to $3,000 was made *in accordance with that listing slip.*

"Mr. Meyberg: *By 'listing slip' you mean with reference to the—*

"The Court: *The annual amount of $3,000 a month or $36,000 per year;* relative to that, the court is going to find for the plaintiff on that, that it was made; the evidence preponderates in that particular."

[2] Nowhere in the record do we find a statement that the plaintiffs, or either of them, were told by the defendant or any one representing her that the apartment house property was worth $325,000 or that the yearly expense aside from insurance was limited to $2,100 annually. Therefore, the amended complaint does not conform to the proof and should not have been ordered filed. As there was no proof of certain material allegations therein, so there was no ground for the findings relating thereto that the defendant practiced fraud upon the plaintiffs by representing that the actual value of the house, land, and furniture was $325,000, and that the yearly operating expense was $2,100 aside from insurance charges. The further finding "that the representations as to the value of said *apartment house* herein specifically found to have been made were not made as an expression of opinion but as a representation of fact" must go by the board also, especially since nowhere in the findings is it specifically found that any representation was made as to the value of said apartment house considered separately and apart from its furniture and equipment. If it be considered that "apartment house" in this connection means the entire apartment house property, still the finding is not justified for the reason already mentioned, that there is no evidence showing the claimed misrepresentation as to a $325,000 value, Mr. J. D. Ryan, one of the plaintiffs, testified that the defendant told him about December 18 or 19, 1927, a week before the exchange was made that "the property isn't worth over $162,000."

The court in finding 5 determined, among other things, that the actual value of the property received by plaintiffs from defendant was $88,100. This finding was based upon the testimony of an expert appointed by the court to appraise the property and whose estimate was formed from a personal inspection of the property, considered as renting at the time of the transaction at $2,600 per month, which, as has been noted, the court found to be the fact. This testimony reads as follows: "Case 3: assuming a gross income monthly, $2,600, being gross income yearly, $31,200, less 20 per cent. vacancies, $6,240, stabilized yearly income, $24,960; yearly expenses, $19,674, leaving a net income from the land alone of $5,286, capitalized at 6 per cent., gives us a *land value* of $88,100." It will be observed that this estimate does not include the value of the furniture of forty-eight apartments which plaintiffs received. The only testimony offered on the value of the furniture was given by this expert witness, as follows: "Now the furniture in my opinion is worth $24,750. I think I am conservative when I say that the depreciation which has accrued is at least 60 per cent., or $14,850; the difference between those two items gives us the present value of the furniture of $9,900." The testimony was given in May, 1929, approximately a year and a half after the exchange of the properties and what the value of the furniture was at that earlier time does not appear. It will be seen, however, that on the expert's testimony, the plaintiffs received real estate worth $88,100 and furniture worth $9,900, a total of $98,000.

Exhibit 1 entitled "Agreement for Exchange," which was signed by plaintiff J. D. Ryan on November 29, 1927, and later initialed at various points by him and the defendant, contains a statement that the Los Angeles property is subject to a first mortgage of $125,000 and a second of $17,000, a total incumbrance of $142,000. As we have observed, this plaintiff was advised by the defendant before the exchange was completed that her property was worth not more than $162,000, or $20,000 above the incumbrances. With this in mind, and notwithstanding the testimony of the expert appraiser, we cannot agree with the conclusion of the trial court that the plaintiffs should recover from the defendants (on the evidence as introduced) the sum of $64,000 minus credits due her, even though—and this is not clear—the value of the furniture may not have been included in the figure $162,000 quoted by the defendant.

It appears from the evidence that plaintiff J. D. Ryan, prior to the time he made this trade, was familiar with the apartment house business, having owned and operated four or five apartment houses in the city of Los Angeles; that he was furnished by defendant with a report on the various apartments in the Lady Ann Apartments showing vacancies, tenants, and rates charged, from which he might have determined for himself the current income, or made any investigation that seemed advisable; that he did not insist on examining the books of the business, although they were in existence and were shown to him in the apartment house; that he made no inquiry of the defendant or any one else concerning expenses, the defendant testifying without contradiction: "I started to go into the expense and he said he knew about the expense, he had run apartment houses before."

Under the circumstances, we feel that no injustice will be done the plaintiffs if this case is placed in position to be tried anew, action which we deem necessary because of

errors hereinbefore noted in the admission of evidence and findings on material matters which are not supported by or which are in direct conflict with the evidence. 2 Cal. Jur. 1028; 24 Cal. Jur. 990.

The judgment is reversed, and new trial ordered.

We concur: HOUSER, Acting P. J.; YORK, J.

131 Cal.App. 585

FREITAS et al. v. PASSERINO et al.

Civ. 8736.

District Court of Appeal, First District, Division 2, California.

May 3, 1933.

Automobiles ⇐245(79).

Contributory negligence of motorist turning toward center traffic lane to avoid collision with approaching motorist who had crossed center lane and was driving on his extreme left side of highway *held* for trial court.

Appeal from Superior Court, Santa Clara County; F. B. Brown, Judge.

Action by H. J. Freitas and another against Henry Passerino and another, in which defendants filed a cross-complaint. From a judgment for plaintiffs, defendants appeal. On motion to dismiss appeal or affirm judgment.

Judgment affirmed.

Russell P. Tyler, of San Francisco, for appellants.

L. H. Schellbach and Frank V. Campbell, both of San Jose, for respondents.

STURTEVANT, Justice.

This is a motion to dismiss an appeal or affirm the judgment. Rules for Supreme Court and District Courts of Appeal, rule V, subd. 3. The plaintiffs contend that the appeal was taken for delay only, and that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

For the injuries sustained in an automobile collision, the plaintiffs commenced an action against the defendants to recover damages. The defendants filed an answer and a cross-complaint. The plaintiffs answered the cross-complaint, and on the issues so framed the action was tried before the trial court sitting without a jury. The trial court made findings of fact in favor of the plaintiffs, and a judgment in their favor was entered. The defendants made a motion for a new trial. The motion was denied. Thereafter they filed an appeal from the judgment and from the order denying them a new trial. On December 20, 1932, the defendants filed their brief in which they contended that the plaintiffs were guilty of contributory negligence as a matter of law.

On Sunday evening, the 13th day of September, 1931, at about 9 p. m. the plaintiffs were driving from San Francisco toward San Jose. They were operating a Chevrolet car. Mrs. Freitas was driving, and Mr. Freitas sat at her right, holding their infant child. About the same time Mr. Passerino, his mother and father, and Mr. Piazza were driving on the highway north toward San Francisco. Mr. Passerino was operating a Dodge car, and he was doing the driving. His father was seated at his right, and the others occupied the rear seat. At a point near Sunnyvale, approximately 500 feet north of Matilda avenue, the highway runs generally north and south. It is divided into three lanes marked by strips painted on the surface of the highway. Immediately before the collision the plaintiffs were on the right-hand side of the highway in the westerly lane, and no other cars were ahead of them in that lane. In the easterly lane there was a string of cars, as one of the witnesses expressed it. The middle lane was unoccupied. Near the point of collision is a fruit stand. While approaching that stand, the plaintiffs observed the defendants' car, 800 feet south, leave the easterly lane, and, as both plaintiffs testified, it crossed over the center lane and nearly across the westerly lane until it was running with its right wheels in that lane and its left wheels on the shoulder on the westerly side, and was headed toward the plaintiffs. The plaintiffs continued to observe the car and continued to drive forward. When they were about 350 feet from the on-coming car, Mrs. Freitas slowed down from 40 miles per hour to about 20 miles per hour. The defendants' car was still in the westerly lane coming toward her. When the cars were about 50 feet apart, she attempted to turn toward the center lane. When about 25 feet from the on-coming car, she applied her brakes. At the time of the impact she testified that her car was going about 20 miles per hour. Mr. Passerino testified that, when he turned out of the easterly lane, he did so to pass the car immediately in front of him; that he had not succeeded in doing so, but that his car and the one he was attempting to pass were running abreast—his car in the center lane, the other car in the easterly lane, and, when 15 feet from the plaintiffs' car, that Mrs. Freitas swerved her car to her left and collided with his car. In view of the danger confronting her, if Mrs. Freitas drove as she and her

husband testified, her negligence, if any, was an issue of fact to be determined by the trier of the facts and not a question of law for the court. Jensen v. Fish, 54 Cal. App. 304, 201 P. 954; Swartz v. Acme Express & Drayage Co., 102 Cal. App. 615, 283 P. 358; 42 C. J. 1137. The appeal presents no substantial question needing further argument.

The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

GODFREY v. BROWN et al. *

Civ. 8493.

District Court of Appeal, First District, Division 1, California.

May 6, 1933.

Hearing Granted by Supreme Court July 5, 1933.

1. Automobiles ⇐244(20).

Evidence supported jury's finding that motorist attempting to cross intersection first and striking automobile approaching from right was negligent.

2. Appeal and error ⇐1067.

Modifying proposed instruction by deleting somewhat argumentative statements emphasizing that no insurance company was interested *held* harmless.

Though it might have been better for court to have more forcibly and fully expressed thought that jury should not consider question of insurance, it was not reversible error to strike out somewhat argumentative portions of proposed cautionary instruction directing jury that there should be no assumption that any insurance company was interested in case or in outcome thereof, and that jury should not speculate on or mention existence or non-existence of insurance.

3. Trial ⇐232(3).

Extent to which judge should caution jury to disregard indemnity insurance in negligence cases is within judge's sound discretion.

4. Automobiles ⇐246(9).

Where there was fourteen-foot jog at intersection, instruction *held* not misleading because not specifying precise intersection.

It appeared that H. street lay on one side and B. way on the other side of intersecting street, and could be classed as one street, though they entered intersecting street at points approximately 14 feet apart so that there would be actually two intersections if each street were prolonged. It was contended that instruction in question which referred to intersection of H. street and B. way with the intersecting street was misleading because it did not inform jury whether it meant intersection of H. street and the intersecting street, or intersection of B. way and the intersecting street. It appeared, however, that jury had map before it, and all of evidence was addressed to only one intersection.

5. Automobiles ⇐246(9).

Instruction that vehicle approaching intersection from right at lawful speed has right of way *held* proper under statute (St. 1923, p. 560, § 131(a), as amended).

6. Trial ⇐256(10).

Correct instruction that vehicle on right has right of way *held* not objectionable because omitting unrequested instruction giving precedence to driver on left if first entering intersection.

7. Automobiles ⇐246(60).

Instruction that, where accident would not ordinarily have occurred with proper care, overturning of automobile in driver's exclusive control evidences negligence under res ipsa loquitur doctrine, *held* not erroneous.

8. Automobiles ⇐146.

Standard of care required of motorists is prudence and circumspection always.

9. Appeal and error ⇐933(5).

Where affidavits showing misconduct were opposed by counter affidavits, and new trial was denied, appellate court must conclude that no misconduct occurred.

10. Trial ⇐232(3).

Where only reference to insurance was juror's question, which court left unanswered because improper, whether defendant carried liability insurance, instruction that automobile guest and drivers were only parties interested in action *held* sufficient.

Appeal from Superior Court, Santa Cruz County; H. C. Lucas, Judge.

Action by Ella Godfrey against C. W. Brown and others. Judgment for plaintiff, and defendant named appeals.

Affirmed.

Rittenhouse & Snyder, of Santa Cruz, and Charles V. Barfield and Eldon B. Spofford, both of San Francisco, for appellant.

Ford & Johnson, of San Francisco, and Wyckoff, Gardner & Parker, of Watsonville, for respondent.

PARKER, Justice pro tem.

The action arose out of an automobile collision. Plaintiff was a guest in the car of

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 29 P.2d 165.

defendant Brown, whose car collided at a street intersection with a car driven by defendant Cole. It was plaintiff's contention that the collision occurred or was occasioned by and through the negligence of both defendants. As is quite usual, each defendant denies negligence and fastens the blame on the other. The jury found for plaintiff against both defendants, and Brown appeals from the judgment entered pursuant to the verdict. Defendant Cole did not participate in the trial other than as a witness.

[1] The appeal is based upon three main grounds, namely, insufficiency of evidence, error in giving and refusing to give instructions to the jury, and misconduct of counsel. These will be taken up in the order stated. We will not attempt an analysis of the entire case. It is agreed that there was a collision and that it occurred in an intersection. The defendant Brown testified that as he approached the intersection he saw the car of defendant Cole. The cars of the respective defendants were then about equidistant from the entrance to the intersection area, but, testified Brown, the car of Cole was traveling at a speed twice as fast as that of Brown, and Cole was approaching from Brown's right. While we have referred to an area as an intersection, the fact is that such a designation may be somewhat lacking in describing the area here involved. The exact situation is that while one of the intersecting streets continues along in a straight line, the other street, according to the maps, "jogs" off about fourteen feet. As this feature of the case is relatively unimportant, we mention it merely in passing. The jury visited the scene of the accident and was familiar with all of the geographical details. The evidence disclosed that the collision was caused by the car of Brown striking that of Cole. Likewise was there evidence that the car of Cole could be seen at a distance of one hundred feet approaching the intersection from a point more than thirty feet from the Brown point of entry. Also, there is testimony that the Cole car entered the intersection before the Brown car. The foregoing recites but a few of the highlights of the case. It is apparent, therefore, that the jury had sufficient facts to support the verdict against the defendant Brown. It is impossible to diagram every detail of an accidental occurrence or to demonstrate in all cases the conclusions reached. Without more elaborate detail, we find two drivers in broad daylight each attempting to beat the other through a crossing, and each feeling that he had plenty of time. The result seems to have been a tie. This court is not prepared to say, as a matter of law, that driving straight ahead into a collision does not constitute negligence. We will not disturb the jury's finding inasmuch as we find that the evidence, taken as a whole and supported by such inferences as may be drawn therefrom, will support the verdict.

[2, 3] The criticized instructions may be considered at this point. It will appear hereinafter that the question of indemnity insurance cropped up in the trial and, as usual, is made a ground for reversal. The defendant Brown requested the court to give the jury a cautionary instruction in an effort to overcome the wrong, real or fancied, resulting from a mention of insurance. The court instructed the jury as follows: "I instruct you that this is a case between the plaintiff Ella Godfrey on one hand and C. W. Brown and Ray E. Cole on the other. These are the only parties to the action and the only persons interested in the outcome of the case." The instruction offered was identical with the instruction given except that there was much more to the offered charge. The instruction offered directed the jury that there should be no assumption that any insurance company was interested in the case, and that no insurance company was interested in the outcome. The requested instruction further stated that the jury should not speculate upon the existence or nonexistence of insurance, or even think about or mention the matter in jury-room discussions. We do not feel that the modification of the proposed instruction was prejudicial. The rejected portion was somewhat argumentative at best. Boiling it down, the purpose was to inform the jury that only the actual parties were to be considered, and this is what the court said in the instruction given. There was no actual suggestion of insurance in the case. One juror asked if defendant Brown was carrying liability insurance and was told by the court that that was not a proper question and there the matter dropped. There is never any necessity of doing a futile thing. If the twelve jurors believed that Brown had insurance, the court might charge them to disregard that fact until all of the cautionary words in the language had been exhausted, with no result. Just how far a trial judge must go in these matters is a question best left to his sound discretion. Oftentimes by dwelling on a subject more harm is done than if the incident is ignored. It might well be that the verdict here returned was as it was because the jury did believe that Brown had no insurance, in which case the question of indemnity left the rights of the parties undisturbed. We concede that it may have been better for the court to have more forcibly and fully driven in the thought that the jury must not consider the question of insurance, but we cannot hold the failure so to do to be error demanding a reversal. There is too much of the speculative in the argument.

[4-6] The next instruction complained of is as follows: "* * * 'Where two vehicles approach an intersection of public highways at approximately the same time, the vehicle approaching from the right shall have the right of way providing such vehicle is traveling at a lawful rate of speed.' In this case, if you find 1. That the automobile driven by defendant Brown and that driven by defendant Cole approached the intersection of Hubbard Street and Berkeley Way with Market Street, at approximately the same time; and 2. That Cole's car was traveling at a lawful rate of speed; Then, defendant Cole had the right of way over defendant Brown, approaching from the left, and in such circumstances, it was the duty of defendant Brown to yield the right of way to defendant Cole." Appellant objects to the foregoing instruction on two grounds. His first objection is based on the claim that the instruction is misleading because it does not inform the jury whether it means the intersection of Hubbard street and Market street or the intersection of Berkeley way and Market street. Hubbard street and Berkeley way might be classed as one street. They enter Market street, however, at points approximately fourteen feet apart, so that in reality there would be two intersections if each street were prolonged. Yet the jury had the map before it and all of the evidence was addressed to the one intersection, so that there was little likelihood of misunderstanding. Secondly, appellant contends that the instruction does not explain the law correctly, in that it omits the very important qualification that if the driver on the left enters the intersection first, driving at a lawful rate of speed, he has the right of way over the driver approaching from the right. There was a conflict as to which car entered the intersection first. There was testimony that each approached about the same time. Cole claimed he was in first, and Brown maintained that Cole got in after he did. Yet the testimony of Brown is that when he first saw Cole they were about equally distant from the intersection and Cole was traveling twice as fast. Simple calculation suggests the answer as to who reached the intersection first. The instruction given correctly stated the law as to automobiles approaching an intersection. California Vehicle Act, St. 1923, p. 560, § 131 (a), as amended, as it existed at the time of the accident. If appellant desired instructions on the relative rights of the parties within the intersection, he should have requested the same. That the court did not cover other elements in the relations of the parties at the time is not an objection to be made to this instruction. Ackerman v. Griggs, 109 Cal. App. 365, 293 P. 115.

The next instruction under attack needs little comment. Quoting from appellant's brief, he says: "Appellant's objection to this instruction did not go to the whole thereof, nor was it contended that the giving of the instruction in question, standing alone, constituted reversible error. * * * in the event of a new trial herein appellant desires to have the benefit of a ruling thereon." Thus presented and the objection being that the instruction was "apt to be misunderstood," we will refrain from further consideration of the point.

[7, 8] The final instruction presented for review is as follows: "Where one is riding in an automobile as an invited guest; and the driver of the car is in the exclusive control thereof; and if it is shown that the car, while being so driven, is overturned, the doctrine of res ipsa loquitur is applicable. That doctrine is stated as follows: Where the thing is shown to be under the management of the defendant, and the accident is such as in the ordinary course of things does not happen, if those who have the management use proper care, the fact of the accident affords reasonable evidence, in the absence of explanation by the defendant, that the accident came from want of care." At the outset we note that the instruction is limited to a given situation. We cannot construe it as broadly as does appellant. In effect the jury was told that if they found the driver in exclusive control and the car overturned, the stated doctrine was applicable. There is no dispute of the fact that the car in which plaintiff was a guest did overturn, nor is there dispute of the fact that appellant was in the exclusive control of said car. The facts of the case show that the collision occurred in a wide intersection and in open daylight. The standard of care required of drivers of motor vehicles, regardless of statutory enactment, is prudence and circumspection at all times. The plaintiff had no knowledge of any of the facts other than that she was riding in the back seat of the car operated by appellant Brown. The extent of her knowledge is that the car overturned and she sustained severe injuries. Regardless of the origin of the doctrine of res ipsa loquitur and regardless of the limits to which it was applied, we find that the rule has been broadened to meet many conditions not anticipated. We are not disposed to treat exhaustively on the history and evolution of legal principles. The rules of decision must change with varying conditions. All things temporal are relative, and as the corelated factors shift and change the prior rules expand to embrace the changed conditions.

The entire field of jurisprudence had become thick with what might be called phrase frames, upon each of which was fastened some crystallized gem of legal lore, usually in a dead language. These served as ready aids in the solution of the few situations presented in controversy. Human contacts

became extended and the machine age came upon us with overwhelming force, sweeping away much that might better have been preserved. Then came strange statutes, conceived in selfish interest and enacted in ignorance of the remedy needed. Through all this change the courts sought to maintain undisturbed the great principles thought to underlie the structure of our jurisprudence, and to apply these principles to the new problems, but to no avail. Truly has it been said that the old order changeth. While we look with reverent awe upon the wisdom of the ancient law givers, we still realize that their own concept of law itself, as a rule of human conduct, justifies an elasticity measured by the infinite variety of the human and his changing environment. And in this process of evolution we find the doctrine of res ipsa loquitur. Its present application is found, discussed and illustrated in many of the late cases. Ragin v. Zimmerman, 206 Cal. 723, 276 P. 107; Brown v. Shortlidge, 98 Cal. App. 352, 277 P. 134; Onell v. Chappell, 38 Cal. App. 375, 176 P. 370; Horney v. Dillingham, 81 Cal. App. 443, 253 P. 970; Seney v. Pickwick Stages, 82 Cal. App. 226, 255 P. 279; Burke v. Dillingham, 84 Cal. App. 736, 258 P. 627; Leitert v. Pickwick Stages, 68 Cal. App. 504, 229 P. 889; Berry on Automobiles (6th ed.) vol. 1, § 234; Crooks v. White, 107 Cal. App. 304, 290 P. 497, 499; Edwards v. Gullick, 213 Cal. 86, 1 P.(2d) 11; Slappey v. Schiller, 116 Cal. App. 274, 2 P.(2d) 577; St. Clair v. McAlister, 216 Cal. 95, 13 P.(2d) 924, 925. Many California authorities have been collected in an exhaustive note found in 25 A. L. R. 693.

In Crooks v. White, supra, we find the following: "The doctrine of res ipsa loquitur is applicable to carriers by automobile without reward, as well as to carriers * * * for hire. * * *" In Brown v. Davis, 84 Cal. App. 180, 257 P. 877, many of the authorities are reviewed and there again it is held that the doctrine has equal application whether the case be one involving a carrier for hire or a carrier without hire. A mere reference to Brown v. Davis will suffice without extended quotation therefrom. An excellent discussion of the doctrine and its application is to be found in the case of St. Clair v. McAlister, supra. There the plaintiff was a passenger in a public bus. The statement of the case as found in the opinion discloses not a shred of evidence showing negligence on the part of the bus driver. He had entered an intersection at a rate of speed estimated from seven to twelve miles per hour. In the intersection the bus collided with the ever-present Ford. The evidence, beyond question, proved negligence on the part of the driver of the Ford. However, the verdict was against both the owners of the bus and the owner or driver of the Ford. The trial court applied as against the bus owner the doctrine of res ipsa loquitur. In this it was upheld and the Supreme Court details the reasons for its approvals.

Another point decided in the last-cited case is that where there are two defendants charged with negligence, the plaintiff may invoke the doctrine of res ipsa loquitur as against one and proceed specifically to prove the negligence of the other without losing the benefit of the doctrine as against the defendant to whom the doctrine might be applicable. On this point the court says: "The plaintiff was confronted with a situation where, in charging concurrent negligence, she was entitled to the application of the doctrine upon proof of her status as a passenger on the bus while the same was being operated by the bus company and the resultant injury from such operation. But as to McAlister [operator of the Ford], she was bound to prove his negligence by a preponderance of the evidence without the aid of the presumption. This she could not do except by proving the particular acts which constituted such negligence. By producing such proof it should not be held that she waived or forfeited her right to invoke the doctrine as to the defendant's carrying her as a passenger."

Concluding this branch of the case we may again turn to the instruction which has provoked the discussion. In effect the court told the jury as follows: Where the car in which plaintiff was riding was under the management of the defendant and the accident would not have happened but for the lack of care, then the fact that an accident did happen may be considered as reasonable evidence that there was a lack of care. Whatever name the court may have found for this principle, it seems merely a statement of the obvious and incapable of working prejudice to any substantial right of either party. We may add something on the effect or the limitation of the doctrine of res ipsa loquitur. In St. Clair v. McAlister, supra, the court quotes approvingly from Scarborough v. Urgo, 191 Cal. 341, 216 P. 584, as follows: "'Such a presumption [being the presumption arising under the doctrine of res ipsa loquitur] is evidence in the case, but it has no greater or different effect than the testimony of witnesses, and in no degree changes the rule as to the burden of proof, viz. the burden of producing a preponderance of evidence.'" With this in mind, and already having held the evidence sufficient to support the verdict, we may well apply the rule of reversals only in event of error causing miscarriage of justice. If a witness had testified that the accident could not have happened unless the defendant were negligent and the court had, upon motion made therefor, refused to strike such testimony, it would not be imperative upon a reviewing court to reverse the judgment regardless of the ev-

idence. From whatever angle we view this criticized instruction, we conclude that the judgment of the court below may not be disturbed on account thereof.

[9, 10] Lastly, we meet the question of prejudicial misconduct. At a point in the trial, practically at the end thereof, the following is disclosed by the transcript:

"The Court: I neglected one thing, gentlemen. During the last recess one of the jurors spoke to me and indicated that a juror would like to ask a question. I replied that if any questions were to be asked they could be asked later when all the jurors and counsel were present and if it was a proper question it would be answered; if not an explanation would be given. Mrs. Radford.

"Juror Radford: I want to know if Mr. Brown was carrying liability insurance?

"The Court: That is not a proper question.

"Juror Radford: That is what I wanted to know.

"Mr. Snyder [counsel for appellant Brown]: I would like to be able to answer that but do not insist on it.

"Mr. Gardner [counsel for plaintiff]: I have no objection."

On a motion for a new trial appellant urged the ground of prejudicial misconduct and supported the motion with a number of affidavits, the purport of which was that at this point the counsel for plaintiff laughed and giggled and went through various and obvious phases of merriment; that the conduct of counsel and others left the jury impressed with the idea that Brown did carry insurance and that his counsel did not dare tell the truth about it. Counter affidavits were filed denying specifically such conduct, and the trial court held with plaintiff. We must conclude, in the absence of any evidence here, that the complaint of appellant as to the conduct of counsel is not supported by the facts. There is nothing at all in the record before us other than as quoted. Nothing developed to indicate whether or not any party was insured. All that the juror wanted to learn was whether it was proper for the jury to know anything on that subject, and she was promptly advised thereon. Nothing indicates that the juror believed Brown had insurance, although the facts of the case might well indicate this situation. Here was a plaintiff suing her brother at whose home she was living, and with whom she had always and still maintained the normal relations existing between brother and sister. It might have been advantageous to defendant had he told the jury frankly what conditions were. We are not inclined to review the cases on the subject of accident insurance being interjected into an issue of this sort. Reference may be had to Noble v. Bacon (Cal. App.) 18 P.(2d) 699, and the cases there cited. The question was fully presented to the court below on motion for a new trial and it was there found that no prejudice resulted. We do not feel that the record is such as to call for any further instructions on the subject than were given, as noted heretofore.

Judgment affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

131 Cal.App. 698

QUEVEDO v. SUPERIOR COURT IN AND FOR SAN BERNARDINO COUNTY et al.

Civ. 1250.

District Court of Appeal, Fourth District, California.

May 10, 1933.

1. New trial ⇐110.

Trial court may grant new trial only when proceedings therefor have been initiated by party under statute; granting new trial on court's own motion being unauthorized (Code Civ. Proc. § 657).

2. New trial ⇐9.

Where plaintiff sought new trial on issue of damages only, trial court *held* unauthorized to grant new trial on all issues (Code Civ. Proc. § 657).

3. New trial ⇐9.

Where statutory foundation has been laid and new trial requested on all issues, court may order new trial generally or on certain issues only (Code Civ. Proc. § 657).

4. Certiorari ⇐28(2).

Where order granting new trial was without jurisdiction and void, order could be annulled on certiorari.

Petition by Domingo Quevedo, a minor by Frances Quevedo, his guardian ad litem, for a writ of review to the Superior Court of the State of California, in and for San Bernardino County, and F. A. Leonard, Judge thereof, to annul that part of an order which granted a new trial on all of the issues instead of on the issue of damages only in a personal injury action brought by petitioner. The writ was issued by the Supreme Court, and made returnable before the District Court of Appeal. Motion to dismiss the proceeding.

Motion to dismiss denied, and that part of the order granting a new trial on all of the issues annulled.

Swing & Swing, of San Bernardino, for petitioner.

W. E. Byrne, of San Bernardino, for respondents.

BARNARD, Presiding Justice.

Upon the application of petitioner, a writ of review was issued by the Supreme Court and made returnable before this court. It appears that the petitioner brought an action in the respondent court seeking to recover some $30,000 as damages for personal injuries alleged to have been caused by the negligence of the defendants in the action. The answer of the defendants denied negligence on their part and alleged contributory negligence on the part of the plaintiff. A jury returned a verdict in favor of the petitioner in the sum of $4,000 and judgment was entered accordingly. In due course the petitioner filed notice of intention to move "for a new trial of said action on part of the issues only, to-wit: on the issue of damages, upon the following grounds and for the following cause materially affecting the substantial rights of said plaintiff, to-wit: Insufficiency of the evidence to justify the verdict." It fully appears that no other notice of intention to move for a new trial was given by any of the parties to said action and that no other motion for a new trial was made or attempted to be made. After hearing petitioner's motion, as thus limited by the notice of intention, the court denied the same but granted a new trial upon all of the issues, the order made being as follows:

"The plaintiff's motion for a new trial upon the sole issue of damages is hereby denied, but a new trial is hereby granted as to all of the issues raised by the pleadings upon the ground of the insufficiency of the evidence to sustain the verdict."

This proceeding seeks to annul that portion of this order granting a new trial as to all of the issues, as being void and one which the court had no jurisdiction to make.

The respondents earnestly contend that the court had power to make the order complained of, upon its own motion, and cites many cases from other jurisdictions. It was pointed out in Diamond v. Superior Court, 189 Cal. 732, 210 P. 36, that such authorities as these are of little value here, because of the difference in statutory regulations and rules of practice. The court there stated that the rule in this state is that the right to move for a new trial is statutory and must be pursued in the method provided in the statute, and it was held that the trial court had no inherent right to go outside of the statutory authority and grant a new trial for the reason that a transcript was not available, due to the death of the reporter. In Prothero v. Superior Court, 196 Cal. 439, 238 P. 357, it was held that the trial court was without power to grant a new trial where the notice of intention to move for the same was filed too late. In Peters v. Anderson, 113 Cal. App. 158, 297 P. 76, it was held that the trial court was without power to grant a new trial in the absence of the statutory notice of intention to move for the same, although the parties had stipulated that such a motion might be made. That a notice of intention to move for a new trial is necessary to confer jurisdiction on the trial court to consider the same, was held in Ransome-Crummey Co. v. Superior Court, 188 Cal. 393, 205 P. 446.

[1] From these and other authorities which might be mentioned, it seems to be clearly established that since the repeal in 1915 (St. 1915, p. 202) of the former section 662 of the Code of Civil Procedure, a trial court has not the power to grant a new trial of its own motion but may do so only when proceedings therefor have been initiated through the request of one of the parties, in accordance with the statutory provisions.

[2] This brings us to the question whether, under the 1929 amendment (St. 1929, p. 841) to section 657 of the Code of Civil Procedure, the application of one of the parties for a new trial on a part of the issues only, confers authority upon the court not only to pass upon the matter thus presented but to go on and grant a new trial upon all of the issues, in the absence of any request therefor from any of the parties. Otherwise stated, the problem is whether the trial court, having no power to grant a new trial upon all of the issues in the absence of a request by one of the parties presented in the statutory manner, acquires authority to make such a general order, through the request of one of the parties, as now permitted by the statute, for a new trial upon part of the issues alone.

[3] Prior to the amendment of section 657 in 1929, while a new trial could be granted only after a notice of intention was filed, it was well settled that, where the statutory foundation had been laid and a new trial asked for, the court had power to order a new trial generally or only in part and with respect to limited issues. In refusing a hearing in the case of Donnatin v. Union Hardware & Metal Co., 38 Cal. App. 12, 175 P. 26, 177 P. 845, the Supreme Court, although asserting the right of a court in its discretion to order a new trial upon limited issues where a new trial generally had been requested, expressed doubt as to whether a party could, by moving for a new trial on one issue alone, prevent the granting of a new trial in general. At that time section 657 did not specifically give to a party the right to ask for a new trial on one issue alone. In 1929 the

pertinent portion of this section was amended to read as follows:

"The verdict may be vacated and any other decision may be modified or vacated, in whole or in part, and a new or further trial granted on all or part of the issues, on the application of the party aggrieved. * * *"

Theretofore the "application of the party aggrieved" had been held essential to give the court jurisdiction to make an order for a new trial. The amendment made no change in this situation, the only change being to provide that a verdict may be vacated in whole or in part and that a new or further trial may be granted on all or part of the issues. The amendment was not necessary to enable a court to grant a new trial upon one issue when a new trial in general had been applied for, as such procedure had long been upheld. It would seem that the only reasonable purpose of the amendment was to meet the suggestion made by the Supreme Court in refusing a hearing in Donnatin v. Union Hardware & Metal Company, and to permit a party to avail himself of the right to apply for a new trial upon part of the issues alone without reopening the whole case. And as the power of the court to act had previously been dependent upon the making of an application by the party aggrieved, the statutory right to make a restricted application clearly implies, in carrying out the purpose of the amendment, a corresponding limitation upon the order that might be made in connection therewith and based thereon.

There is a wide difference between a court giving a party something less than asked for, but included therein, and giving him something entirely apart from the thing asked for. The phrase "on the application of the party aggrieved" applies to the new provisions of the amended section as well as to the old. As amended, the section gives a party the right to apply for a new trial upon part of the issues instead of applying for a new trial in general, as before. It is the obvious purpose of the amendment to permit this very thing and the benefit of the amendment would be largely lost if, by so applying, a party opened the door to the same jurisdiction that would have been formerly conferred by a general application for a new trial on all of the issues. In our opinion, the statute as amended means that a party may make application for a new trial upon all of the issues or upon one or more issues alone and that the court may pass upon the application and grant a new trial, either as a whole or in part, in accordance with the foundation laid by the application. No injustice can result to the opposing party, since he has the opportunity to himself ask for a new trial upon all of the issues. And if the court feels that the issues are so intermingled and blended that the trial of one or more of them separately might work an injustice, the partial new trial asked for may be denied and the case left in a position sufficiently satisfactory to the other party that he has not sought a new trial.

We conclude that under the circumstances here appearing the court was without authority to do more than to act upon the motion as made, and to grant or refuse a new trial upon the one issue referred to.

[4] The respondent filed a motion to dismiss this proceeding upon the ground that the order complained of was appealable and that certiorari will not lie. The court made an order upon the matter before it and thereafter made a further order, the latter being the only one that is here attacked. If our views upon the main questions presented are correct, the court had jurisdiction only to make its ruling upon the petitioner's motion for a new trial on one issue alone. Having done this, its further order was not only void (Bloomquist v. Haley, 204 Cal. 258, 268 P. 364), but, having been entered after it disposed of the matter before it, and being an order not provided for in our procedure, it may be annulled on certiorari (Stanton v. Superior Court, 202 Cal. 478, 261 P. 1001). It may be added that it appears upon the face of the proceeding that the order complained of was made after the court had passed upon the real question before it and in the absence of the jurisdictional steps required by the statutes. Diamond v. Superior Court, supra.

The respondents' motion to dismiss this proceeding is denied and that portion of the trial court's order granting a new trial on all of the issues is annulled.

We concur: MARKS, J.; JENNINGS, J.

131 Cal.App. 647

GUTTERMAN v. GALLY et al.

Civ. 8521.

District Court of Appeal, First District, Division 2, California.

May 9, 1933.

Hearing Denied by Supreme Court July 7, 1933.

1. Appeal and error ⇨901.

Plaintiff, declining to amend after general and special demurrers were sustained, must stand upon his pleading and show complaint was not subject to any of objections specified in demurrers.

2. Fraud ⇨47.

In action for damages for fraud, allegations of complaint must show plaintiff has thereby suffered damage.

3. Conspiracy ⇨18.

In action for conspiracy to defraud in maintaining artificial market for stock, plain-

tiff could not recover on complaint not alleging actual value of stock purchased by him, since no damage was shown.

4. Conspiracy ⇐18.

In action for conspiracy to defraud resulting in plaintiff's purchase of stock in 1928, allegation of value of stock at time of filing second amended complaint in 1931, or even at time of filing action, was insufficient to show value showing damage.

5. Pleading ⇐249(2).

Plaintiff, after unsuccessful effort to state cause of action for damages for fraud, could not by way of amendment add alleged cause of action for money had and received.

6. Election of remedies ⇐14.

Purchaser's election to affirm purchase of stock and sue for damages for fraud constituted waiver of right to subsequently disaffirm and sue for money paid.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Herman Gutterman against John Victor Gally and others. From a judgment of dismissal, plaintiff appeals.

Affirmed.

Arnold C. Lackenbach, of San Francisco (Lauder W. Hodges, of San Francisco, of counsel), for appellant.

Edgar C. Levey and Marvin E. Lewis, both of San Francisco, for respondents John Victor Gally and Western Finance Pub. Co.

Nat Schmulowitz, George B. Harris, Gavin McNab, and Schmulowitz, Wyman, Aikins & Brune, all of San Francisco, for respondents David A. Coplin, Benjamin F. Serlis, and Bendac Corporation.

SPENCE, Justice.

Plaintiff sought to recover damages alleged to have been sustained as the result of a conspiracy to defraud on the part of defendants. Defendants' demurrers to plaintiff's second amended complaint were sustained and a motion to strike was granted. Plaintiff was granted leave to amend, but declined to do so and judgment of dismissal was entered. From this judgment plaintiff appeals.

The second amended complaint covers twenty-five pages of the transcript and a similar amount of space is covered by the demurrers and motion to strike. We do not believe it necessary, however, to set forth in detail all of the contents of these pleadings. The complaint relates the alleged circumstances surrounding plaintiff's speculations in mining stock during the speculative era of 1928. Among the defendants were certain brokers, the owner of a certain financial weekly and the owner of a certain financial service which issued trading recommendations and special bulletins. Plaintiff was a subscriber to said financial weekly and said financial service. Plaintiff alleged that certain of the defendants acquired an option on 200,000 shares of the class A preferred stock of Central Eureka Mining Company at $1.25 per share and conspired to sell said stock by maintaining an artificial market therefor and to divide the proceeds; that they listed said stock on the San Francisco Mining Exchange in order to induce plaintiff and others to believe that the current price on said exchange "had a reasonable and customary relation to the intrinsic value of such preferred stock" and for a period of time defendants created and maintained an "artificial market * * * thereby preventing the current market price of said preferred stock from bearing any relation whatever to the intrinsic value of said preferred stock"; that the opening sales were at a price of $2.50 per share and thereafter defendants caused the current market price to increase from time to time until it reached $6.37½ on September 21, 1928; that thereafter defendants withdrew from the market and permitted said stock to drop to $2 per share; that thereafter said stock continued to further decline and "is now worthless"; that defendants concealed from plaintiff the fact "that such price did not bear any relation whatever to the actual value of said preferred stock"; that defendants caused articles to be published in said financial weekly concerning the mining company which articles recommended the purchase of said stock at the current market price and "represented that said price was fair and reasonable and had a reasonable and customary relation to the intrinsic value of said preferred stock"; that defendants intended thereby to deceive plaintiff into believing that their advice was disinterested and that the current market price was "a fair price determined by the factors ordinarily affecting the market"; that defendants knew that said representations were false and fraudulent; that defendants concealed from plaintiff the fact that said current market price was "fraudulently fixed" and that all of said stock "except that currently sold" was owned by or under option to defendants; that defendants caused trading recommendations and special bulletins to be issued by said financial service recommending that said stock be purchased and held, representing therein "that said market price was a fair price and represented the intrinsic value of said preferred stock" and further represented that said current market price was "low" and was "a bargain."

Plaintiff further alleged that he had "no knowledge whatever * * * on which to

determine whether or not the price of its preferred stock recommended by defendants represented the fair value thereof"; that he believed the representations of defendants and, relying thereon, he made the following purchases of said stock at the "current market prices prevailing": August 14, 1928, 500 shares at $3.70 per share; August 21, 1928, 2,000 shares at $3.95 per share; and September 5, 1928, 1,000 shares at $4.60 per share. It also appears from the allegations of the complaint that plaintiff thereafter made the following sales of said stock at the "current market price": September 19, 1928, 500 shares at $5.30 per share, and "several days thereafter," 100 shares at $5.92 per share. The prayer of the complaint was for the entire purchase price of all of the shares less the amount received by plaintiff through the profitable sales of some of the stock which he had purchased.

[1] The demurrers were both general and special and the complaint was attacked for uncertainty in numerous particulars. As plaintiff declined to amend after said demurrers were sustained, it is well settled that he must stand upon his pleading and must show that the complaint was not subject to any of the objections specified in the demurrers. Aalwyn v. Cobe, 168 Cal. 165, 142 P. 79; Robinson v. Godfrey, 78 Cal. App. 284, 248 P. 268. We shall not therefore discuss the many grounds of alleged uncertainty of the complaint, but will confine the discussion to one deficiency in the pleading which in our opinion made the alleged first cause of action stated in the complaint subject to defendants' attack both by general demurrer and by special demurrer.

[2, 3] We may assume without deciding that the alleged misrepresentations set forth in the complaint might be sufficient under certain circumstances to be the basis of an action for damages for fraud, but other allegations would be required in order to show that plaintiff in fact had a cause of action. "It is fundamental, of course, that no matter what the nature of the fraud or deceit, unless detriment has been occasioned thereby, plaintiff has no cause of action." Barron Estate Co. v. Woodruff Co., 163 Cal. 561, 571, 126 P. 351, 355, 42 L. R. A. (N. S.) 125. In other words, in an action for damages based upon fraud, the allegations of the complaint must show that plaintiff has thereby suffered damage and no basis for damage could be shown in the present case in the absence of an allegation showing the actual value of the stock purchased. 12 Cal. Jur. 814, 815. We search in vain for an allegation in the complaint showing the actual value of said stock. It is quite obvious that the figures in the complaint represented the "current market price" on the stock exchange as plaintiff himself alleges that these figures bore no relation to the "intrinsic value" of the stock. In fact, he alleges that defendants prevented said "current market price of said preferred stock from bearing any relation whatever to the intrinsic value of said preferred stock." The complaint is filled with such terms as "actual value," "intrinsic value," "fair price," and the like in the allegations with reference to the alleged misrepresentations, but no attempt is made to allege what was the "value," "actual value," "market value," "intrinsic value," or "fair value" of said stock at any time. Experience has shown that the "current market price" of securities on the stock exchange is not always the same as "actual value" or the "market value" thereof, and it has been held that while the "current market price" may be some evidence of the "actual value" or "market value," it is only evidence thereof. In re Estate of Spitly, 124 Cal. App. 642, 13 P.(2d) 385. It is clear from plaintiff's allegations that the "current market price" fluctuated, but it further appears that plaintiff sold some stock at a profit. Had he held the stock sold and disposed of the same a little later at the alleged subsequent "current market price" of $6.37½ per share, his profits on said sales would have been even greater. It also appears that he might have sold all of his stock at a substantial profit, but we are not called upon to engage in speculation as to what plaintiff might have done. He failed to allege the "actual value" or "market value" of said stock at any time and if that value exceeded the "current market price" which plaintiff paid for said stock then he suffered no damage. In the absence of allegations with respect thereto, plaintiff has failed to show that the alleged misrepresentations as to value were false or that any alleged misrepresentation or concealment of any kind resulted in damage. We are therefore of the opinion that the first count of said complaint was fatally defective and that it was subject to the attack made upon it both by the general and special demurrers. Plaintiff takes the position that his cause of action did not require allegations of the "actual value" of the stock and that "the only values in question are the prices listed on the exchange." With this position we cannot agree.

[4] Before passing from the consideration of this point, a word should be said regarding the allegation that said stock "is now worthless." This allegation might be construed to mean that the stock had no value of any kind at the time to which the allegation refers. It is found in the second amended complaint filed in 1931 while the transaction occurred in 1928. We believe, however, that an allegation of value relating to the time of the filing of the second amended complaint or even to the time of the filing of the action is insufficient. See Garstang v.

Skinner, 165 Cal. 721, 134 P. 329; Nunemacher v. Western Motor, etc., Company, 82 Cal. App. 233, 255 P. 266; Neher v. Hansen, 12 Cal. App. 370, 107 P. 565; Wegerer v. Jordan, 10 Cal. App. 362, 101 P. 1066.

[5, 6] We now turn to a consideration of plaintiff's alleged second cause of action. After demurrers had twice been sustained to complaints which had contained but one cause of action for damages for fraud, plaintiff filed his second amended complaint again setting forth his alleged cause of action for such damages and adding an alleged second cause of action. Plaintiff incorporated by reference therein the first six paragraphs of the first alleged cause of action and then added the usual allegations of an action for money had and received. In addition to the demurrers interposed thereto, defendants made a motion to strike the alleged second cause of action, which motion was granted. Plaintiff contends that the trial court erred in granting said motion and states that "the second cause of action is a count in assumpsit based upon the same transaction." We may first note that nowhere in the first cause of action does it appear that plaintiff had purchased any stock from defendants or that any of the defendants had received any of the money paid by plaintiff for said stock; but even if it had so appeared from the averments in the first alleged cause of action we are still of the opinion that the trial court properly granted the motion to strike out said alleged second cause of action.

The remedies available to one claiming to have been defrauded in a transaction with another have been frequently discussed. Bancroft v. Woodward, 183 Cal. 99, 190 P. 445; Conlin v. Studebaker Bros., 175 Cal. 395, 165 P. 1009; Hallidie v. Enginger, 175 Cal. 505, 166 P. 1; Paolini v. Sulprizio, 201 Cal. 683, 258 P. 380; Stone v. Superior Court, 214 Cal. 272, 4 P.(2d) 777, 79 A. L. R. 743; Firpo v. Pacific Mutual Life Insurance Co., 80 Cal. App. 122, 251 P. 657; Fitzhugh v. University Realty Co., 46 Cal. App. 198, 188 P. 1023; Hammond v. Ocean Shore Development Co., 22 Cal. App. 167, 133 P. 978; 12 Cal. Jur. 787. However, our attention has not been called to a single case in which a plaintiff, after an unsuccessful effort to state a cause of action *for damages for fraud*, has subsequently been permitted to add by way of amendment an alleged cause of action for money had and received. These remedies are inconsistent. When plaintiff brings the first type of action he elects to affirm, retain the proceeds of the transaction and sue for damages. On the other hand, the second type of action is based upon disaffirmance and the plaintiff in such action asks for the return of the money paid. The rule is stated in 12 California Jurisprudence, 787, as follows: "While one who has been defrauded may elect to rescind the contract or to affirm it and claim damages, he cannot do both at the same time. Consequently, if he affirms and brings an action for damages, he thereby loses his right to disaffirm." Even where it is recognized that there are exceptions to the above rule it has been stated that "* * * a party induced to enter into a transaction by fraud affirms the transaction when he brings an action for damages, and because of the affirmance loses any right to disaffirm subsequently. * * *" Bancroft v. Woodward, 183 Cal. 99, at page 101, 190 P. 445, 446. We are therefore of the opinion that plaintiff's election to affirm and sue for alleged damages constituted a waiver of any right to subsequently disaffirm and sue for the money paid.

From what has been said it follows that the motion to strike the alleged second cause of action was properly granted, that the demurrers to the alleged first cause of action were properly sustained, and that there was no error in entering a judgment of dismissal after plaintiff declined to amend.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

131 Cal.App. 594

BUSCH v. OSWALD et al.

Civ. 7589.

District Court of Appeal, Second District, Division 1, California.

May 4, 1933.

Rehearing Denied June 1, 1933.

Hearing Denied by Supreme Court June 30, 1933.

1. Automobiles ⇐305(1).

Plaintiff's testimony showing pedestrian's movements at intersection at which automobile collision occurred *held* admissible as disclosing circumstances existing at time.

2. Trial ⇐296(4, 5).

In action for injuries sustained in automobile collision at street intersection, plaintiff's instructions on contributory negligence *held* not erroneous, in view of other instructions.

Appeal from Superior Court, Los Angeles County; Joseph P. Sproul, Judge.

Action by Earl W. Busch against George H. Oswald and others. From a judgment in favor of the plaintiff, the defendants appeal

Judgment affirmed.

W. I. Gilbert, of Los Angeles, for appellants.

Paul Blackwood, of Los Angeles, for respondent.

DESMOND, Justice pro tem.

Plaintiff, here the respondent, recovered judgment in a substantial amount for serious injuries which he received when his automobile, a Chevrolet coupé, collided with a dump truck belonging to defendants, at the intersection of Florence avenue and Compton road, a point located in county territory a short distance outside the city limits of Los Angeles. From this judgment defendants appeal.

Defendants, employed by the county of Los Angeles as paving contractors, were engaged in the late afternoon of November 21, 1928, in placing an asphalt surface on the southerly portion of Florence avenue just east of Compton road. The space to be covered approximated 60 feet along Florence avenue by 20 feet in the roadway next the southerly curb. "Stop" and "Go" signals were working at this time at all four corners of the intersection. Plaintiff, employed as a fireman by the county of Los Angeles, drove north on Compton road and according to his testimony came to a full stop at Florence avenue. He further testified that, while standing in that position, he saw a truck proceed to the west along Florence avenue, also saw two women start to walk in a westerly direction across Compton road on the southerly side of Florence avenue, saw them step back to the sidewalk on the easterly side of Compton road, then saw them step into Compton road again and proceed to the west in front of his stationary automobile; that the signal toward which he was facing then turned to "Go" and immediately thereafter he drove north into the intersection, planning to turn east on Florence avenue toward his engine-house, and raised his left hand outside his car window, as a signal for the right-hand turn; that, before the turn was executed, defendants' truck, loaded with ten tons of hot asphalt, backed against his automobile, pinning his upraised hand and arm between the two vehicles.

A witness for defendants, one of their truck drivers who claimed to have been detailed to the specific duty of flagging traffic, standing for that purpose in Compton road just south of Florence avenue, testified that "the truck did not back into the automobile; the automobile ran into the truck. * * * They met about the same time. * * * I mean the automobile ran into the rear right-hand corner of the truck; right in the tail gate hook. * * * He ran into the truck with his front door; not the front part of the automobile, not that I know of."

[1] Both parties produced several witnesses who were or claimed to have been at the scene of the accident when or very shortly after it occurred while plaintiff was still there prior to being driven to a hospital. After hearing the recitals of these witnesses, conflicting on various points, the jury entered a verdict in favor of the plaintiff. There is no question that respondent was injured at this street intersection, but appellants question the validity of the jury's decision, which holds them solely responsible for that injury. It is contended that the trial court erroneously instructed the jury on the subject of contributory negligence; also that the testimony of plaintiff relating to the movements of the two women on the southerly side of Florence avenue and in Compton road was improperly permitted to go to the jury over the objection of the defendants. We see no merit in this latter contention, believing the jury was entitled to know whether or not plaintiff at this time had his wits about him and was making proper observations of traffic moving in the neighborhood. Counsel for plaintiff made it clear that he was not endeavoring by his inquiry to prove due care on the part of the plaintiff by showing the exercise of ordinary care or a lack thereof on the part of the pedestrians; in fact, he said: "I am trying to show just what happened in front of his car and the traffic going east and west on Florence avenue." We agree with the trial court that this constituted a proper investigation of surrounding circumstances, a duty enjoined upon the plaintiff by defendants' own instructions Nos. 3, 5, 7, 8, and 9, hereinafter set out in whole or in part. Furthermore, it does not appear that appellants requested an instruction from the court advising the jury that the evidence in question was admitted for the single purpose indicated, procedure which was open to them (10 Cal. Jur. 816); perhaps we may fairly conclude that such instruction was not considered necessary in view of the statements made by counsel for respondent as to the limited purpose for which the testimony was offered and the comments of the court establishing that limitation.

[2] We come now to the contention of appellant that the court erroneously instructed the jury on contributory negligence. This contention centers about plaintiff's instruction No. 16, reading thus:

"The defendants plead as a further and separate defense to the plaintiff's cause of action as follows: 'Further answering, said defendants allege that the plaintiff himself was guilty of negligence directly and proximately contributing to the happening of the accident, in that he did not exercise ordinary care or any care for his own safety, but so carelessly, negligently and recklessly conducted himself and operated his said automobile at and about the time and place of the accident as to directly and proximately contribute to the happening thereof.'

"I instruct you that this plea of contributory negligence interposed by the said defendants in their answer is what is termed in law

as an affirmative defense, and the burden is on the defendants to establish by a preponderance of the evidence that the plaintiff was *guilty of contributory negligence which proximately caused the injuries;* and if, upon the whole case, the evidence on that issue is, in your judgment, evenly balanced, or if it preponderates against such contributory negligence, then it is not proven, and you should find that the plaintiff was not guilty of contributory negligence as charged in said defense." (Italics ours.)

Particular exception is taken to the language "guilty of contributory negligence which proximately caused the injuries"; appellants urging that the words "proximately caused the injuries" constitute an erroneous definition of the degree of negligence that they would be required to fasten on respondent in order to sustain the burden of proof mentioned in the instruction.

Plaintiff's instruction No. 6 reads as follows: " 'Proximate cause,' as used in these instructions, must be understood to be that cause which, in a natural and continuous sequence, unbroken by any new cause, produces the injuries complained of, and without which such injuries would not have occurred."

Instruction No. 9 reads thus: "Negligence, however, upon the part of either party is of no consequence in the case unless you also find that such negligence was the proximate cause of the injury. By proximate cause is meant the efficient cause; the one that necessarily starts the other causes in operation. It is that which is the actual cause of the injury, whether operating directly or by putting intervening agencies, the operation of which cannot be reasonably avoided, in motion, by which the loss is produced—it is the cause to which the loss should be attributed."

In plaintiff's instruction No. 12 the court instructed the jury upon the duty of the driver of a vehicle "meaning an automobile truck" to maintain a vigilant lookout for other vehicles on the highway and in instruction No. 13 upon the requirement that the truck driver must keep his machine under such control as would enable him to avoid a collision with another person, using proper care and caution, even to the point of stopping if necessary.

Instruction No. 12 concluded as follows: "* * * If you find in this case that the driver of defendants' auto truck did not use due care and vigilance in keeping such a lookout for the automobile which plaintiff was driving and which was upon the highway, *and that such failure, if any, was the sole, proximate cause of any injury to plaintiff,* then you will find damages against the defendants, and in favor of the plaintiff."

The closing language in instruction No. 13 reads: "* * * A failure, if any, on his part, to use this care was negligence, *and if this negligence, if any, was the sole, proximate cause of the injury to the plaintiff,* then you will find damages in favor of plaintiff, and against the defendants."

Appellants claim in effect that the jury, having in mind the language of instructions 6 and 9, relating to proximate cause, might have so construed the phrase to which exception is taken in instruction No. 16, viz. "contributory negligence which proximately caused the injuries," that the defendants in order to clear themselves of liability would be required to prove that the plaintiff's negligence was solely responsible for his own injuries. In considering that claim, we refer to the words we have italicized in instructions 12 and 13 above and to pertinent language relating to contributory negligence appearing in various instructions requested by defendants and given by the court as follows:

Instruction No. 3. "* * * No person has the right to voluntarily enter into a position of danger if they know and appreciate the dangerous condition; and the plaintiff Busch had no right to enter into a dangerous situation, if he knew or in the exercise of ordinary care should have known of the dangers, if any; and if he failed to thus exercise ordinary care for his own safety, he was guilty of negligence, *and if such negligence directly or proximately contributed to the happening of the accident, in any degree, however slight, your verdict will be for the defendants, notwithstanding you may believe that the defendants were guilty of negligence at the time and place of the accident.*"

Instruction No. 5. "You are instructed that in order to determine whether or not the plaintiff was guilty of contributory negligence, you may take into consideration the fact that said corner was undergoing repairs; if you should find that it was; the fact that the truck of defendants was plainly visible, if you should find it was plainly visible; the fact that the entire intersection was visible to plaintiff, if you should find it was so visible, together with all of the other facts and circumstances in connection with the case; *and if you should find that the plaintiff was guilty of negligence which directly or proximately contributed to the happening of the accident, in any degree, however slight, your verdict will be for the defendants, notwithstanding you may believe that the defendants were guilty of negligence at the time and place of the accident.*"

Instruction No. 7. "You are instructed that if the stop signal was up, indicating that traffic was stopped in the direction in which the plaintiff was proceeding, and the plaintiff drove past said stop signal and into the intersection, he was guilty of negligence as a matter of law, *and if such negligence directly or proximately contributed to the happening*

of the accident, in any degree, however slight, your verdict will be for the defendants, notwithstanding you may believe that the defendants were guilty of negligence at the time and place of the accident."

Instruction No. 8. "* * * If you shall find that the stop signal was up at the intersection in question, then you are instructed that the plaintiff had no right to enter the intersection until the signal had dropped to 'go', *and if he did this he was guilty of negligence as a matter of law, and if such negligence directly or proximately contributed to the happening of the accident, in any degree, however slight, your verdict will be for the defendants, notwithstanding you may believe that the defendants were guilty of negligence at the time and place of the accident.*"

Instruction No. 9. "You are instructed that if you shall find from the testimony that barricades were up and properly lighted, the plaintiff would have no right to enter that particular territory in which the barricades were located, and if he did so, he was guilty of negligence, *and if such negligence directly or proximately contributed to the happening of the accident, in any degree, however slight, your verdict will be for the defendants, notwithstanding you may believe the defendants were guilty of negligence at the time and place of the accident.*" (All italics ours.)

It will be noted that plaintiff's instruction No. 16 does not say that the defendants are required to show that plaintiff was guilty of negligence which proximately caused the injuries but of *contributory* negligence which proximately caused the injuries. "What then," we may imagine a juror asking, "is this special kind of negligence known as contributory negligence which proximately causes injury"?

The answer is found in defendants' instruction No. 2 given by the court as requested and containing a clear definition of contributory negligence. It reads as follows: "You are not permitted to compare the negligence of the plaintiff, if any, with the negligence of the defendants, if any, in order to determine which, if either, was guilty of greater negligence than the other. The sole question for you to determine, in so far as contributory negligence, if any, of said plaintiff is concerned, is: First, was said plaintiff negligent; and, second, did such negligence contribute directly or proximately to the happening of the accident, in any degree, however slight? If it did, you must return a verdict in favor of the defendants, notwithstanding you may believe that the defendants were guilty of negligence at the time and place of the accident." Taken in conjunction with the other instructions given by the court, especially defendants' instructions Nos. 3, 5, 7, 8 and 9, we cannot believe that the jury was misled by the language of instruction No. 16, as to what constitutes contributory negligence within the meaning of the law. As was said in Harvey v. Aceves, 115 Cal. App. 333, 344, 1 P.(2d) 1043, 1047, a case in which a jury verdict for the plaintiff was affirmed: "All of the instructions upon the subject of contributory negligence should be taken together, and so taken, it seems apparent that they could not have misled the jury." In that case the court gave the following instruction among others: "Contributory negligence is an affirmative defense to be established by the defendant, and such contributory negligence as alleged by said defendant herein, must be shown by a preponderance of the evidence *to have been the proximate cause of the plaintiff's injury.*" (Italics ours.) In commenting upon this instruction, the court says, page 339 of 115 Cal. App., 1 P.(2d) 1043, 1045: "It is argued that this, in connection with the correct definition of proximate cause given by the court, in effect instructed the jury that in order to sustain her defense of contributory negligence, it was necessary for appellant to establish that the negligence of the plaintiff was the sole and only cause of the injuries of which he complains." See, also, Flood v. Miura, 120 Cal. App. 467, 8 P.(2d) 552, where there is an interesting discussion of the distinction between the statement that contributory negligence was the proximate cause of an injury and the statement that it proximately caused the injury. Reasoning along similar lines appears in Towberman v. Des Moines City Ry. Co., 202 Iowa, 1299, 211 N. W. 854.

Having in mind the same condition that obtained in Callet v. Alioto, 210 Cal. 65, 290 P. 438, as to instructions, we find that the trial court here, as there, did not undertake to state all the law applicable to the case in one instruction, and, considering all the instructions together, conclude that "the jury was fully and accurately informed as to the law applicable to this case"; therefore that no prejudicial error was committed by the court in this regard.

Judgment affirmed.

We concur: HOUSER, Acting P. J.; YORK, J.

131 Cal.App. 602

EWENS v. NEWMAN et al.

Civ. 7647.

District Court of Appeal, Second District, Division 1, California.

May 4, 1933.

1. Automobiles ⇐388.

Motorist who, at 40 miles per hour, collided with another car driving slowly in intersection, thereby killing passenger in speeding automobile, was negligent.

2. Evidence ⇐12.

Judicial notice may be taken of mortality tables in common use.

3. Death ⇐86(1).

Pecuniary loss sustained by minor children from death of parents depends on facts and circumstances in each case (Code Civ. Proc. § 377).

4. Death ⇐86(2), 88.

To determine pecuniary loss sustained by children from death of father, loss of comfort and society and support should be considered (Code Civ. Proc. § 377).

5. Death ⇐99(4).

$12,500 *held* not excessive for loss sustained by three children of 6, 11, and 15 years, respectively, from death of Chinese father who was a clerk 60 years of age (Code Civ. Proc. § 377).

6. Appeal and error ⇐882(12).

Appellant cannot complain of instructions given at his request.

Appeal from Superior Court, Los Angeles County; H. S. Gans, Judge.

Action by Ethel M. Ewens, as administratrix of the estate of Git Wong, deceased, against J. Newman and others. From judgment for plaintiff, named defendant and another appeal.

Affirmed.

B. P. Gibbs, of Los Angeles (M. Tellefson, of Los Angeles, of counsel), for appellants.

George L. Greer, of Los Angeles, for respondent.

HENDERSON, Justice pro tem.

The defendants Newman and Saavedra appeal from a judgment for $12,500, entered against them on the verdict of a jury as damages for the wrongful death of Git Wong, the father of three minor children, as the result of injuries sustained by him as a passenger in an automobile hired from the defendant Newman, and negligently operated by his employee, the defendant Saavedra. This action was brought by the respondent, in her representative capacity, for the benefit of the three minor children, pursuant to the provisions of section 377 of the Code of Civil Procedure.

[1] It is urged that the evidence shows no negligence on the part of defendants proximately causing the accident, and that, on the contrary, the testimony clearly shows that it was a case of unavoidable accident. Briefly stated the testimony, which was conflicting, most favorable to plaintiff, showed the following facts: The accident occurred at the intersection of Main and Thirty-first streets in the city of Los Angeles as the result of the collision of an automobile, occupied by decedent and driven by appellant Saavedra in a northerly direction on said Main street with an automobile driven by defendant Patterson in an easterly direction on said Thirty-first street. The defendant Patterson, in low gear and at a speed of about five miles an hour, entered and proceeded across the intersection, and when the front portion of his automobile had passed the center line of Main street it was struck by the automobile operated by defendant Saavedra at a speed approximately at forty miles per hour. Bearing in mind the testimony just summarized, further comment respecting the foregoing objections is obviously unnecessary as a justifiable inference of negligence can readily be drawn therefrom.

[2] We are also called upon to declare that the verdict is contrary to law and necessarily based on speculation and conjecture since neither testimony of decedent's life expectancy nor of the pecuniary loss to which his heirs would be subjected is in the record. However, it was shown that he was about sixty years of age at the time of his death, and in determining his life expectancy we may take judicial notice of the mortality tables in common use. Dickinson v. Southern Pacific Co., 172 Cal. 727, 158 P. 183. An examination of such a table shows that his life expectancy was 14.10 years. 41 Cor. Jur. 216. While the record does not disclose the approximate earnings of the deceased, nor the amount he actually contributed to the support of his family, the testimony, although in some respects conflicting, in this regard shows: That Git Wong was a Chinaman engaged as a clerk, who for several years had maintained a home for his wife and children in the city of Los Angeles. Three weeks before the accident his wife died, and he was making arrangements to take his three children, aged six, eleven, and fifteen years, respectively, on a vacation trip to China. He was in good physical condition before the accident and provided for his family the same as any other husband or father would.

[3, 4] The pecuniary loss suffered by a minor child due to the death of its parent must

be determined necessarily by the conditions and circumstances surrounding each particular case. It seldom happens that testimony can be produced to show with precise or absolute certainty the amount expended by a parent in the support of his minor child. The pecuniary loss, however, includes a consideration of the loss of comfort and society (Gilmore v. Los Angeles Ry. Corp., 211 Cal. 192, 293 P. 41; Jones v. Leonardt, 10 Cal. App. 284, 101 P. 811); as well as the deprivation of support the deceased was bound to furnish his children (Taylor v. Albion Lumber Co., 176 Cal. 347, 168 P. 348, L. R. A. 1918B, 185; Fong Lin v. Probert, 50 Cal. App. 339, 195 P. 437). In light of the testimony above reviewed the jury were justified in their conclusion that the minor children of the deceased suffered a substantial pecuniary loss.

[5] The defendants claim that the verdict in favor of the plaintiff in the sum of $12,500 is excessive. Such a contention is not sustained when considered in light of the life expectancy of the deceased and the ages of the minor children. In view of these facts it may not be said that the verdict at first blush suggests passion, prejudice, or corruption on the part of the jury, and under these circumstances we may not disturb it. Olsen v. Standard Oil Co., 188 Cal. 20, 204 P. 393.

[6] It is further urged that the court erred in its instructions to the jury. Since the record discloses that the questioned instructions were given at appellants' request, they cannot complain of them even when erroneous. Reinders v. Olsen, 60 Cal. App. 764, 214 P. 268.

The judgment is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

131 Cal.App. 626

PEOPLE v. HOBDAY.

Cr. 2282.

District Court of Appeal, Second District, Division 2, California.

May 5, 1933.

1. Incest ⇐15.

In prosecution for incest, no corroboration of victim's testimony is necessary to warrant conviction.

2. Incest ⇐16.

Weight of evidence is for jury in incest prosecution, where evidence establishes guilt beyond reasonable doubt.

Appeal from Superior Court, Los Angeles County; Fletcher Bowron, Judge.

Harry R. Hobday was convicted of incest, and he appeals.

Affirmed.

Frank J. Lavan, of Culver City, for appellant.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

PARKER, Justice pro tem.

Appellant was convicted by a jury of the crime of incest alleged to have been committed upon the person of his fourteen year old daughter. Subsequent to the verdict a motion for a new trial was made and denied. From the judgment thereafter entered and the order denying a new trial this appeal is presented.

[1] The sole ground urged is that the evidence is insufficient to sustain the verdict. We find no merit in the appeal. The law has remained unchanged for many years to the effect that there need be no corroboration of the victim's testimony in cases of this character. All of the argument here made no doubt was made to the trial jury and in spite thereof a verdict of guilty was returned. To detail the facts would merely perpetuate a sordid story of lust and degeneracy. Suffice it to say that every element of the crime charged was proved by testimony the jury evidently believed.

[2] Summing up the argument of appellant, he urges that the outrage of a child by a parent is a thing in itself so inherently improbable and revolting to the normal human that every intendment should be against the verdict. Such never has been the law. In all cases where a defendant is charged with the commission of a public offense the presumption favors innocence. But when the evidence presented does establish guilt beyond a reasonable doubt the presumption is dispelled and the weight of the evidence is a question for the jury.

It has become something of a commonplace to urge that charges of this character are difficult to disprove. Yet current or past history records few miscarriages of justice. The truth is that these charges are often too difficult to prove and justice is aborted. The evidence presented in the instant case is in itself not unsatisfactory. The defendant's testimony was impeached by proof of a prior conviction of felony.

The transcript is not voluminous and we have therefore carefully reviewed all of the testimony, and aside from the sole ground urged for reversal we have studiously sought to ascertain if any error was committed in the proceeding. We find the case fairly tried,

no errors of law in the reception or rejection of evidence, and the law governing fully stated to the jury.

The judgment and order appealed from are affirmed.

We concur: WORKS, P. J.; STEPHENS, J.

131 Cal.App. 680

THOMPSON et al. v. DENTMAN et al. (two cases).

Civ. 7622, 7657.

District Court of Appeal, Second District, Division 2, California.

May 10, 1933.

Hearing Denied by Supreme Court July 7, 1933.

1. Witnesses ⇐393(3).

In action for death resulting from automobile collision, refusal to allow impeachment foundation of witness testifying that one car "went" behind another, by reference to her testimony at coroner's inquest that car "shot" behind the other, was error (Code Civ. Proc. § 2052).

2. Death ⇐88.

Adult and nondependent children may recover damages for loss of society, comfort, and protection of parent.

3. Death ⇐107.

In action by husband's administrator and children for death of wife and mother, where question of damage to all plaintiffs was submitted to jury, judgment for single sum for all plaintiffs was proper.

4. Automobiles ⇐246(20).

Instruction in which specific speed of automobiles colliding was assumed or defined as limit of lawful speed *held* not error as against contention that in civil cases jury may decide whether speed was reasonable (St. 1923, p. 517, as amended).

5. Trial ⇐260(1).

Appellants could not complain where instructions refused were given to jury in other instructions.

6. Automobiles ⇐245(14).

In action for pedestrian's death resulting from collision of automobiles, whether motorist stopped at intersection was for jury notwithstanding motorist's undisputed testimony that he stopped (St. 1923, p. 560, § 131, as amended).

7. Automobiles ⇐246(9).

Instruction in action for pedestrian's death from collision of automobiles that if one motorist entered intersection first he had right of way was error where speed of such motorist exceeded lawful limit (St. 1923, p. 560, § 131, as amended; p. 517, as amended).

8. Trial ⇐296(3).

Erroneous instruction in action for pedestrian's death from collision of automobiles that motorist first entering intersection had right of way without regard to speed *held* not cured by instruction that, where two vehicles approached intersection, vehicle approaching from right at lawful speed had right of way.

9. Appeal and error ⇐1064(1).

In action for pedestrian's death from automobile collision, where proximate cause depended on close analysis of evidence and instructions, erroneous instructions *held* to require reversal (Const. art. 6, § 4½).

Appeals from Superior Court, Los Angeles County; Edwin F. Hahn, Judge.

Action by Vera C. Thompson, administratrix, substituted for Conrad Biehl, deceased, and others, against A. G. Dentman and others. From judgment for plaintiffs, named defendant separately appeals, and defendant Edward L. Bowker and others jointly appeal.

Reversed and remanded as to all appellants.

Hearing denied by Supreme Court; CURTIS, J., dissenting.

W. I. Gilbert, of Los Angeles, for appellant Dentman.

Paul Nourse and Forrest A. Betts, both of Los Angeles, for appellants Bowker.

Samuel A. Rosenthal, of Los Angeles, for plaintiffs and respondents.

STEPHENS, Justice.

We are in this opinion considering appeals from the verdict and the judgment for damages in the sum of $7,850 and costs in favor of all of the plaintiffs and against all of the defendants. The defendants Bowker join in appealing separately from defendant Dentman, who appeals separately and alone.

The damages were awarded for the death of Veronica Biehl, alleged to have occurred by reason of the negligence of defendants and appellants A. G. Dentman and Edward L. Bowker, in operating their automobiles. The verdict and judgment is also against defendants Walter K. Bowker and Harriet B. Bowker by reason of their statutory liability as the parents of Edward L. Bowker whose operator's license was issued on their application.

The plaintiff Conrad Biehl was the surviving husband, and the plaintiffs Henry Edwin Knechtel, Edna Idella Hilbert, and Joseph Wesley Knechtel were the surviving children of the deceased Veronica Biehl.

General Statement of Facts.

This is another case of two automobiles meeting within the intersection of two thoroughfares. It is more distressing than most others of these distressing cases because the death tragedy overtook the victim as she was walking across the street, innocent of all blame. Contributory negligence, though alleged, was stipulated out of the case. The jury found that both drivers of the two colliding automobiles were negligent. The accident occurred at the intersection of two streets crossing each other at approximately right angles. Bowker, aged 19, was driving a model A Ford touring car northerly. Dentman was driving an Essex coach easterly. An ordinary boulevard stop sign was in place on the east and west street at the corner approached by Dentman. Dentman's left front bumper projection collided with Bowker's left rear fender near the center of the intersection. Bowker's car tipped upon its right wheels, described an arc, and its right rear side struck Mrs. Biehl, hurtling her through the air and to the ground. Dentman's car turned to the north and went toward the easterly curb of the north and south street and northerly of the intersection area. There was a two-rail electric railway along the center of the east and west street, and Edward L. Bowker, driving the last 100 feet approaching the crossing, did not have a clear and uninterrupted view of the railway for 400 feet in either direction.

Without going into details we think there is substantial evidence to support the jury's determination that the negligence of both drivers proximately contributed to the tragedy. It is also true that, had the jury found either one of the drivers solely to blame, there was substantial evidence to support such a finding.

Both appellants claim there was reversible error in the court's instructions, but, before we consider these claims, we shall dispose of the other specifications of error.

Defendant Dentman assigns as error the refusal of the court to instruct the jury to return a verdict for him. In view of what we have just said, it is clear that we think this specification without merit.

Defendant Dentman assigns as error the refusal of the trial court to grant him a new trial. For reasons that will hereinafter appear obvious, we think this motion should have been granted.

[1] Defendants Bowker assign as error the court's refusal to permit an impeachment foundation. Mary L. Hull was a witness to the accident, and was called as a witness for plaintiffs at the trial. She testified in part as follows: "I observed the Essex immediately after I heard the crash and looked up. It appeared to me that the Essex was following the Ford. The Ford was swerving to the left. The Essex came in behind the Ford and *went* to the right curb. The Essex followed the Ford. It seems to me the Ford was going this way (indicating on map); the first I saw of the Essex it was going to the right of the Ford, and the Ford was on the two right wheels, going to the left. There was no speed to the Essex from the time I first observed it after the collision and the time it came to a stop." Upon cross-examination the witness was asked if the Essex "shot" behind the Ford, and the court sustained the objection that the question was "improper." The cross-examiner then explained that he was seeking to lay a foundation for impeachment and a record of the witness' testimony at the coroner's inquest as to the cause of the death was produced, from which it appears that the witness testified substantially as above quoted, but she had used the word "shot" instead of the word "went," italicized by us for clarity. The court would not permit the laying of foundation for impeachment, apparently for the reason stated in the objection that the testimony at the inquest was the same as that given in the instant hearing. The court was probably right until the purpose of the original cross-examining question was explained. In the light of this explanation and in consideration of the great importance the rate of speed of each car bore to the question of proximate cause of the collision, we think the impeachment questions and procedure should have been allowed. The shade of difference in the word "went" as used in one instance and the word "shot" as used in the other, in description of the same event, might have been very important. Code Civ. Proc. § 2052; People v. Bushton, 80 Cal. 160, at page 161, 22 P. 127, 549, and Worley v. Spreckels Bros., 163 Cal. 60, at page 71, 124 P. 697.

The Judgment in Favor of all Plaintiffs.

[2, 3] All of the defendants (appellants) claim that the verdict and judgment in favor of all plaintiffs jointly is against the law and the evidence. It will be remembered that four plaintiffs joined in instituting and maintaining this action; Conrad Biehl, the husband of Veronica Biehl who was killed, and two sons and one daughter of Conrad and Veronica Biehl. In the course of trial it was stipulated by all of the parties and accepted by the court that the plaintiffs other than Conrad Biehl, the husband, "are not dependent and were not dependent children at the time of the death of Veronica Biehl. * * * None of them are now or were (at death of Veronica Biehl) minors. They are all adult persons, and were not dependent on Mrs. Biehl at the time of her death." The complaint alleges: "That during her lifetime, the deceased, Veronica Biehl, was engaged in the manufacture, distribution and sale of 'homemade noodles' to which she gave her personal attention and efforts, and that as a

direct result of her said employment and business she earned approximately fifteen hundred ($1,500.00) dollars per year; that in addition to said activities, the deceased, Veronica Biehl, performed household duties as a housewife; and that the plaintiff, Conrad Biehl, was dependent upon the said decedent for his maintenance and support. That by reason of the death of the said Veronica Biehl, the plaintiffs have been deprived of her *love, society, comfort and protection*, all to their damage in the sum of twenty-five thousand ($25,000.00) dollars." (Italics ours.) All defendants put these allegations in issue. There is no evidence in the case relating to these issues except those concerning Conrad Biehl, the husband and father. That the alleged sons and daughter are in fact sons and daughter of Mr. and Mrs. Biehl is not specifically admitted nor proved, but we take it that the stipulation may be extended by construction to admit this. It is contended by appellants that this stipulation should be construed to mean that there were no compensable damages suffered by the sons and daughter of any nature including "love, society, comfort and protection." We think the stipulation cannot be so construed. There can be no question but that the adult and nondependent children of a deceased person may in proper cases recover damages estimated upon a pecuniary basis for the loss of society, comfort, and protection. In the instant case no question as to pleading is raised, no evidence, except as to the relationship as covered by stipulation, is had, and the court submitted the claim to the jury through the following instruction: "If you find from a preponderance of the evidence that the plaintiffs are entitled to recover herein, you should then consider the question of their damages, and if you find for the plaintiffs then you will award them damages in such amount as will in your judgment fairly compensate them for the loss of society and comfort and services, if any, sustained by them as a result of the death of their wife and mother, Veronica Biehl. In determining the amount of your verdict you may take into consideration the amount expended or incurred by the plaintiffs for the funeral expenses for the burial of said decedent, and also such pecuniary loss sustained by the plaintiffs, if any, by being deprived of the services, society and comfort of the said Veronica Biehl." There are other instructions in which the word "plaintiff" in the singular is used, but we think this does not change the fact that the court did submit the question of damages to all the plaintiffs to the jury. It is also true that the court carefully defined "pecuniary damages" and in many cases in referring to damages followed it up with "if any." But we think the full damage allegation was submitted to the jury. Thereafter the jury returned its verdict as follows: "We, the jury in the above entitled action, find for the plaintiffs Conrad Biehl, Henry Edwin Knechtel and Edna Odella Hilbert and against the defendants Edward L. Bowker, Walter K. Bowker, Harriet B. Bowker and A. G. Dentman and assess their damages in the sum of $7,850.00 this 14th day of April, 1930." The court caused a judgment in accord therewith to be entered. Both appellants think this verdict and judgment is contrary to the evidence and against law. We will confess that there is much to be said in support of these claims, but we shall not analyze the arguments for the reason that we think the opinion in the recent case of Gilmore v. Los Angeles Ry. Corp., 211 Cal. 192, 295 P. 41, is conclusively against appellants' contentions and arguments.

We shall now turn our attention to the several assignments of error specifically concerning the court's instructions, and shall first consider those of appellants Bowker.

[4] The court gave a number of instructions in which a specific speed is assumed or defined as the limit of a lawful speed. Appellants Bowker contend that this was error, that the California Vehicle Act (St. 1923, p. 517, as amended) does not fix any rate that is unlawful in civil matters and that "it is always the right of the jury to decide whether or not a given speed is reasonable under all of the circumstances surrounding an accident." In view of the doctrine expressed in the opinion in Benjamin v. Noonan, 207 Cal. 279, 277 P. 1045, and California cases following that case, we think it would be profitless to discuss appellant's very able argument upon this subject. Such instructions are not erroneous as to this point.

[5] These appellants complain that error was committed in the court's refusal to give several of their proffered instructions, but the law sought to be conveyed to the jury thereby reached the jury through other instructions.

We shall proceed to discuss appellant Dentman's exceptions numbers 24, 27, 31, and 33, respecting the giving and the refusal to give certain instructions.

Ruling and Exception No. 24.

(Instruction for Defendants Bowker.)

"You are instructed that section 131 of the California Vehicle Act, subsection (a) thereof provides as follows: 'When two vehicles approach an intersection of public highways at approximately the same time the vehicle approaching from the right shall have the right of way, *provided such vehicle is traveling at a lawful speed*,' and if you find from a preponderance of the evidence that the defendant Dentman violated said section of the California Vehicle Act immediately prior to and at the time of the collision in question, then you will find said defendant to have been guilty of negligence as a

matter of law, and if you further find that such negligence on his part was the sole proximate cause of the accident in question, your verdict in this case will be in favor of the plaintiff and against the defendant Dentman, but will be in favor of the defendants Bowker."

We do not understand that this instruction is in and of itself claimed as erroneous, but that it must be considered in connection with the others above noted.

[6] As to exception No. 27, it is sufficient to say that the instruction refers to the matter of a boulevard stop, and that appellant is mistaken in his assertion that the court did not define the expression "boulevard stop." Appellant in this connection asserts "That the uncontradicted evidence discloses that appellant, on reaching the intersection * * * brought his car to a stop before proceeding into the intersection." True, no witness testified that he saw this appellant (Dentman) drive into the intersection without stopping, and Dentman testified that he did stop. But this was not conclusive and did not preclude the jury from considering all of the circumstances of the collision that were presented to them in determining the truth of this important point.

Ruling and Exception No. 31.

(Instruction for Defendants Bowker.)

"You are instructed that if you find from a preponderance of the evidence that at the time the defendant Dentman entered the intersection in question the vehicle of the defendant Bowker had entered said intersection, then you will find the defendant Dentman to have been negligent with reference to his failure to observe the right of way rule, and if you further find that such negligence on the part of the defendant Dentman was the sole and proximate cause of the accident in question, then your verdict in this case will be in favor of the plaintiff and against the defendant Dentman, but will be in favor of the defendants Bowker."

[7] By this instruction the jury was told that, if Bowker entered the intersection first, then Dentman violated the right of way rule when he entered. Thus the right of way goes to Bowker without any requirement as to his legal speed. Bowker himself named the speed at which he approached and entered the intersection at a mileage greater than the law allows. Could it be said that he would still have the right of way? It would seem to us that a right of way is only for those who are themselves obeying the law. This instruction was erroneous.

Ruling and Exception No. 33.

(Defendant Dentman's Instruction No. 4, as Modified by the Court.)

"You are instructed that while the defendant Bowker would have the right of way over the defendant Dentman because of the fact that the defendant Dentman was approaching from his left, still, if the defendant Dentman had entered the intersection, ~~or was closer thereto than the defendant Bowker, he~~ [prior to the time defendant Bowker reached the intersection], Dentman would have the right of way, and would not be guilty of negligence in attempting to proceed forward in said crossing [provided that Dentman approached and entered said intersection at a lawful rate of speed]. (Given as modified.) Hahn. (Parts in brackets added by the court and parts with line through stricken by court from the instruction as requested.)"

Appellant points out that this instruction is to the effect that, Bowker being on the right of Dentman, Bowker had the right of way unless Dentman entered the intersection first, under a legal rate of speed. In other words, the meaning of this instruction is that, because Bowker was on the right, he had the right of way unless (1) Dentman had entered the intersection first, and (2) was within lawful speed. It will be seen that there was no requirement whatever as to Bowker's speed. Our comment and ruling on the last preceding exception applies equally to this instruction.

This case is one in which it seems to us that a confusion of instructions on the subject of right of way may well have confused the jury into determining actionable negligence through error of understanding as to the law.

[8] To the argument that the quotation of the law in instruction 24 cured the defects pointed out in 31 and 33, we think there is a conclusive answer. The quoted law uses the expression "When two vehicles *approach* an intersection," whereas instruction 31 does not use the word "*approach*" at all, but uses the term "entered the intersection"; instruction 33 speaks of Bowker's right of way because "Dentman was *approaching* from his left, still, if the defendant Dentman *had entered* the intersection prior to the time defendant Bowker *reached* the intersection, Dentman would have the right of way, and would not be guilty of negligence in attempting to *proceed forward in said crossing* provided that Dentman *approached and entered* said intersection at a lawful rate of speed." With the aid of our italicized words it will not require great concentration to appreciate the very different subjects treated in this instruction and the quoted law in instruction No. 24.

[9] While we do not approve of the reversal of jury verdicts upon technical errors and do approve of the liberal application of section 4½ of article 6 of the Constitution, we think that, since the proximate cause in this case must be determined by a very close

analysis of the evidence and the instructions, the cause must be reversed as to each appellant.

The order in each appeal is: Judgment reversed; cause remanded for retrial.

We concur: WORKS, P. J.; CRAIG, J.

131 Cal.App. 703

BUSH et al. v. SIKKING.

Civ. 7036.

District Court of Appeal, Second District, Division 1, California.

May 11, 1933.

1. Usury ⇐22.

Inclusion of phrase "if paid on or before maturity, security should be assigned back," in note payable two years after date, did not render note payable on or before two years after date as regards claim of usury (Usury Act [St. 1919, p. lxxxiii]).

First portion of the note stated: "Two years after date, for value received, I promise to pay," while at the end of the note appeared the statement that "this note is secured by assignment of Title" to specified apartment, "and if paid on or before maturity, the Title or certificate of interest shall be assigned back to me."

2. Usury ⇐42.

Payment of interest in excess of 12 per cent. per annum, plus principal, for actual time borrower had money, *held* not usurious, where total interest did not exceed 10 per cent. per annum for full period to maturity of note (Usury Act [St. 1919, p. lxxxiii]).

Appeal from Superior Court, Los Angeles County; William Frederickson, Judge.

Action by L. W. Bush and another against A. W. Sikking. From an adverse judgment, plaintiffs appeal.

Affirmed.

Dryer, Castle, McConlogue & Richards and Walter H. Odemar, all of Los Angeles, for appellants.

Catherine A. McKenna, of Los Angeles, and Ira S. Hatch, of Long Beach, for respondent.

YORK, Justice.

This is an appeal from a judgment of the superior court, rendered in an action in which plaintiffs asked for recovery of three times the amount of interest paid to defendant, on the theory that it was paid in violation of the provisions of the Usury Act of the state of California (St. 1919, p. lxxxiii). The whole question involved is whether or not the Usury Act limits the interest that may be received to 12 per cent. for the actual time that the money was had by the plaintiffs, or whether the defendant had the right to accept an amount in excess of 12 per cent. per annum (computed upon the shortened period), in addition to the principal, by reason of the fact that the loan in question was paid before the maturity of the note. In other words, was the payment of an amount in excess of 12 per cent. per annum, plus the principal, a violation of the Usury Act, when the total amount of such interest paid did not exceed 10 per cent. per annum for the full period to the maturity of the note?

One question was raised by appellants as to whether or not the note was one to be paid on or before two years, or whether it was to be paid two years after date, as contended by the defendant. The first portion of the note states: "Two years after date, for value received, I promise to pay," while at the end of the note is the following statement: "This note is secured by assignment of Title to Apt. #1007 Sovereign Apt. Long Beach, and if paid on or before maturity, the said Title or certificate of interest shall be assigned back to me."

[1] The contention of the appellants is that the inclusion within the note of the phrase "if paid on or before maturity" governs the two-year period to the extent that the note was payable at any time at the option of the plaintiffs, while the defendant contends that the provision "if paid on or before maturity" is inserted in the note solely and only because of the fact that, if the note for any reason should be paid before maturity, then the security was to be returned to the plaintiffs upon such payment, and that such phraseology does not make the note a note payable on or before two years after date. We can see nothing in the words contained in the note, which was dated February 23, 1928, that would make this other than a note that was due on the 23d day of February, 1930, and not before that date.

[2] In the case of Sharp v. Mortgage Security Corp., 215 Cal. 287, 290, 9 P.(2d) 819, 820, it is stated:

"The first question is: What is the period to be considered when testing a transaction for the presence of usury? In Haines v. Commercial Mortgage Company, 200 Cal. 609, 625, 53 A. L. R. 725, 254 P. 956, 255 P. 805, 807, this court said: 'We intended to hold that the maximum rate allowed for loans coming under the act is at the rate of 12 per cent. per annum for the full period of the loan, and that within such limit the parties may freely contract in respect thereto, if done in writing.' While this pronouncement when

made may have been open to the observation that it was dictum, yet we based it upon the weight of authority and what was deemed to be the only just rule.

"The case of Easton v. Butterfield Live Stock Co., 48 Idaho, 153, 279 P. 716, 718, is an instructive case citing a great many authorities, and the rule is there stated as follows: 'In determining whether usurious interest has been charged or collected under a particular contract it is not permissible to consider only a portion of the term. The test is: Did the lender under his contract charge or receive a profit on his investment in excess of the maximum rate for the full period of the loan? If he has, there is usury; otherwise not.'

"A similar holding is found in Conservative Loan Co. v. Whittington et al., 120 Okl. 137, 250 P. 485, 487, where the court said: 'The test as to whether a contract is usurious is: Does the interest charge agreed to be paid under the terms of the contract exceed the amount of interest that would accrue for the term of the loan figured at the full legal contract rate? If it does exceed such amount, it is usurious; otherwise it is not.' See, also, Webb on Usury, § 29.

"It is also elementary that the contract must in its inception require a payment of usury or it will not be held a violation of the statute. * * *"

We have not had any case cited to us where an amount of interest has actually been received under the terms and conditions as were present in the instant case, but, if the reasoning which we have just quoted from the case of Sharp v. Mortgage Security Corp. is a correct test as to whether or not a transaction is usurious, then this receipt of an amount less than 12 per cent. interest for the entire period of two years would not be a violation of the Usury Act.

The judgment appealed from is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

131 Cal.App. 587

HERCULES POWDER CO. v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 8853.

District Court of Appeal, First District, Division 2, California.

May 4, 1933.

1. Master and servant ⇐417(7).

On petition for writ of review to annul award by Industrial Accident Commission, every inference in support of award must be indulged.

2. Master and servant ⇐405(4).

Evidence sustained finding in compensation case as to loss of vision from steel dust only as to one eye of employee.

3. Master and servant ⇐403.

Burden rests on compensation claimant to prove his case in all its parts.

4. Master and servant ⇐403.

Where chronic glaucoma was present, compensation claimant was bound to introduce such evidence as would enable Industrial Commission to determine loss of vision due exclusively to accident, and make award accordingly (Gen. Laws 1931, Act 4749, §§ 3 (4), 9(b) (9).

5. Master and servant ⇐385(11¼).

Where chronic glaucoma in both eyes of compensation claimant was present, and only loss of vision of right eye was due to accident, award based on 100 per cent. disability was error (Gen. Laws 1931, Act 4749, §§ 3 (4), 9(b) (9).

Certiorari to Industrial Accident Commission.

Proceeding under the Workmen's Compensation Act by Charles H. Neyman, claimant, opposed by Hercules Powder Company, employer. Award of compensation by Industrial Accident Commission, and employer petitions for writ of review.

Award annulled, and caused remanded, with directions.

Pillsbury, Madison & Sutro and Francis Gill, all of San Francisco, for petitioner.

A. I. Townsend, of San Francisco, for respondents.

STURTEVANT, Justice.

The petitioner, as employer and its own insurance carrier, has applied for a writ of review to have annulled an award made by the Industrial Accident Commission in favor of Charles H. Neyman. In its points and authorities it claims that the respondent commission exceeded its powers in making several different findings.

The facts out of which the controversy arose are comparatively brief. The claimant, Charles H. Neyman, is by occupation an electrical engineer. Within a few years prior to October 10, 1931, he applied to the Pacific Gas & Electric Company for employment. Before employing him he was required to undergo a medical examination. A little later he applied to the Ford Motor Company, for employment. It also required him to undergo a physical examination. Still later he accepted employment with the Hercules Powder Company. He had been in their employ about a year. On October 10, 1931, while operating an electric drill, some of the dust made

by the drill while he was boring was blown into both eyes. The petitioner took him to the Richmond Hospital, where Dr. Hedges instilled 4 per cent. cocaine in both eyes to enable him to remove the dust particles. On the next day, upon Neyman's complaint that his right eye was still bothering him, he was taken by the petitioner to Dr. Stephens. The latter made a thorough examination and prescribed a treatment. At the time that Dr. Hedges treated the patient, the patient was suffering great pain. After the treatment was finished and all dust particles removed the eyes were irrigated and then the right eye was bandaged and the patient was directed to allow the bandage to remain for a day. When Neyman was examined by Dr. Stephens the latter removed the bandage. At that time he found the inflammation had passed away and the eyes were so clear that he was able to and did make a full and complete examination, the result of which disclosed that Neyman was suffering from chronic glaucoma of at least a year's standing which was far advanced in both eyes. About the 1st of November Neyman consulted Dr. Benjamin Thomas of Oakland. Upon making an examination Dr. Thomas reached the same conclusions regarding the presence of glaucoma and the long standing thereof. From the time that Neyman went to Richmond Hospital and continuously thereafter all vision of the right eye was entirely gone. The left eye was inflamed immediately after the dust particles got into it, but responded to treatment by Dr. Hedges. The record discloses nothing to the contrary until December 11, 1931. About that date Dr. Thomas made further examinations, and, as stated in his letter on that date, "Mr. Neyman has a very grave prognosis in regard to the vision in his left eye also." Our attention has not been called to any other passage in the record regarding the condition of the left eye subsequent to the date last mentioned.

The respondent commission, after a prolonged hearing, made findings of fact which, among other things, included the following:

"Findings of Fact.

"1. * * * While drilling with an electric drill, said applicant got steel in both eyes, and thereafter was furnished medical treatment for such condition, and the injury and treatment used in the removal of steel from the eyes of the applicant caused a: acute exacerbation of a quiescent glaucoma condition of both eyes. At said time the said employer was self-insured, under and by virtue of permission and authority from the Industrial Accident Commission of the State of California, and both employer and employee were subject to the provisions of the Workmen's Compensation, Insurance and Safety Act of 1917.

"2. Said applicant was a driller, 42 years of age, and said injury caused permanent disability consisting of loss of sight of both eyes. The percentage of said permanent disability is 100 per cent. * * *"

[1, 2] The petitioner makes many attacks, but in the view we take of the record it will not be necessary to notice all of them. The petitioner says there was no evidence that the glaucoma was quiescent. The respondents reply that it is immaterial because, as they contend, the petitioner is liable whether the glaucoma was quiescent or was not. Continuing, the petitioner claims that the only competent evidence was to the effect that the treatment by Dr. Hedges did not cause an acute exacerbation of the chronic glaucoma and that the opinion to the contrary given by Dr. Thomas was not based on a complete history of the case. That contention has much to support it. But if the point be conceded the contention does not terminate this proceeding. The uncontradicted evidence was that Neyman was suffering from glaucoma in both eyes before the accident. It was the opinion of Dr. Thomas that when Dr. Hedges instilled 4 per cent. cocaine, a mydriatic, the drug caused an acute exacerbation of the chronic glaucoma because the history of the case showed no inflammation when Dr. Stephens made his examination and for other reasons not necessary to repeat several experts expressed an opinion contrary to that of Dr. Thomas. However, the conflict was more apparent than real. No witness expressed the opinion that the glaucoma was caused by the accident. All admitted its presence, its decided development, and all were of the opinion that it was of at least a year's standing. Dr. Thomas was of the opinion that when Dr. Hedges instilled cocaine into Neyman's eyes he thereby caused an acute exacerbation of the existing glaucoma which produced blindness in the right eye. The other experts testified that while such treatment might in some cases produce that result, nevertheless, under the history of this case, they were of the opinion that it did not do so. However, those same witnesses were in agreement that as chronic glaucoma progresses the fibres of the optic nerve are atrophied one by one; and that when it has nearly run its course and when only a few unatrophied fibres remain the disease may be culminated and a complete loss of vision may be caused by many different causes. The respondent commission named a board of three able specialists to make an examination and report its findings to the commission. The board consisted of Doctors Pischel, Glaser, and Cordes. It reported as follows: "* * * That if the sight of the right eye was good before the injury, the blindness of that eye may have been precipitated by a combination of causes—irritation and pain, caused by the injury and by the efforts to remove the foreign bodies at the shop, associated with worry and excitement. The cocaine and other mydriatics may have

been an additional factor. In other words, the loss of vision of the right eye may have been the result of the above factors superimposed upon an eye that had been already tremendously damaged by the pre-existing glaucoma. That the present loss of vision in the left eye is in no way related to the injury." That statement, it will be noticed, is predicated on the assumption that the sight of the right eye was good before the injury. However, if it was not it would seem that the result mentioned would be all the more certain. Dr. Alexander, at the request of the petitioner, made an extended examination and filed a written report. Speaking from his own experience and reading in part from standard authorities, he said: "The final step in complete blindness in chronic simple glaucoma, and the method in this non-inflammatory case, is that one or more of many causes of rise of intro-ocular tension acted on an optic nerve which had just a few unatrophied fibres left. Namely, those going to the macula region and giving the central vision so that the patient might even get 20/20 vision. The increased pressure necessary for this step would only have to be moderate, causing atrophy of the last remnant of the nerve. Long lists of such cases are mentioned in all text books. Fuchs says on page 468 'Often specific causes for these attacks can be demonstrated such as hearty meals, late hours, emotional excitement, etc. In many cases they return without cause, that is without obvious or probable cause.' * * * Finally the whole picture could be caused by any one of a thousand and one coincident and extraneous factors as the final non-inflammatory step of loss of vision in the admitted chronic glaucoma." On the theory just stated there was no conflict in the evidence. In other words, the uncontroverted evidence was to the effect that before the day of the accident Charles Neyman was afflicted with chronic glaucoma in both eyes. When, shortly after the accident, Dr. Hedges inserted in the eyes mydriatics the effect of the treatment might have produced acute glaucoma. Be that as it may, the evidence was distinctly conflicting on that issue. However, chronic glaucoma so operates that the fibres of the optic nerve, one after the other, are atrophied. As the disease progresses vision is narrowed. If at the time of the accident only a few fibres were left undamaged the effect of getting quantities of metal dust in the eyes, rubbing them, having the dust extracted, worrying over the condition, etc., might result in a noninflammatory condition which would atrophy the remaining undamaged fibres and thus cause a total blindness in one eye or both. Considering all of the symptoms disclosed by the history of the case, as we understand their testimony the medical experts testified that Neyman's case fell within the class last stated. If the respondent commission so interpreted the evidence, it was entitled to infer that the presence of the metal dust in Neyman's eyes caused such a "general condition, nervous and otherwise, which modified the blood circulation in the eye * * *," producing "the final non-inflammatory step of loss of vision in the admitted chronic glaucoma." Freely admitting that other inferences might be drawn to the contrary, nevertheless, on this hearing every inference in support of the judgment must be indulged. Mah See v. North American Acc. Ins. Co., 190 Cal. 421, 426, 213 P. 42, 26 A. L. R. 123. Therefore we are of the opinion that it cannot be said that finding number one is not sufficiently supported as to the loss of the sight of the right eye.

As to the left eye the record is quite different. The evidence is positive, on the side of the petitioner, that it was not affected by the accident. On the side of the claimant Dr. Thomas said it was affected—whether temporarily or permanently he did not say. No witness testified that the claimant had entirely lost his sight in that eye. Nevertheless the respondent commission made a finding to the effect that the claimant had lost his sight in both eyes. In so far as that finding extends to the left eye it was not supported by the evidence.

[3-5] The petitioner complains because the respondent commission did not apportion the injury and determine what portion of the disability was caused by the accident. Section 3, subd. 4, 2 Deering's Gen. Laws, p. 2276. The commission has made no reply. We think the contention is well founded. The burden rested on the claimant to prove his case in all its parts. When he had finished making his proof it will be conceded that he was entitled to relief to the extent of the injury suffered as to each eye. However, as he had not lost the sight of both eyes he was not entitled to rely on section 9, (b) (2) (9), Ib. Furthermore, as the evidence showed that he was afflicted with chronic glaucoma in both eyes immediately before the accident, he was not entitled to claim that the industry should be charged with the full damage done to the optic nerve. He was bound to introduce such evidence that the respondent commission could separate the damage done by the accident from the damage done by the chronic glaucoma and apportion its award accordingly. Edson v. Industrial Acc. Com., 206 Cal. 134, 139, 273 P. 572.

From what has been said it follows that the award under review was and is unsupported by the undisputed facts. The award is therefore annulled, and the cause remanded to the respondent commission for further proceedings not inconsistent with the views herein expressed.

We concur: NOURSE, P. J.; SPENCE, J.

131 Cal.App. 619

CLAYTON v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al.

Civ. 9107.

District Court of Appeal, First District, Division 1, California.

May 5, 1933.

Rehearing Denied May 12, 1933.

Attachment ⇐236.

Courts ⇐1.

Superior court had power to determine motion to dissolve petitioner's attachment which power did not depend on correctness of decision (Code Civ. Proc. § 1102).

Petition by Phineas D. Clayton for alternative writ of prohibition directed to James G. Conlan, Judge of the Superior Court of the State of California, in and for the City and County of San Francisco.

Petition denied.

J. E. White and Abraham Setzer, both of San Francisco, for petitioner.

Thomas M. Foley, of San Francisco, for respondents.

PER CURIAM.

The petition for an alternative writ of prohibition is denied.

The respondent court had jurisdiction to hear and determine the motion to dissolve petitioner's attachment (Truck Owners & Shippers, Inc., v. Superior Court, 194 Cal. 146, 228 P. 19), and this power did not depend upon the correctness of the decision (Code Civ. Proc. § 1102; Dahlgren v. Superior Court, 8 Cal. App. 622, 97 P. 681; People v. San Diego, 71 Cal. App. 421, 236 P. 377).

131 Cal.App. 654

VON KESLER v. BAKER.

Civ. 7643.

District Court of Appeal, Second District, Division 2, California.

May 9, 1933.

Rehearing Denied June 6, 1933.

Hearing Denied by Supreme Court July 7, 1933.

1. Contracts ⇐129(2).

Contract for payment of 25 per cent. of recovery or 20 per cent. of settlement to expert witness was void as tending to impair administration of justice, and hence contrary to public policy.

2. Contracts ⇐129(2).

Where contract for payment of 25 per cent. of recovery or 20 per cent. of settlement to expert witness was contrary to public policy, no recovery could be had under common count.

3. Contracts ⇐138(6).

Court will not enforce contract for payment of 25 per cent. of recovery or 20 per cent. of settlement to expert witness, irrespective of defendant's failure to properly present defense that contract was contrary to public policy.

Appeal from Superior Court, Los Angeles County; J. A. Smith, Judge.

Action by J. R. Von Kesler against H. A. Baker. From judgment for plaintiff, defendant appeals.

Reversed, with directions.

Bicksler, Smith, Parke & Catlin, of Los Angeles, for appellant.

Edmond Wheeler Pottle and Edward H. Estill, both of Los Angeles, for respondent.

WORKS, Presiding Justice.

This is an action to recover the sum of $11,755.61 for services rendered and traveling expenses incurred under a contingent contract to testify as an expert witness in certain litigation. Plaintiff had judgment, and defendant appeals.

Baker was a fruit and berry packer. He had placed in cold storage with a certain company in Portland, Or., a large amount of loganberries. It was claimed by him that the berries were allowed to ferment through the negligence of the storage company. A part of the damaged product was still in the company's warehouse, and a part had been shipped to Chicago. Baker contemplated the commencement of two actions for damages, one to cover the berries remaining in the storage company's warehouse, the other to cover those which had been shipped, although but one action was at first under consideration by him. Von Kesler was a fruit and berry broker in Chicago, and had represented Baker there for many years. The contemplated actions were commenced, Von Kesler attended the trial of each, and testified as an expert witness in each. He came to Oregon, where the actions were tried in the United States court, and his traveling expenses were incurred because of his trips from Chicago to Oregon and return. Judgment was procured in one action for the sum of $23,000, in the other for $19,649.10. The amount of these judgments was paid to Baker before the commencement of the present action.

At the trial of this action counsel for Von Kesler made a preliminary statement to the jury. He announced to the triers of fact that he expected to prove the following: In December, 1920, Von Kesler met Baker, at the

request of the latter, in Seattle. After some preliminary conferences and investigations, Baker said to Von Kesler, "I will have to bring this suit * * * and I will have to have your testimony as an expert; you are the only one I can prove my case by, and you stand by me, Von, and I will give you 25 per cent of any verdict I may get. If the cases are not tried, I will give you 20 per cent." In the spring of 1921 Baker called at the office of Von Kesler in Chicago and told him that his attorney had determined to begin the two actions above mentioned, instead of one. Baker then said: "But in any case, Von, I want you to testify, I want you to be my expert in that case; you are the only one that knows the facts, and you are the only one who can prove them from the standpoint of an expert, and I will pay you 25 per cent if we try the case, and 20 per cent if we settle them." Von Kesler said he would be there when the cases are called. The first case was tried about June or July, 1922; the second "along in the summer" of 1926. On each occasion Von Kesler arrived on the scene some time before the case was called—his first arrival was seven days in advance—and in the two interims he had numerous consultations with Baker and his counsel. In short, the statement to the jury was to the effect that Von Kesler fully performed his part of the agreement. The premise here to say, also, that the evidence showed the same thing.

Von Kesler's testimony fully justified the assertions made in the opening statement, but he testified also that in the conversations between him and Baker, the latter said he expected Von Kesler to testify to the truth at the trial of the two actions. Indeed, the opening statement did not show that he contracted to do otherwise.

Appellant suggests to us—we do not say "contends," for the point is one which cannot directly avail him, as it affects alone the public welfare—that the agreement upon which this action is founded was void as against public policy. If the contract was void, it can be so only because the compensation promised to be made to Von Kesler was payable upon the contingency that the actions were to be settled or won. Appellant seeks to put upon some of the testimony a construction which would give to the compact even a more sinister complexion, but we think the view thus taken is untenable.

In an action before the Supreme Court the plaintiff sued to recover for services rendered as a detective in procuring evidence to be used in a divorce suit. The court said: "While in the transcript there are various assignments of error, the sole point urged here by appellant for a reversal is that the contracts made the basis of the cause of action, and as found by the court, are contrary to public policy and void, and no recovery should have been had upon them. In elaboration of this proposition of law appellant asserts that any contract between parties which has for its object the dissolution of the marriage relation, or facilitating that result, is contrary to good morals and void; that, further, any contract having for its object the procurement of testimony for the purpose of securing a divorce is illegal and void." The opinion of the court also contains the following: "A contract is void whereby one agrees to obtain or procure testimony of certain facts which will successfully support or defeat a lawsuit, or which provides that payment to the party procuring such testimony is to be contingent upon the result of the action for which he is engaged to procure it. It is the element of payment contingent on the success of the litigation in which the evidence is to be produced, or the fact that the agreement is to procure evidence not of facts as they exist, but of particular facts necessary to the success of the party litigant, who contracted for their production, which vitiates the contract. It is the contingency on the one hand, and the agreement to furnish a given set of facts essential to a successful litigation on the other, and both of which in their nature are calculated to induce false charges and the production of perjured testimony to subvert the truth and pervert justice, through fraud, trickery, and chicanery at the hands of unscrupulous private detectives or other conscienceless persons, which has impelled the law, with wisdom, to declare such contracts illegal." Hare v. McGue, 178 Cal. 740, 174 P. 663, L. R. A. 1918F, 1099. It will be observed that in this passage, by the use of the disjunctive in two places, the court declares such a contract as the one under discussion to be void if the payment to be made is "contingent on the success of the litigation" in which the evidence is to be used. It is true that the court then held that the contract before it was not subject to the condemnation pronounced by the language quoted. Nevertheless, and if the passage be regarded as obiter, it is thoroughly in accord with our views concerning the agreement between Von Kesler and Baker. The decision of the Supreme Court is in part quoted by this court in Harris v. Moore, 102 Cal. App. 413, 283 P. 76, 78, although there the agreement was principally condemned as being one "to furnish a particular state of facts," and not evidence known or suspected to exist. The facts stated by the court show, however, that a bonus was agreed to be paid, contingently, upon the production of a certain item of evidence to be developed in the future, although the opinion recites that "there is no contention that the bonus was earned."

[1] Let us return to the conditions presented by the instant case. The ordinary witness in a lawsuit, civil or criminal, is compellable to attend court and testify to facts known to him upon the payment of the mod-

est witness fee provided by law. The expert witness may require more, and many men of high character and great ability in various scientific pursuits make their living out of the munificent compensation earned by them as professional witnesses. Even though these men are paid irrespective of the result of the causes in which they testify, there is a too prevalent belief that they will take the witness stand in behalf of either party to an action who first comes forward to employ them. This scandal—for we think it may be called one—would be vastly enhanced if agreements like the one before us were permitted to stand. If we assume that Baker was damaged in the actions over the acetous loganberries as found by the United States court, he had an important interest at stake in the litigation, but Von Kesler, to the extent of his one-fourth interest in any judgments to be procured in the cases, was practically made a party complainant in them in return for his services to be rendered as an expert witness. Such things cannot be. Here was too great a temptation to practice deceit and to commit the too common crime of perjury. The agreement was void as tending to obstruct and impair the administration of justice, and therefore as contrary to public policy.

[2] The complaint sets up, under the common count, a cause of action for judgment in the same amount alleged to be due under the attempted express contract, and respondent insists that he is entitled to the reasonable value of his services in the amount named. We are not inclined, under the circumstances of the case as detailed above, to regard this claim with great complacency. After what we have already said, to yield to the blandishments of respondent would be too much like a rendition of obedience to the injunction of Matthew: "But when thou doest alms, let not thy left hand know what they right hand doeth." We are not disposed to do alms under respondent's common count.

[3] Respondent contends, upon various grounds, that appellant has waived, or has failed properly to present, the question above discussed. This is not a question determined for the benefit of appellant. It is one for the courts alone, out of a respect which they, of all peoples and institutions, should entertain toward the due administration of justice in all the purity which can characterize the activities of human minds. The Supreme Court has said something on this head which is distinctly apposite: "It is said by appellants that respondents (1) were estopped to assert facts constituting the fraud in this case; (2) that the oral agreement was superseded by the writing which cannot be varied by parol; (3) that appellants have not alleged the fraudulent part of the agreement, and it is only respondents who have sought to rely upon it, and, therefore, that the latter will not be permitted to profit by their own turpitude. Each of these considerations is a false quantity in a case of this character. We are here concerned with a fraud, not against any individual, but against the public. The rule is well stated in Dealey v. East San Mateo Land Co., supra [21 Cal. App. 39, 130 P. 1066]: 'It makes no difference how or when the fact was brought to the attention of the court that the contract sued upon is against public policy. Neither does it matter whether or not one of the parties raises the question of its illegality upon that account, but courts of law and of equity, as the true character of such a contract is disclosed, refuse to permit themselves to be used in settling a controversy arising out of such a contract.'" Haley v. Bloomquist, 204 Cal. 253, 268 P. 365, 367. See, also, Kreamer v. Earl, 91 Cal. 112, 27 P. 735; Dealey v. East San Mateo Land Co., 21 Cal. App. 39, 130 P. 1066; Domenigoni v. Imperial L. S. & M. Co., 189 Cal. 467, 209 P. 36.

The judgment which is below directed to be entered by the trial court shall not carry costs.

Judgment reversed, with directions to the trial court to render judgment that plaintiff take nothing by his action.

We concur: STEPHENS, J.; ARCHBALD, Justice pro tem.

131 Cal.App. 674

PACIFIC COAST BUILDING-LOAN ASS'N v. SEASIDE NAT. BANK.

Civ. 7564.

District Court of Appeal, Second District, Division 1, California.

May 10, 1933.

1. Building and loan associations ⇐41(7).

Evidence in building-loan association's action against bank for conversion and money received *held* to show authority of plaintiff's agent to indorse drafts payable to plaintiff and place them to his individual credit with defendant.

2. Building and loan associations ⇐41(7).

Evidence in building-loan association's action against bank for conversion and money received *held* to show that draft, indorsed by plaintiff's agent and deposited to his individual account in bank, was sent to him for purpose which could not be carried out and that he asked and followed sender's further instructions as to use of proceeds.

3. Building and loan associations ⇐41(7).

Agent's daily reports to building-loan association, canceled checks indorsed by him in its name and placed in his personal bank account, slips covering his deposits therein, and his correspondence with one sending him draft, payable to association, after deposit thereof in such account, *held* admissible in association's action against bank for conversion and money received.

Appeal from Superior Court, Los Angeles County; K. S. Mahon, Judge.

Action by the Pacific Coast Building-Loan Association against the Seaside National Bank. Judgment for defendant, and plaintiff appeals.

Affirmed.

Overton, Lyman & Plumb, of Los Angeles, for appellant.

Keys & Houston, of Long Beach, for respondent.

YORK, Justice.

This is an appeal by plaintiff from a judgment rendered in favor of the defendant in an action brought for damages by plaintiff against defendant. Plaintiff's complaint sets forth two causes of action, one for conversion, and the other for money had and received for the plaintiff's use and benefit. Both causes of action arise from the same transaction and are for the same amount of money.

The dispute in the instant case arises over the way in which a draft was handled. The draft was made payable to G. P. Broughton and was thereafter endorsed by the said Broughton as follows: "Pay to the order of Pacific Coast Loan of Los Angeles—G. P. Broughton."

The defendant's answer denied that the plaintiff was the owner or was ever rightfully in possession or at all in possession of this draft, which was of the agreed value of $6,060. It was received by one C. M. North, who was agent for the plaintiff and carried on its business in the city of Long Beach. The court found, upon evidence: "That, as such agent of plaintiff, said C. M. North had ostensible authority to make collections and to pay withdrawals from plaintiff company, including coupons; to receive cash and checks payable to plaintiff company; to endorse plaintiff's name upon the checks; and to deposit the same in the defendant bank, both to the credit of plaintiff and to his individual credit." The court found that such draft was received by the said North with instructions from the said G. P. Broughton to invest the draft in full paid-up membership certificates of plaintiff company in the amount of $6,000, the said $60 being for premiums. The court also found upon evidence introduced at the trial: "That prior to the 11th day of August, 1928, plaintiff company had ceased to issue full paid-up membership certificates, of which fact the said C. M. North informed the said G. P. Broughton; and the said C. M. North was, by G. P. Broughton, directed and instructed to invest the funds of G. P. Broughton, represented by said bank draft in the securities of another company other than plaintiff." The court also found:

"That the said C. M. North, as the agent of plaintiff, endorsed the name of plaintiff upon the back of said draft and deposited the same in defendant bank to the credit and individual account of C. M. North in said bank.

"That the said C. M. North, acting as the agent and representative of G. P. Broughton, checked out from the defendant bank the said $6,060.00, for the benefit of G. P. Broughton; that plaintiff was, at no time, the owner, or was, at any time, in possession of the said $6,060.00 bank drafts; that at the institution of this suit, defendant was not, and is not now, indebted to plaintiff in any sum."

This matter comes before us on a bill of exceptions. The following evidence appears in said bill of exceptions as having been given by the said C. M. North (Tr., pp. 28–33):

"Chauncey M. North, called as a witness on behalf of the plaintiff and being first duly sworn, testified as follows:

"Direct Examination:

"By Mr. Prince: I have seen the draft which was drawn by the First National Bank of Montrose, Colorado, upon the National City Bank of New York, in favor of Mr. G. P. Broughton, dated August 7, 1928, for $6,060.00. This draft was received by me from Mr. Broughton in a letter addressed to me at Long Beach, and was for the purpose of buying full paid membership shares in the Pacific Coast Building-Loan Association. After I received the draft I deposited it in the Seaside Bank to my credit. I wrote Mr. Broughton a letter and told him I had received instructions from the Pacific Coast Building-Loan Association that it was not issuing full paid membership shares any more. The endorsement on the back of the draft reading 'Pacific Coast Building Loan Association' is in my handwriting. The writing 'C. M. North' also appearing on the back of the draft is my signature. I later drew a check on my account for $6060.00. I don't remember to whom the check was made payable, but the agent of the Bay Cities Building & Loan Association took possession of it.

"At this point a photostatic copy of the

front and back of the draft was offered and received in evidence as Plaintiff's Exhibit 2.

" 'Exhibit 2.

" 'The First National Bank 82–71

" 'Montrose, Colorado, August 7, 1928.

No. 91883.

" 'Pay to the order of G. P. Broughton $6060.00

Not Over Six Thousand Sixty Dollars not over Dollars

To the National City Bank,

1–8 New York City, N. Y.

" 'C. B. Akard, Vice President, Cashier.

" '(No Protest 90–1148)

" '(Endorsements:)

" 'Pay to order of Pacific Coast Building & Loan of Los Angeles.

" 'G. P. Broughton

" 'Pacific Coast Building Loan Association

" 'C. M. North

" 'Received payment through New York Clearing House. Prior endorsements guaranteed.

" 'Aug. 18, 1928.

" 'The National Park Bank of N. Y. 1–54.'

"(Reporter's Note: Rubber stamp endorsement of Seaside National Bank, dated Aug. 11, 192, Pay to the Order—balance illegible.)

"The witness continues: I never made any report of this transaction to Pacific Coast Building Loan Association.

"Cross-Examination:

"By Mr. Keys: I represented the plaintiff in Long Beach from June 1, 1926, until August 30, 1928, and maintained there an office for the transaction of its business. During that period of time the association maintained an account in the defendant bank and I maintained an individual account there. In the individual account I deposited cash belonging to Pacific Coast Building-Loan Association and checks payable to such association. From the individual account I paid withdrawals from the association.

"At this point a copy of the letter accompanying the draft was offered and received in evidence as defendant's Exhibit A.

" 'Exhibit A.

" 'Robert Winfield Daniels

" 'Attorney at Law

" 'Phone 372-12

" '305 Henderson Building

" 'San Bernardino, California.

" 'Montrose, Colorado, August 7, 1928.

" 'Pacific Coast B. & L. A.

" 'Dear Sir:

" 'Some time ago I was in your office and you told me to go to the lumber yard for information. You may remember me as I told you I would like to work out of your office.

" 'I am sending $6,060 for 600 shares of full paid M. shares. I may have some more before long. Can you get me some capital stock.

" 'Yours very truly, G. P. Broughton.'

"The witness continues: A short time before I received the letter and draft from Mr. Broughton I received a letter from the plaintiff stating that it issued no more of the full paid membership shares. The only information that I received from the association or any of its officers or agents that the certificates would not be issued was contained in the letter which I have mentioned above.

"At this point a letter addressed by Mr. G. P. Broughton to C. M. North was marked as Defendant's Exhibit B for identification.

"The witness continues: The signature to the letter marked as Defendant's Exhibit B for identification is that of Mr. Broughton. I first saw this letter some time after the date of the letter.

"Redirect Examination:

"By Mr. Prince: In my cross-examination I testified that during the course of the conduct of my office, I received checks payable to Pacific Coast Building-Loan Association and also cash. I don't think that I ever received any checks that were made payable to me directly. I did receive checks that were made payable to the depositors of the Pacific Coast Building-Loan Association and which were endorsed in blank by them, but I don't know what proportion of the checks that I received were drawn in this manner.

"Recross-Examination:

"By Mr. Keys: I generally placed the checks that were payable to me to the credit of Pacific Coast Building-Loan Association, and if I had paid out more than I had taken in I gave the association my check or else the association gave me a check to make the account balance. When the checks were payable to the customers of the Pacific Coast Building-Loan Association I endorsed them. Mr. C. A. Sargent, the assistant secretary of the association directed me to sign or endorse checks which were payable to their clients and to deposit them in the bank."

[1, 2] The appellant contends that C. M. North had no authority to endorse in the name of plaintiff drafts payable to the plaintiff, and to place the same to his individual credit with the defendant. There was sufficient evidence in the record to show that he had such authority, and that this draft was sent to C. M. North not solely as the agent of the plaintiff, but for a purpose which could not be carried out, and after the said North requested further instructions and received them, that he complied with said instructions as to the use of the money. There is no evidence in the record showing any consideration passing from the plaintiff to the said Broughton for the said draft in any manner, shape or form.

[3] Appellant complains that the trial court committed error in admitting in evidence the following documents:

(a) Error in admitting in evidence daily reports made by C. M. North to plaintiff.

(b) Canceled checks indorsed by C. M. North in the name of the plaintiff, and placed in the personal account of C. M. North with defendant bank, and the deposit slips covering deposits made by C. M. North to his personal account with the defendant bank.

(c) Correspondence and telegrams written by either G. P. Broughton or C. M. North subsequent to the deposit of the draft in the account of C. M. North with the defendant bank.

All of this evidence was properly admitted by the trial court to show all the surrounding circumstances connected with the handling of this draft.

The bill of exceptions fails to disclose wherein or whereby the plaintiff lost anything by the action of the defendant bank.

The judgment is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

131 Cal.App. 669

NELSON v. NATIONAL GUARANTY LIFE CO.

Civ. 820.

District Court of Appeal, Fourth District, California.

May 9, 1933.

Hearing Denied by Supreme Court July 7, 1933.

1. Insurance ⇐388(4).

Test whether life insurer waived forfeiture for nonpayment of premium on due date was whether insurer's conduct induced insured to believe payment within reasonable time after due date would be accepted, and had acted accordingly, and that, until some notice was given more specific than those given, forfeiture would not be insisted upon.

2. Insurance ⇐372.

Provisions respecting lapse of life policy for nonpayment of premiums and respecting reinstatement could be waived by insurer.

3. Insurance ⇐388(4).

Life insurer accepting payments late in previous months, inducing insured to believe late payment would be received in discharge of installment, waived provisions respecting forfeiture until specific notice was given.

4. Insurance ⇐611.

Liability under life policy was fixed at time of insured's death.

5. Insurance ⇐665(2).

In action on life policy, evidence showed that parties, by contract, notices, and course of dealing, made payment of premium by mail method to be used.

6. Insurance ⇐388(4).

Where life policy premium was due July 15th, but insurer by course of dealing led insured to believe payment within reasonable time after 15th would discharge premium, and insured mailed premium on July 23d, parties having made mailing method to be used, and premium was received on the 24th, when insured's death occurred, payment was made before death.

Appeal from Superior Court, Tulare County; Frank Lamberson, Judge.

Action by Selma S. Nelson against the National Guaranty Life Company. From a judgment for plaintiff, defendant appeals.

Affirmed.

See, also, 17 P.(2d) 155.

Feemster, Perkins & McCormick, of Visalia, for appellant.

J. A. Chase, of Visalia, for respondent.

ANDREWS, Justice pro tem.

The plaintiff sues to recover on a policy of life insurance issued to her deceased husband by defendant. The defense is that the policy lapsed by nonpayment of an installment of the premium, and also that there was fraud on the part of the insured in making false statements in the application for the policy.

On trial the plaintiff introduced evidence which she claims constituted a waiver by defendant of the strict performance of payment of the premium, and that the fraud was that of the agent of defendant, and not of the deceased.

The policy contained a provision for forfeiture and relating to waiver, in the following words: "The failure to pay any premium within fifteen days from date on which it is due shall without further action of the company lapse this policy and the insured shall thereafter have no claim hereunder until and unless he shall have been reinstated by the company. At any time within one year after lapsing, such insured may be reinstated upon his furnishing proof acceptable to the company that he is of insurable age, in good health, and by payment of all past due premiums or payment of the rate at attained age. Sending of notice of premium or any other notice after forfeiture or lapse shall not be a waiver or evidence of waiver of any lapse or forfeiture."

The premium in question was due July 1st, and on the 23d the insured mailed to defendant currency, which currency was received

on the 24th and formal receipt issued without knowledge of the death of the insured, which had occurred by accident on the same day and after the premium was mailed.

The payments previous to this last payment had been made by the insured at irregular times, many of them after the 15th, the date upon which forfeiture would have resulted by the terms of the contract except for waiver. Seven payments were made after the 15th of the month in which they were due, one as late as the 30th, one on the 27th, and the one in the month previous to the final one in question was made on the 25th.

The defendant through the testimony of its officers admitted the practice of permitting payments to be made without proof of health, and subsequent to the 15th, for a limited time, in what it contends was a reinstatement under the policy, and during that time refrained from making any declaration of forfeiture.

Introduced in evidence are three communications, two of which were sent by defendant to the insured by mail, one of which was prepared and was to have been sent on the day the premium was received. The first was dated on the 10th, and called attention to the fact that the premium due on the 1st had not been paid, and stating: "Your last day of grace is the fifteenth of this month." The next was dated on the 18th, and referred to the notice mailed on the 10th, and suggested that most likely the payment had been neglected and asked payment to-day, closing with the request for prompt reply and an assurance of its desire to serve with justice those whose protection was intrusted to its care. The third communication was dated the 24th, and, while never mailed, had been prepared to be sent in the regular routine of defendant's business. This communication referred to the former letters, and stated that it was hard always for it to be called upon to announce to a widow that the husband's insurance had been allowed to lapse, saying: "Do today what you should and mail your check for reinstatement." All these letters were form letters regularly sent to past-due policyholders.

[1-3] 1. Had defendant, by its course of dealing as shown from the facts stated, waived the forfeiture? The test should be, whether by such conduct the insured had been led to believe that payment made within a reasonable time after the 15th would be received in discharge of the installment and the policy would continue in force, and had acted accordingly, and that, until some notice was given, other and different and more specific than those referred to, the forfeiture would not be insisted upon.

The theory of defendant is that as a matter of law the lapse under the contract was brought about by default of payment, and that subsequent receipt of the payment worked a reinstatement. The notices to some extent were worded to create that impression. While the policy provided that, if a lapse occurred on the 15th, the contract was ended and reinstatement could only be had as provided in the policy, as quoted above, yet in the many lapses no reinstatement had been made as required by the policy. Of course, all these provisions are for the benefit of the company and can be waived by it, and the fair inference was that, as proof of health had never been required, the payments were being accepted as continuation of the policy and not reinstatement. Such understanding by the insured operated as a waiver of all the provisions relating to forfeiture until specific notice should be given.

The contract, if those forfeiture provisions were waived, was in that class where nonpayment of an installment would not work a forfeiture, and where the law permits payments to be made until definite notice is given that failure so to do will work a forfeiture. The result of this course of reasoning would seem to be that this contract was in force at the time of death, whether the payment was in fact made or not.

This working out of the problem is the application to the facts here involved of the law of waiver in this class of cases, settled by the courts of last resort in this state, and it seems unnecessary here to attempt to review or amplify those cases.

[4-6] 2. Was payment in fact made before death? Liability, or not, was fixed at the time of death. The parties, by their contract, notices, and course of dealing, had, impliedly at least, made payment by mail the method to be used.

If, according to the contention of defendant, payments made after the 15th were to be considered as applications for reinstatement, then it would be essential that the payment be received, and, with full knowledge of the facts, accepted and approved by defendant before the death of the insured. If, by reason of the waiver, the insured still had the right to make the payment, his mailing of it would be complete and irrevocable action on his part in making it. In that event, the defendant would have no option to refuse.

That provision of the regulations of defendant respecting registration of currency has to do with the possible loss of the payment by miscarriage, or otherwise, and is not here involved, inasmuch as the currency reached the defendant promptly. It should therefore be held that payment was in fact made before the death.

3. The trial court, in its findings, determined that no misrepresentations in the application were made by the insured; that the agent of the defendant who prepared the

application for signature remarked upon the obvious good health of the insured, and explained that, because the application was taken to transfer another policy, the health question had been gone into in the original application and little attention need be given to that matter in making the transfer; that the statements of the insured were of the most general character, and the answers to the detailed questions contained in the applications were inserted by the agent of defendant; that the application was signed by the insured without knowledge of what had been written in by the agent; and that, if any fraud apparently resulted from the answers, it must be held to be the fraud of the agent and not of the insured.

The trial court further found that there was in fact no history of illness or bad health in the life of the insured which in any material degree affected his general health or physical condition.

These findings of the trial court are sustained by the evidence, and dispose of the contention of the defendant on this phase of the case.

The judgment of the trial court is affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

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218 Cal. 176

DE ACOSTA v. DE ACOSTA (D'ORR et al., Interveners).

L. A. 13979.

Supreme Court of California.

May 15, 1933.

1. Appeal and error ⇐664(1).

Recital in decree that evidence was heard cannot be overthrown by court's minutes, reciting that no evidence was offered, in absence of bill of exceptions giving authenticated showing of proceedings on trial (Code Civ. Proc. § 670).

2. Appeal and error ⇐926(4).

No presumption can be indulged that appellant was denied right to offer pertinent evidence or that such evidence was excluded, in absence of bill of exceptions.

In Bank.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by May T. de Acosta against Francisco M. de Acosta, in which Paul Barksdale D'Orr and another intervened. From an interlocutory decree, defendant appeals.

Affirmed.

Robert L. Hubbard, of Los Angeles, for appellant.

Denio, Hart, Laubman & Simpson, of Long Beach, for respondent.

Frank H. Love, of Los Angeles, for interveners.

PRESTON, Justice.

In this action in partition, the court rendered an interlocutory decree to the effect that plaintiff and defendant each owned an undivided one-half interest in certain real property; that the interveners had a lien of $450 thereon; that plaintiff had a lien for taxes paid by her as well as for half of certain rentals collected by defendant; that the property should be sold under direction of a referee and the proceeds of sale applied under final direction of the court.

Plaintiff and defendant were husband and wife. They were separated, but plaintiff had by a prior proceeding been denied a divorce. They owned the property here involved in joint tenancy with right of survivorship. The above decree in substance granted plaintiff's prayer as well as that of the interveners but it in effect denied defendant's petition for an accounting, which had been filed as part of his answer. Said answer admitted all the allegations of the complaint but the portion thereof styled a petition for accounting alleged various expenditures made by defendant to preserve the joint properties of the parties as well as for necessaries and medical care for himself, and it asked that these expenditures be reimbursed out of the proceeds arising from the sale for partition.

On April 13, 1932, the cause was called for trial. The minutes of the court for that day in part recite: "Counsel present argument to the court. *No evidence offered.* Interlocutory decree of partition is ordered for plaintiff. In accordance with oral stipulation of counsel in open court, it is ordered that John A. Gray be appointed sole referee in partition."

On the same day the cause was heard and the interlocutory decree was rendered as aforesaid but it in part recited: "*After hearing the evidence* of the respective parties and considering the same, findings of fact and conclusions of law being waived. * * *"

[1, 2] Appellant urges that partition is purely an equitable proceeding and the court was powerless to order a sale without due proof first being made in support of the necessary allegations of the complaint. He also asserts that property held in common was liable for the family necessaries incurred by him as well as for the other expenses referred to in his petition for accounting.

But the record does not allow either of these questions to be raised. It is true that the minutes of the court above recited showed that no evidence was offered on the trial, whereas the interlocutory judgment recites that evidence of the respective parties was received and considered, but in the absence of a bill of exceptions giving an authenticated showing of the proceedings on the trial, we do

not see how the recital in the decree can be overthrown by the minutes of the court, which, by law, are not made part of the judgment roll. Section 670, Code Civ. Proc. And certainly in the absence of a bill of exceptions no presumption can be indulged that appellant was denied the right to offer pertinent evidence or that such evidence, if offered, was excluded. These observations answer fully all questions urged by appellant. The record shows no error.

The judgment is affirmed.

We concur: SHENK, J.; LANGDON, J.; CURTIS, J.; THOMPSON, J.

218 Cal. 123

PEOPLE v. STANDARD OIL CO. OF CALIFORNIA.

S. F. 14739.

Supreme Court of California.

May 1, 1933.

Rehearing Denied May 29, 1933.

1. Licenses ⇨16(9).

Sales of gasoline by distributor to army post exchange at Presidio military reservation in San Francisco, over which United States exercises sole legislative authority, *held* sale not outside state, but in state within statute imposing license tax on distributors of gasoline measured by sales in state (St. 1923, pp. 571, 572, §§ 1(c), 3).

2. Licenses ⇨19(3).

Sales of gasoline by distributor to army post exchange at Presidio military reservation in San Francisco, for resale to persons for their private consumption, *held* not sale to "department of United States government" for its official use within statute exempting from license tax gasoline sold to United States government or any department thereof for official use (St. 1923, p. 574, § 10, as amended by St. 1927, p. 1309, § 1).

[Ed. Note.—For other definitions of "Department," see Words and Phrases.]

3. Commerce ⇨64.

Deliveries of gasoline from San Francisco to Presidio military reservation in San Francisco, where distributor sold gasoline to army post exchange for resale to persons for private consumption *held* "intrastate commerce," not "interstate commerce," which state could not impede by license tax on gasoline (St. 1923, p. 574, § 10, as amended by St. 1927, p. 1309, § 1).

[Ed. Note.—For other definitions of "Interstate Commerce" and "Intrastate Commerce," see Words and Phrases.]

In Bank.

Appeal from Superior Court, City and County of San Francisco; C. J. Goodell, Judge.

Action by the People against the Standard Oil Company of California. From a judgment for defendant, plaintiff appeals.

Reversed, with directions.

Rehearing denied; THOMPSON, J., dissenting.

U. S. Webb, Atty. Gen., and H. H. Linney, Deputy Atty. Gen., for the People.

Pillsbury, Madison & Sutro, Felix T. Smith, and V. K. Butler, Jr., all of San Francisco, for respondent.

Geo. J. Hatfield and I. M. Peckham, both of San Francisco, amici curiæ.

PER CURIAM.

This action is by the people of the state of California to recover from defendant a balance due for excise taxes imposed by the act of 1923 (Stats. 1923, p. 571, c. 267), as amended by the Statutes of 1927, pp. 1309 (c. 716) and 1565 (c. 795), based upon sales of gasoline to and deliveries at the army post exchange located on the Presidio military reservation at San Francisco. The defendant had judgment in the court below, and plaintiff prosecutes this appeal.

The case arises upon an agreed statement of facts, which show that beginning about July 1, 1929, and ending September 30th of the same year, defendant sold and delivered to said post exchange a certain quantity of motor vehicle fuel; that such gasoline was carried by defendant in barrels and tank trucks to the exchange and there delivered, defendant bearing the expense of and assuming the risk in such transportation; that the Presidio was established as a military post under Spanish dominion in 1776; was continued as such by the republic of Mexico, and was ceded to the United States in 1848 by the treaty of Guadalupe Hidalgo (9 Stat. 922); that in 1850, by executive order, it was reserved for public purposes; that said order was modified in 1851, from which year it has been continuously occupied by the United States as a military reservation; that, moreover, on March 2, 1897, the Legislature of California ceded to the United States government sole legislative jurisdiction over said reservation; that the Presidio post exchange at all times herein was an organization doing business under army regulation No. 210-65, dated June 29, 1929, as modified by circular 57 of the War Department, dated October 31,

1929; that defendant duly reported said sales to the state board of equalization, as required, but declined to pay the tax due thereon, claiming that a sale to the post exchange was not to be considered in computing said tax.

The pertinent provisions of the said act are: Section 1(c), Stats. 1923, p. 572, which, so far as here material, defines a distributor to be one who refines, manufactures, produces, or compounds motor vehicle fuel in this state and sells the same in this state (also covers other classes not here involved). Section 3 (Stats. 1923, p. 572) provides: "Every distributor shall * * * pay a license tax to the state * * * for each gallon of motor vehicle fuel refined, manufactured, produced or compounded by such distributor in this state and sold and delivered by him in this state, or imported by such distributor into and distributed or sold by him in this state otherwise than in the original package. * * *" Section 10 (Stats. 1923, p. 574), as amended in 1927 (Stats. 1927, p. 1309, § 1), provides for certain exemptions as follows: "The provisions of this act requiring the payment of license fees shall not be held or construed to apply to motor vehicle fuel imported into this state in interstate or foreign commerce and intended to be sold in the original and unbroken tank cars or other original receptacles, containers or packages and so sold while the same are in interstate or foreign commerce nor to any motor vehicle fuel exported or sold for exportation and exported for use outside this state, nor to any motor vehicle fuel sold to the government of the United States or any department thereof for official use of said government but every distributor shall be required to report such exports and sales to the state board of equalization in such detail as that board may require."

We thus have presented the question whether sales and deliveries of gasoline at a military reservation under the sole jurisdiction of the United States, made to the army post exchange therein, are to be excluded in fixing the license fees to be paid by the distributor under said act of the Legislature. Or, in other words, is the post exchange at the Presidio military reservation in San Francisco entitled to purchase gasoline in this state at a price less than that paid by other persons admittedly coming under the act?

[1] It is at once conceded, as already implied, that the military reservation in question is territory over which the United States exercises sole legislative authority. U. S. v. Watkins (D. C.) 22 F.(2d) 437; People v. Mouse, 203 Cal. 782, 265 P. 944. It is contended that, by reason of this concession, a sale consummated on it is a sale outside the state, as though consummated in Nevada or Oregon. It is our conclusion that the manifest intention of the act was to include all sales completed within the geographical confines of the state, and for this purpose said military reservation was to be included like all other territory. The holding to the contrary in U. S. v. Cordy (D. C.) 58 F.(2d) 1013, is based upon the peculiar provisions of the act there involved, under which it was held by the District Court that the language of the act itself excluded sales made upon military reservations. This holding does not aid in the solution of the problem before us.

[2] It is next urged that a sale to the army post exchange is a sale to a department of the government of the United States for official use of said government. Manifestly these sales are neither to a "department" of the government nor for official use. The gasoline was sold to the exchange for resale to certain classes of persons for their private consumption. We have no hesitation in concluding that the legislative intent was to include the sales in question in computing the tax. But these observations do not determine the cause.

We are pointed to the decision of the Supreme Court of the United States in the case of Panhandle Oil Co. v. Mississippi, 277 U S. 218, 48 S. Ct. 451, 452, 72 L. Ed. 857, 56 A. L. R. 583, where the court used language showing that an important question is here involved. There, as here, the state of Mississippi imposed an excise tax upon distributors of gasoline measured by sales within that state. The state sued the oil company to recover balances represented by sales to the United States for use of its Coast Guard service operating in the Gulf of Mexico and for its veterans' hospital at Gulfport. The sales were made directly to the government, and the court held that said statute was inoperative as to them, using language in part as follows: "The states may not burden or interfere with the exertion of national power or make it a source of revenue or take the funds raised or tax the means used for the performance of federal functions. * * * The amount of money claimed by the State rises and falls precisely as does the quantity of gasoline so secured by the government. It depends immediately upon the number of gallons. The necessary operation of these enactments when so construed is directly to retard, impede, and burden the exertion by the United States of its constitutional powers to operate the fleet and hospital. * * *" This was a five-four decision of the court; Justices Holmes, Brandeis, McReynolds, and Stone dissented, Justices Holmes and McReynolds writing opinions.

But it seems to us that a well-founded distinction may be found between the sales there involved and sales to an army post exchange. The commanding officer of an army post is not required to organize the post exchange unless there is need for it or unless the units present desire to participate therein or un-

less the personnel is sufficient to profitably maintain and support such an institution. In other words, a post exchange is at most but a government agency, designed to operate for the welfare of the troops such activities as a general store, meat or vegetable market or gasoline station, or a restaurant, gymnasium, recreation room, library, or theater. Thus it is not properly described by the word "department" of the government in its activities. It is largely a co-operative institution, intended to supply the needs and promote the moral and civic betterment of the troops at the post.

It is supervised by an exchange council, composed of the commanding officers of the respective units represented in the organization. The funds of the exchange are not public moneys within the meaning of the Revised Statutes of the United States (Rev. Stats. §§ 5488, 5490, 5492 [18 USCA §§ 173, 175, 177]). The exchange is not instituted by the aid of funds from the United States nor are its avails paid into the treasury. It is a voluntary, unincorporated, co-operative association in which all units share the benefits and all assume a position analogous to that of partners. In the event of the inability of the post exchange to pay its debts, the organizations which participate in it are supposed themselves to pay off all such obligations in proportion to their respective interests in the exchange. Neither the government nor the officers of the post wherein the exchange is located are liable for its debts. The property of the post exchange is not to be treated as property belonging to the United States. The exchange itself is liable for certain federal taxes, such as the stamp tax imposed by the Internal Revenue Act, the freight tax imposed by the War Revenue Act of 1917 (40 Stat. 300), a floor tax on tobacco under the Revenue Act of 1918, § 702 (40 Stat. 1118); sales of ice cream and soft drinks by a post exchange are subject to tax under the same act. From these and other observations that might be made, touching the nature of the organization of an army post exchange, we are of the opinion that it is an organization largely engaged in business of a private nature and that sales to it should not be beyond the reach of the taxing power of the state wherein it is located and that it is not one of those agencies through which the federal government directly exercises its constitutional or sovereign power.

The case of Thirty-first Infantry Post Exchange v. Posadas, 54 Philippine Reports 866, 876, throws some light on the question before us. There the post exchange drew into question the validity of a tax levied by the government of the Philippine Islands on sales by local merchants to the exchange. The court sustained the tax and distinguished the Panhandle Oil Case, supra, and, among other distinguishing features, it pointed out the following: "There the right of the United States to make purchases was derived from the United States Constitution; here the right of the army post exchange to make purchases is derived from army regulations and army practice. There the sale was made to instrumentalities authorized by the Constitution, which consumed the merchandise; here the sales were made to army post exchanges not so constitutionally authorized, which merely acted as intermediaries. There it must be taken for granted that the Coast Guard fleet and the veterans' hospital were constructed and operated by government funds; here, except that buildings are provided by the United States government for the army post exchange, the latter are not so constructed and operated."

Again in Keane v. United States (C. C. A.) 272 F. 577, it was held that a conspiracy to defraud the United States was not made out by charging a conspiracy to defraud an army post exchange. We quote the syllabus: "A military post exchange, which is a voluntary association of companies, detachments, or other army units at military posts, permitted, but not required, by a special regulation of the War Department for the purpose of conducting for the benefit of the members of such units what is in effect a co-operative store and place of entertainment, with their own funds, and for whose contracts and obligations the United States is not responsible, and in whose funds it has no interest, though its business is conducted by an officer detailed for the purpose, held not a 'department of the government,' and proof of a conspiracy to defraud a post exchange held not to sustain an indictment, under Criminal Code, § 37 (18 USCA § 88), for conspiracy to defraud the United States."

Such cases as Surplus Trading Co. v. Cook, 281 U. S. 647, 50 S. Ct. 455, 74 L. Ed. 1091, and Concessions Co. v. Morris, 109 Wash. 46, 186 P. 655, and others of that class which relate to taxation of personal property having its situs upon a military reservation in the exclusive jurisdiction of the United States are not in point and throw little, if any, light upon the question here involved.

[3] Lastly, it is contended that the deliveries from San Francisco to the Presidio reservation constitute interstate commerce within the exclusive jurisdiction of the United States and that the state of California may not impede it by this form of taxation. The transactions in question were purely intrastate. There is no force in the contention that a sale and transportation from a point in California without the reservation to the exchange on the reservation is interstate commerce. We are pointed to no federal authority to this effect, and, in reason, none should exist holding that a military reservation under the exclusive legislative authority of the United States is to be considered in the same status as the District of Columbia or Alaska,

or other territory having an autonomous existence. Under the plain holding in the case of Eastern Air Transport, Inc., v. South Carolina Tax Commission, 285 U. S. 147, 52 S. Ct. 340, 76 L. Ed. 673, interstate commerce would not be involved even if the sales were made of gasoline to be used thereafter by persons engaged exclusively in interstate transportation of goods.

The judgment is reversed, with directions to the court below to enter judgment for plaintiff as prayed.

217 Cal. 673

GIN S. CHOW et al. v. CITY OF SANTA BARBARA et al.

L. A. 12834.

Supreme Court of California.

April 3, 1933.

Rehearing Denied May 1, 1933.

1. Appeal and error ⇐907(3).

On appeal on judgment roll alone, findings are conclusively presumed to be supported by evidence.

2. Appeal and error ⇐907(3).

On appeal on judgment roll alone, findings are to receive, if possible, such construction as will uphold rather than defeat judgment thereon.

3. Appeal and error ⇐907(3).

On appeal on judgment roll alone, findings are to be liberally construed and, if possible, any ambiguity or inconsistency will be resolved in favor of sustaining judgment.

4. Appeal and error ⇐907(3).

On appeal on judgment roll alone, judgment will be reversed only on some fatal error appearing on face of judgment roll.

5. Appeal and error ⇐907(3).

On appeal on judgment roll alone, every presumption and intendment is resolved in favor of regularity of proceedings in trial court.

6. Trial ⇐404(1).

Finding capable of two reasonable constructions must be interpreted according to one that sustains judgment.

7. Appeal and error ⇐907(3).

On appeal on judgment roll alone, without transcript of evidence, presumption exists that facts found not within formal issues were supported by evidence introduced.

8. Waters and water courses ⇐130.

City and water district *held* entitled to appropriate extraordinary storm and flood waters not part of usual, ordinary, and customary flow of stream, and not useful or beneficial to riparian lands, and divert such waters to nonriparian lands and beyond watershed without consent of, or compensation to, riparian owners.

9. Waters and water courses ⇐34.

Common law of England relating to riparian rights is applicable in California, except in so far as repugnant to or inconsistent with constitutional or statutory provisions (Pol. Code, § 4468).

10. Waters and water courses ⇐42.

As between riparian proprietor on stream and appropriator of water, right of former to use of water is limited to use of such amount of water as can be put to reasonable and beneficial use (Const. art. 14, § 3, amended in 1928).

> Const. art. 14, § 3, amended in 1928, provides in part that the right to water or to the use or flow of water in or from any natural stream or water course shall be limited to such water as shall be reasonably required for the beneficial use to be served and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water.

11. Waters and water courses ⇐128.

Constitutional provision relating to conservation of water resources of state and requiring waters to be put to beneficial use *held* legitimate exercise of police power (Const. art. 14, § 3, amended in 1928).

12. Constitutional law ⇐81.

"Police power" is attribute of sovereignty and is founded on duty of state to protect its citizens and provide for safety, good order, and well-being of society.

[Ed. Note.—For other definitions of "Police Power," see Words and Phrases.]

13. Constitutional law ⇐81.

Exercise of police power extends to matters of "general welfare" which embraces regulations to promote economic welfare, public convenience, and general prosperity of community.

[Ed. Note.—For other definitions of "General Welfare," see Words and Phrases.]

14. Constitutional law ⇐81.

All property is held subject to reasonable exercise of police power.

15. Eminent domain ⇐2(10).

Permitting appropriation of flood waters of stream, not part of usual and customary flow and not put to reasonable beneficial use by riparian proprietors, *held* not to constitute taking of property of riparian proprietors for public use without compensation

(Const. art. 1, § 14; art. 14, § 3, amended in 1928).

16. Constitutional law ⇐278(1).

Permitting appropriation, under constitutional provision, of flood waters of stream, not part of usual and customary flow and not put to reasonable and beneficial use by riparian proprietors, *held* not to deprive riparian proprietors of property without due process of law (Const. art. 14, § 3, amended in 1928; Const. U. S. Amend. 14).

17. Constitutional law ⇐67.

What constitutes reasonable, beneficial use, or unreasonable use of water is judicial question depending on facts in particular case (Const. art. 14, § 3, amended in 1928).

18. Statutes ⇐47.

Constitutional provision requiring water resources of state to be put to beneficial use and that waste or unreasonable use or unreasonable method of use of water be prevented *held* not too uncertain to be effective, though not stating facts which would constitute reasonableness or unreasonableness (Const. art. 14, § 3, amended in 1928).

19. Waters and water courses ⇐152(13).

Requiring each party to action, equitable in nature, involving water rights, to bear his, her, or its costs, *held* not abuse of discretion (Code Civ. Proc. § 1025).

PRESTON, J., dissenting.

In Bank.

Appeal from Superior Court, Santa Barbara County; Frank C. Collier, Judge.

Action by Gin S. Chow and others against the City of Santa Barbara and another. From the judgment rendered, the plaintiffs appeal.

Affirmed.

Rehearing denied; PRESTON, J., dissenting.

James F. Peck, of San Francisco, and Charles F. Blackstock, of Oxnard (Elizabeth M. Maxwell, of San Francisco, of counsel), for appellants.

Heaney, Price & Postel, of Santa Barbara, W. G. Irving, of Riverside, and J. F. Goux, City Atty., of Santa Barbara, for respondents.

SHENK, Justice.

This is an appeal by the plaintiffs from a judgment declaring the rights of the respective parties in and to waters of Santa Ynez river and denying the application of the plaintiffs for an injunction.

The Santa Ynez river is an innavigable stream having its source on the northerly and westerly slopes of the Santa Ynez and San Rafael Mountains in Santa Barbara county, and flows in a general westerly direction for a distance of about 100 miles to the Pacific Ocean.

The plaintiffs are the owners of lands within the bed and bordering upon the Santa Ynez river and its tributaries. The defendants are the city of Santa Barbara, a municipal corporation, and the Montecito County Water District. The lands of the respective defendants are contiguous and are situate on the coastal or southerly slope of the Santa Ynez Mountains, that is, over the divide and away from the watershed of the Santa Ynez river.

In the year 1877, when the population of the territory within the present boundaries of the defendants was about 2,000 people, the surface supply of water on the coastal slope of said mountains was exhausted and consistent efforts were made thereafter to secure a sufficient supply of water to meet the public needs of this area, which is constantly increasing in population. The Santa Ynez watershed affords the only available and adequate supply for this area.

In April, 1904, the city of Santa Barbara acquired what is known as the Gibralter Dam site, across the Santa Ynez river; also rights of way in the Santa Ynez Mountains for the purpose of constructing a tunnel, called the Mission tunnel, which would connect the reservoir created by the proposed dam with the water distributing system of the city. In October, 1904, the city caused a notice of appropriation to be posted on the banks of the Santa Ynez river, whereby it claimed the right to appropriate, divert and take 250,000 miner's inches of water measured under a 4-inch pressure, the same to be applied in supplying the area in and near said city and the inhabitants thereof with water. This notice was duly recorded. Thereafter the Mission tunnel was bored and was completed in 1911. The Gibralter Dam was completed in 1920 and during each year thereafter and until the commencement of this action (August 6, 1928), water has been impounded in said dam, diverted therefrom and devoted to a public use within the limits of the city to the maximum annual amount of 4,189 acre feet. The maximum capacity of the Gibralter Dam is 15,374 acre feet.

In its effort to obtain an adequate water supply the city of Santa Barbara also acquired the Juncal Dam site which is situate in the Santa Ynez river channel upstream and above the Gibralter Dam.

The defendant water district was organized in 1921 for the purpose of acquiring water rights and constructing works to increase the water supply necessary to be furnished to lands within the district and to the inhabitants thereof. An agreement was entered into between the city and district whereby the

city agreed to convey the Juncal Dam site to the district, together with the right to the waters appurtenant thereto or which might be impounded thereby. It had been the intention of the city to impound waters of said river by a dam to be built at the Juncal Dam site, the same being a part of the plan contemplated by the city at the time of posting and recording the notice of appropriation in 1904. The city agreed to convey to the water district a part of its appropriation right. In reliance upon this agreement the water district, in 1924, began the construction of a tunnel, known as the Doulton tunnel, through the Santa Ynez Mountain range, from a point in the southerly slope thereof in Toro Canyon to a point on the river downstream and west from the Juncal Dam site. This tunnel was completed in April, 1928. The charter of the city of Santa Barbara, adopted in 1927, authorized the city to convey its real estate, water, and water rights and privileges in connection therewith, but only upon the approval of the grant by the electors of the city. On March 20, 1928, at an election held in the city for that purpose, the officers of the city were authorized to execute a deed to the water district conveying the rights agreed to be conveyed in 1924. This deed was executed and delivered to the district on March 26, 1928. Thereafter the district began the construction of the Juncal Dam on said dam site, and it is the intention of the district to impound by means of said dam and to divert by means of the Doulton tunnel 2,000 acre feet of water per annum for the necessary uses and purposes of the district. The conveyance from the city to the district we hold sufficient as between the parties for the purposes intended thereby.

The drainage area of the Santa Ynez river and its tributaries is approximately 900 square miles, of which 219 square miles are above the Gibralter Dam, and 576 square miles of which lie between Gibralter Dam and Robinson's bridge, which bridge is below Gibralter Dam and 13 miles easterly from the mouth of the Santa Ynez river. The tributaries of the river are four creeks entering it above Gibralter Dam and nine creeks entering it at distances from 14 miles to 50 miles above the ocean. The average annual run-off of all of the waters of the drainage area of the river above Gibralter Dam is 55,000 acre feet, and the average annual run-off of the entire drainage area above Robinson's bridge is between 150,000 and 200,000 acre feet.

The lands of the plaintiffs are described in the complaint and are owned by them in common or in severalty. Of these lands 11,784.4 acres border upon and the waters thereon drain into the Santa Ynez river; 5,548 acres border upon and are drained by the tributaries of the river; 1,954.6 acres are severed from the land bordering upon and draining into the river; and 1,900 acres are drained directly into the Pacific Ocean.

The defendants claim the right as appropriators to impound and divert water from the watershed of the Santa Ynez river at points at or above the Gibralter Dam, to the capacity of said dam by the city, and to the extent of 2,000 acre feet per annum by the district.

The plaintiffs brought this action to have it decreed that the defendants have no right to impound or divert, above the lands of the plaintiffs, any of the waters of the Santa Ynez river or its tributaries or to intercept percolating waters moving through the body of said mountains to said river; to have it decreed that the plaintiffs are entitled, as against the defendants, to have all the waters of the river and its tributaries, and all water percolating through the mountains into the river, flow through and by their lands as such waters have been wont to flow in the course of nature, without interruption, interception, or interference by the defendants; that the defendants be enjoined from diverting or impounding any of the waters of said river or its tributaries, and be enjoined from intercepting any of the percolating water on its course to said river.

The issues were joined and after trial the court made extensive findings generally in favor of the defendants and from conclusions of law drawn therefrom entered the judgment from which this appeal is taken.

[1-7] The appeal is taken on the judgment roll alone. On such an appeal the power of the reviewing court is necessarily restricted. In such case "the findings are conclusively presumed to be supported by the evidence; furthermore, it is also elementary that they are to receive, if possible, such a construction as will uphold rather than defeat the judgment thereon; they are to be liberally construed and, if possible, any ambiguity or inconsistency will be resolved in favor of sustaining the judgment." Ochoa v. McCush, 213 Cal. 426, 430, 2 P.(2d) 357, 359; 2 Cal. Jur. pp. 690 et seq. The judgment may be reversed only upon some fatal error appearing on the face of the judgment roll. Miller & Lux v. Enterprise Canal, etc., Co., 145 Cal. 652, 79 P. 439. On an appeal on the judgment roll alone every presumption and intendment is resolved in favor of the regularity of the proceedings in the trial court. Johnston v. Callahan, 146 Cal. 212, 79 P. 870. A finding capable of two reasonable constructions must be interpreted according to the one that sustains the judgment, and a finding must be given such a construction, if a reasonable one, as will support the judgment. E. W. McLellan Co. v. East San Mateo L. Co., 166 Cal. 736, 137 P. 1145. In the absence, as here, of the transcript of the evidence, it will be presumed that facts found not within

the formal issues were supported by evidence introduced by the parties under stipulation or without objection. Hoover v. Lester, 16 Cal. App. 151, 116 P. 382.

With the foregoing rules in mind we proceed to examine the findings, conclusions of law, and the judgment, and the attack the plaintiffs make upon them.

The facts as above related are found by the court and are not called into question. The court made additional findings, hereinafter set forth, many of which are unchallenged and such as are questioned will be discussed.

The right of the city to continue to impound and devote to a public use 4,189-acre feet of water is not questioned in this action.

In further describing the location and nature of the watershed and the character and habits of the river and the rainfall and run-off in its drainage area, the court found that all the water captured by percolation as the result of the construction of the Mission and the Doulton tunnels did not and never could, in a state of nature, percolate into or become a part of the flow of the Santa Ynez river. It also found that the average annual precipitation in said region is 15.81 inches; that approximately 90 per cent. of the total seasonal run-off in the watershed occurs during the months of December, January, February, March, and April; that none of the lands of the plaintiffs are overflowed by the waters of said river, except some portions thereof near the mouth of the river and except also certain portions thereof within the flood channel of the river; that the flood channel of the river is from 15 to 50 feet in depth with uniformly precipitous sides or banks; that from April to November the quantity of water flowing in said river is confined to a limited area of the channel; that the flow of said river is erratic and variable and is directly dependent on the occurrence and the intensity of rainstorms which occur almost entirely during the winter months and which almost invariably occur simultaneously at all points in and around the drainage basin of the river; that during and for a few days after the occurrence of such rainstorms torrential floods are produced which sweep down the flood channel of the river seaward in increasing volume; that less than one-third of the flood and other water of the river originates on the drainage area above the Gibralter Dam and more than two-thirds thereof in the remaining area below said dam; that these torrential floods are confined to the flood channel of the river and sweep down the entire channel of the river with increasing volume, occasionally carrying trees and brush, silt and sand and other material and above said dam on widely separated occasions have moved rocks and boulders; that the most part of said flood waters is discharged into the sea and is lost to all beneficial and useful purposes; that the heavy rainstorms and consequent freshets and torrential floods described "are not of regular, anticipated or annual occurrence, and intervals of two years and more at times occur between said storms. Such freshets and torrential floods are in excess of the regularly recurring and of the usual, ordinary and customary flow of said river; that * * * the usual, ordinary and customary flow of said river, while varying in amount from day to day and from year to year, consists of such waters as flow therein independently of and not as a result of the heavy rainstorms and torrential floods in this finding described"; that the water intended to be impounded diverted, and used by the defendants "is not and cannot be of any use or benefit to, or capable of being put to any beneficial use or purpose by the plaintiffs, or any of them, on their respective riparian lands"; that when all of the lands bordering upon said river and its tributaries and riparian thereto, susceptible of irrigation, and all of the lands overlying said basin are irrigated and when all of the water impounded and diverted and intended to be impounded and diverted by the defendants, has been so impounded and diverted, an average annual quantity of water equal to 121,000 acre feet will then be discharged into the sea and lost for any beneficial or useful purpose; that the defendants "can without injury to the plaintiffs or any of them or to their respective riparian lands, impound the storm, flood and freshet flow of said river * * * sufficient in amount to enable defendants in the aggregate, to divert annually sixteen thousand acre feet, including the 4,189 acre feet of water as to which the defendant city is the owner of the right to divert."

It was further found that "all the water of said river proposed to be hereafter impounded and diverted by the defendants, and each of them, over and above the quantity of water that the defendant City of Santa Barbara has been hereinabove found to have acquired the right to impound and divert, is surplus, storm, flood and freshet water; none of such water is a part of the usual, ordinary and customary flow of said river; none of said storm, flood and freshet water, so proposed to be impounded by defendants, is required to replenish and maintain the underground body of water percolating through and being in said Santa Ynez valley basin, or for any other useful or beneficial purpose, but on the contrary, the supply of water in said basin will be fully maintained and replenished by the flow of said river which is not interfered with by defendants; the impounding and diversion of said storm, flood and freshet water by said defendants in the manner proposed will not diminish in any amount or interfere at all with the usual, ordinary and customary flow of said river; said water, so proposed to be impounded and di-

verted by said defendants, is not of regular occurrence, and is not and cannot be, of any use or benefit to, or capable of being put to any beneficial use or purpose by said plaintiffs, or any of them; nor is the same now, or can the same in the future be, beneficial to the respective riparian lands of said plaintiffs or to any of said lands; said plaintiffs have no right, title or interest in or to the storm, flood and freshet flow of said river proposed to be impounded and diverted by said defendants."

[8] The findings thus far stated are to the effect that the waters to be impounded and taken by the defendants are extraordinary storm waters of the river and not a part of the usual and customary flow of the stream. As such they support the conclusions of law and the judgment on the doctrine of Gallatin v. Corning Irr. Co., 163 Cal. 405, 126 P. 864, 866, Ann. Cas. 1914A, 74, and cases to like effect. In the Gallatin Case Gallatin and others owned lands riparian to Elder creek and South Elder creek. They prayed for an injunction against the defendants therein from diverting the water of South Elder creek so as to prevent the same from flowing down the natural channel thereof and upon the lands of the plaintiffs, who alleged that said waters were necessary for irrigation and that the defendants intended to take a large quantity of water from said creek to nonriparian lands and outside the watershed of the creek. The defendants therein, as have the defendants herein, denied that they intended to take any of the waters of the stream during irrigating season, or any of the "ordinary flow" at any season and alleged that they intended only to take from said creek "the flood waters flowing therein" during the winter months to the extent of 5,000 inches and carry the same to nonriparian lands; that during those months the creek carried flood waters which flowed unobstructed through the lands of the plaintiffs to the Sacramento river; that such flood waters were unnecessary for any beneficial purpose on the lands of the plaintiffs, and that, if the defendants did not take the proposed 5,000 inches, the same would run into the river and serve no useful purpose. The trial court in that case found that the usual and normal flow of the creek "including not only the flow in the dry season, but also the usual normal flood waters in the winter or wet season from rains and melting snows" equaled at least 5,000 inches, but that such quantity did not include the waters that came down the stream in times or seasons of unusual freshets and floods. It appeared that the defendant company intended to construct a headgate which would receive and divert approximately 5,000 inches of the water when the stream rose to the top of the aperture in the headgate, and that the diversion of that quantity of flood waters during said months would in no wise damage the plaintiffs. There was also evidence that at times there was a very heavy volume of water flowing down the creek, but the banks were high enough to confine the water along the whole course, except near the Sacramento river.

The facts in the Gallatin Case are almost identical with the facts in the case at bar, thus far appearing. In affirming the judgment for the defendants this court said: "These facts present the question whether or not flood waters, of the character proposed to be diverted from South Elder creek by the company, may lawfully be taken from the stream for use upon nonriparian lands and outside of the watershed of the stream, without the consent of the riparian owners and without compensating them therefor. In other words, whether the right to have such flood waters flow down the stream in its usual course, under the circumstances here disclosed, is one of the riparian rights attached to lands abutting upon the stream, as parcel thereof, which the owner of such lands may enforce against one who proposes to divert the same to nonriparian lands, where no use is made of such waters on the riparian land and no benefit accrues to riparian land from their passage over the bed of the stream, and no damage is caused to the riparian land from the proposed diversion.

"The question is not entirely new in this state. In Miller v. Bay Cities Water Co., 157 Cal. 256, 27 L. R. A. (N. S.) 772, 107 P. 115, Miller & Lux v. Madera, etc., Co., 155 Cal. 59, 22 L. R. A. (N. S.) 391, 99 P. 502, and Miller & Lux v. Enterprise Co., 145 Cal. 652, 79 P. 439, the question of the right to divert flood waters was considered in cases where the trial court had decided that they formed a part of the regularly recurring flow of the stream during a considerable period of each season, or where it appeared that such flood waters were necessary to supply the gravel strata and artesian basins under the lands of a valley, from which water was obtained to supply the overlying lands. These cases are not parallel to the case at bar. The case of Anaheim, etc., v. Fuller, 150 Cal. 327, 11 L. R. A. (N. S.) 1062, 88 P. 978, is cited by the appellant. It does not decide anything at all concerning flood waters. The portion of the opinion in which such waters are mentioned merely declares the rule that a riparian owner may enjoin a diversion of the ordinary flow without a showing of present damage. This is decided in many other cases, but none of them lays down any rule with respect to riparian rights in flood waters such as those involved here.

"In Edgar v. Stevenson, 70 Cal. 286, 11 P. 704, Heilbron v. Land & Water Co., 80 Cal. 194, 22 P. 62, Modoc, etc., Co. v. Booth, 102 Cal. 151, 36 P. 431, Fifield v. Spring Valley W. W., 130 Cal. 552, 62 P. 1054, and San Joaquin, etc., Co. v. Fresno Flume Co., 158 Cal. 626,

35 L. R. A. (N. S.) 832, 112 P. 182, the court was dealing directly with the question of riparian rights in flood waters. The last-named case is the latest statement by this court upon the subject. It appears to be direct authority for the contention of the defendants. * * *

"These decisions, in effect, establish the just rule that flood waters which are of no substantial benefit to the riparian owner or to his land, and are not used by him, may be taken at will by any person who can lawfully gain access to the stream, and conducted to lands not riparian, and even beyond the watershed, without the consent of the riparian owner and without compensation to him. They are not a part of the flow of the stream which constitutes 'parcel' of his land, within the meaning of the law of riparian rights.

"This rule does not conflict with the decisions in the Bay Cities and Miller & Lux Cases first above cited. In those cases the water in question, although in a sense high water, or flood water, was nevertheless a part of the regular and usual flow of the stream for a considerable part of each year and at a time when such flow was of substantial use and benefit to the riparian lands, or the flow of such waters in their accustomed place was necessary to the gathering of water in subterranean strata from which the owners of overlying land were entitled to take it. The decisions were based on these facts, neither of which exists here, according to the findings."

The foregoing excerpt adequately distinguishes the case of Miller v. Bay Cities Water Co., 157 Cal. 256, 107 P. 115, 27 L. R. A. (N. S.) 772, and Miller & Lux v. Madera, etc., Co., 155 Cal. 59, 99 P. 502, 22 L. R. A. (N. S.) 391, so earnestly relied upon by the plaintiffs herein and holds the doctrine of the Gallatin Case not inconsistent with the holding in those cases. The same characteristics distinguish the other cases relied upon by the plaintiffs on this branch of the present case.

In this connection the case of Hilbert v. City of Vallejo, 19 F.(2d) 510, 511, is instructive and in its essentials, directly in point. That case was decided in May, 1927, by the Circuit Court of Appeals for the Ninth Circuit, and the opinion was written by Judge Hunt. It involved an appeal from an order of the District Court of the United States denying an injunction pendente lite. The plaintiff therein was the owner of a large tract of land riparian to Suisun creek, which rises in Gordon and Wooden Valleys in Napa county. Suisun creek is a natural stream with well-defined channels and banks. It has a considerable fall from its upper portions and empties into Suisun Bay. The city of Vallejo chose a dam site in Gordon Valley and had constructed a dam of sufficient size to impound all of the waters of Gordon creek, intending to store in the reservoir behind the dam 10,000 acre feet of water, if that quantity was available from storm waters, and to divert therefrom 5,058 acre feet of water annually. The evidence on behalf of the plaintiff tended to show that upon rainfall of any consequence on the watershed, greater increased flow would occur for a short period of time, but that thereafter the stream would either stop flowing entirely or would flow in very small quantities; that it was uncertain when rainfall might occur, but that the heavy flow and then a recession would probably occur at least twice every winter or spring, and frequently during each winter and spring; that the usual and the ordinary flow of the stream is not only the few second feet which flow therein during times when rainfall is not occurring on the watershed, but includes the greater flow thereof, as well as the lower flow. On behalf of the defendants it appeared that the watershed lacked heavy snowfalls but was very steep and mountainous, and that below the dam Gordon Valley creek runs through a narrow and precipitous canyon; that the rainfall occurs between December and April, and that within the watershed at irregular times there were unusual rainstorms, at which times the waters of the creek rose rapidly within a few hours, and became flood and freshet waters, and flowed down the creek with great velocity into Suisun Bay where they were lost; that when the rainstorms ceased the waters fell, and within two to six hours disappeared into the bay; that such flood and freshet waters continued only during such rainstorms, but that when the storms ceased the waters returned to their normal, usual, and ordinary flow; that the usual and normal flow as thus defined did not exceed three second feet from December to April; that the defendants had constructed a by-pass at the dam so that from two to twenty second feet could be let down, as might be deemed to be the usual and ordinary flow; that it was not the intention of the city, nor will it be, to impound any of the usual and ordinary flow of the stream; and that no damage would result by the impounding and diverting of said waters by the city. The District Court found in accordance with the showing made by the defendants. After relating in substance the foregoing facts the court said: "The established doctrine of the California decisions is that the right to the flow of water is annexed to the soil, not as an easement or appurtenance but as a parcel (Miller & Lux v. Madera Canal Co., 155 Cal. 59, 99 P. 502, 22 L. R. A. [N. S.] 391), and that the rights of a riparian proprietor are not limited to a body of water which flows in the stream at the period of greater scarcity, but include the ordinary and usual flow of the stream (Herminghaus v. Southern California Edison Co., 200 Cal. 81, 252 P. 607). But, as has often happened before in California, in cases where riparian rights have been asserted, the con-

troversy resolves itself into ascertaining what constitutes the usual and ordinary flow of the stream to which the lands are riparian.

"Appellant's position is that under the evidence the admitted greatly increased flow of Gordon valley creek, though only occurring at times, is not less usual or ordinary than the much-diminished flow which comes after the rains and melting snows have run off, while the city contends that the waters which flow down during and soon after the unusual rainstorms are in excess of the ordinary and usual flow, are of no substantial benefit to appellant or her lands, and therefore may be taken without her consent and without compensation.

"It being appropriate that we should conform our views to the decisions of the highest court of the state, we must give attention to Gallatin et al. v. Corning Irrigation Co. (1912) 163 Cal. 405, 126 P. 864, Ann. Cas. 1914A, 74, where the situation was quite like that in the case at bar." The pertinent facts in the Gallatin Case are then stated and the court continued: "The court, through Justice Shaw, met the question whether or not 'flood waters' of the creek proposed to be diverted could lawfully be taken from the stream for use upon nonriparian lands, and outside of the watershed of the stream, without consent of the riparian owners, and without compensating them therefor. 'In other words,' said the learned justice, 'whether the right to have such flood waters flow down the stream in its usual course, under the circumstances here disclosed, is one of the riparian rights attached to lands abutting upon the stream, as parcel thereof, which the owner of such lands may enforce against one who proposes to divert the same to nonriparian lands, where no use is made of such waters on the riparian land and no benefit accrues to riparian land from their passage over the bed of the stream, and no damage is caused to the riparian land from the proposed diversion.' Many earlier decisions were cited, including San Joaquin, etc., Co. v. Fresno Flume Co., 158 Cal. 626, 112 P. 182, 35 L. R. A. (N. S.) 832 and Fifield v. Spring Valley Water Works, 130 Cal. 552, 62 P. 1054, as establishing the rule that flood waters which are of no substantial benefit to the riparian owner or to his land, and are not used by him, 'may be taken at will by any person who can lawfully gain access to the stream, and conduct it to lands not riparian, and even beyond the watershed, without the consent of the riparian owner and without compensation to him.' The court said: 'They are not a part of the flow of the stream, which constitutes "parcel" of his land, within the meaning of the law of riparian rights.' There can be no misunderstanding of this language. It has clearly defined the rights of a riparian proprietor in excess waters like those in the present case, and in Horst v. New Blue Point Min. Co. (1918) 177 Cal. 631, 171 P. 417, the court, after quoting the language we have quoted from the Gallatin Case, went further and held that injunction will not be granted to restrain the diversion of water by a nonriparian proprietor at the instance of a lower riparian owner, when the amount diverted would not be used by the latter, but would greatly benefit the person diverting it.

"Plaintiff, evidently appreciating the applicability of the doctrine of the decisions cited, argues that those cases have been overruled by Lindblom v. Round Valley Water Co. (1918) 178 Cal. 450, 173 P. 994, and Herminghaus v. Southern California Edison Co. (1926), supra. The Round Valley Case has little pertinence. * * *

"In Herminghaus v. Southern California Edison Co., supra, the question involved rights to waters of the San Joaquin river, found by the court to be a natural stream, with well-defined channels and banks, which, with its tributaries, rises in the Sierra Nevada mountains, and which, in its natural flow of water, varies in the course of each and every year according to the seasons and annually recurring accretions which occur in their usual, expected, and accustomed seasons each year. Upon such findings the court held the conclusion to be inevitable that the waters of the river annually flowing therein before, during, and after the regularly recurring accretions in the volume thereof, constituted 'the usual and ordinary flow of said river, and are in no sense "storm" or "flood" or "vagrant" or "enemy" waters, as these terms are understood in law.' Earlier California decisions were referred to as fortifying the conclusion that the lands of the plaintiff were riparian to the San Joaquin river, entitled to the enjoyment of such riparian rights as they might be determined to be invested with in the entire flow of the waters of the river, 'considering the same with its seasonal accretions as the usual and ordinary flow of said stream during each and every year.'

"The case is readily distinguished from Gallatin v. Corning Irrigation Co., supra, in that in the Gallatin Case the court found that waters such as flow down Suisun creek and its tributaries, and which defendant herein claims a right to take, were flood or excess waters, whereas in the Herminghaus Case the waters of San Joaquin river were expressly found not to be flood waters, and for that reason were not subject to the rules applicable to flood waters. This distinction is so evident that the court in the Herminghaus Case made no reference whatever to Gallatin v. Corning Irrigation Co., supra. In one important respect, however, the Herminghaus Case has a bearing, namely, in the discussion recognizing the fundamental rule of Modoc Land & Live Stock Co. v. Booth, 102 Cal. 151, 36 P. 431, that a riparian owner should not be permitted to demand as of right the

intervention of a court of equity to restrain all persons who are not riparian owners from diverting any water from the stream at points above him simply because he wishes to see the stream flow by or through his lands undiminished and unobstructed. Weil on Water Rights, pp. 880, 881."

In the present case as a part of the findings, there is a recital of a disclaimer on the part of the defendants announced by counsel for the defendants prior to their argument in the trial court to the effect that "the defendants disclaim any intention to take or impound the ordinary and usual flow of the Santa Ynez River by means of the Gibralter Dam," and "that said defendants do intend to impound by means of said Gibralter Dam and reservoir * * * the flow of said river which occurs during or immediately after rain storms and which are in excess of the ordinary and usual flow of said river." The court found in accordance with the disclaimer, and as hereinbefore indicated, found that the usual, ordinary, and customary flow of the river consists of such waters as flow therein independently of and not as a result of heavy rainstorms; that such heavy rainstorms and consequent freshets and torrential floods are not of regular, anticipated, or usual occurrence and intervals of two years and more at times occur between said storms.

In order to safeguard at all events the usual, ordinary, and customary flow of the stream to which the plaintiffs are found to be entitled, the court directed that the defendant city shall, during the summer and fall months in each year, and until the ensuing rainy season, release and discharge from the Gibralter Dam, into the stream channel of the river below said dam and reservoir, waters in excess of the waters flowing into said reservoir during said period, to the extent of 616 acre feet; and that the defendants shall make and maintain such adequate and efficient provision, in connection with their dams and reservoirs, as will permit the usual, ordinary, and customary flow of the river to be discharged into the stream bed of the river below the Gibralter Dam. Provision is then made for measuring the stream flow at the dam with the right on the part of the plaintiffs, or their representatives, to inspect the measuring devices and the operation thereof and the records obtained therefrom during all business days and every business hour. These provisions were carried into the judgment.

From the foregoing provisions for the protection of, and for releasing, the usual, ordinary, and customary flow of the stream for the benefit of the plaintiffs, it is further apparent, in connection with the findings as a whole, that the trial court concluded that the evidence in the case brought it within the doctrine of the Gallatin and Hilbert Cases above referred to, wherein provision had been made to like effect for safeguarding and releasing the ordinary flow of the stream in recognition of the rights of riparian owners.

Thus far, on the findings above recited and quoted, the conclusions of law and judgment are supported on the doctrine of the Gallatin Case. We pass now to a consideration of the facts as reflected in further findings of the court, which are claimed by the plaintiffs to be in their favor and to require a reversal of the judgment; also to a consideration of the law applicable thereto.

The plaintiffs insist that the doctrine of the Gallatin Case cannot be applied to the present case because of other findings of the court. It was found "that at all times of largest natural flow of said water in said river, and at all times when there is a flow of water in said river, said water seeps underground upon said lands and saturates the sands and gravels lying and being therein." It is argued that since seepage occurs whenever there is any water flowing in the river channel (including extraordinary and excess as well as ordinary flow), the riparian owner is entitled to such seepage as inherent in his riparian right, and being so inherent it must be deemed of some benefit to the riparian land, however little may be that benefit, and as such is a property right which may not be taken from him without compensation. It is asserted that the impairment of the riparian estate to any degree whatever by nonriparian use is wrongful, and that in the very nature of things "no possible detriment" can be predicated only where there is "no possible benefit" from the flood. But the court also found that such seepage has no effect upon the growing of grass or crops on the lands of the plaintiffs outside of the river channel; that none of the storm, flood, and freshet waters proposed to be impounded by the defendants is required to replenish and maintain the underground body of water percolating through and being in the Santa Ynez river basin or for any other useful or beneficial purpose, but on the contrary, the supply of water in said basin will be fully maintained and replenished by the flow of the river, which is not interfered with by the defendants. These findings of the ultimate facts are fortified by the specific findings as to the formation of the river channel and the flow of waters therein and that the 18,000 acre feet proposed to be taken by the defendants are but a part (in fact less than one-third) of the 55,000 acre feet constituting the average annual run-off of the watershed above Gibralter Dam; that the total average annual run-off is from 150,000 to 200,000 acre feet, and that after the defendants have taken all of the water which they propose to take there will be discharged into the sea

and be lost for any useful or beneficial purpose an annual quantity of at least 121,000 acre feet.

With reference to lands of the plaintiffs which are overflowed by the waters of the river, the court found that certain lands lie within the flood channel of the river; that the river is and for years past has been a degrading stream; that within the flood channel there is a secondary or low-water channel which meanders from side to side through and within the flood channel and which changes its course from time to time following flood flows in the river; that in some places within the flood channel but above the low-water channel, certain accretions called "montes" have occurred, which consist of sand, gravel, silt, vegetable matter, and other detritus; that these "montes" vary in location and extent depending upon the shifting of the course of the flood; that during floods some of them are eroded and carried away and others are elsewhere created within the flood channel; that their total area at the time of trial was approximately 500 acres, and varied in size from 3 to 75 acres; that no more than 125 acres of these "montes" have been cultivated; that the quality of their soil is variable but generally fertile; and that some of the remainder is susceptible of being cleared and cultivated, the balance being infertile and valueless for agricultural purposes. The plaintiffs claim that there is thus a showing of some benefit to said "montes." But the court found that the impounding and diversion now taking place and contemplated by the defendants will not diminish the flow of said river over said "montes" to such an extent as will prevent the necessary periodical irrigation and saturation of said "montes" and other lands lying within the flood channel of the river; that the underground basin of the Santa Ynez river contains therein, or there is percolating therethrough, water more than sufficient to irrigate all of the lands riparian to said river and its tributaries, susceptible of irrigation, and, in addition thereto, all of the lands overlying said basin; that when all of said lands are irrigated said basin will be periodically replenished by the flow of said river having its source in the watershed below the Gibralter Dam.

It was also found that some of the plaintiffs have, during the summer months, pumped water from the bed of the river for domestic and irrigation uses. These uses are asserted to be riparian and beneficial to the plaintiffs' lands. That such uses are riparian is not disputed; but in this connection the court found that the waters remaining and flowing in said stream after the impounding, storage, and diversion of waters heretofore or intended "will be more than sufficient to replenish and maintain such underground waters." It was also found that "the part of the waters remaining and flowing in said river after the impounding, storage and diversion by defendants of the waters of said stream which they have heretofore impounded, stored and diverted, and which they intend hereafter to impound, store and divert as herein found, will be in excess of the amount of waters that is or could be put to any use beneficial to any of said lands of the plaintiffs herein. The waters of the Santa Ynez river originating below Gibralter dam are and will be more than sufficient in amount to serve all the beneficial uses and purposes of the plaintiffs on their respective riparian lands"; that "no water whatever is devoted or used from said river by any plaintiff on his lands, or can be applied for any beneficial purpose on any of the lands of the plaintiffs, or any of them, when the river is in flood."

The plaintiffs insist that notwithstanding the findings which would bring the case within the doctrine of the Gallatin Case, the further findings to the effect that seepage to some extent occurs into the sands and soils of the plaintiffs' riparian lands at times when the river is in flood, that the "montes" in the bed of the stream are overflowed whenever any flood waters flow in the stream, and that some waters are pumped from the bed of the stream in the summer season, entitle the plaintiffs to the full flow of the stream at all times, undiminished by any diversion by the defendants. It is insisted that however small the invasion of the riparian right may be and however slight the benefit may be to the riparian owner, still it must be presumed, as a matter of law, that damage to his lands has resulted entitling him to an injunction. It is to be remembered that the court has found that the waters taken and to be taken by the defendants would be of no benefit whatever to the plaintiffs' riparian lands, if the same were not taken, and that no injury whatever will accrue to said lands by reason of said taking.

[9] It is contended that the plaintiffs are entitled to the protection, by injunction, of the unsubstantial and technical right which they assert under the common law of England as adopted as a rule of decision in this state in 1850 (Pol. Code, § 4468), and the application of the law of riparian rights then existing in England to conditions in this state. The Code section reads: "The common law of England, so far as it is not repugnant to or inconsistent with the Constitution of the United States, or the Constitution or laws of this state, is the rule of decision in all the courts of this state." This language is general in its terms. It does not mention the law of riparian rights, but has been held to include it by necessary implication. The English law of riparian rights was applied in this state in 1886 in Lux v. Haggin, 69 Cal. 255, at page 390, 4 P. 919, 10 P. 674, 753,

wherein it was declared: "By the common law the right of the riparian proprietor to the flow of the stream is inseparably annexed to the soil, and passes with it, not as an easement or appurtenance, but as part and parcel of it. Use does not create the right, and disuse cannot destroy or suspend it. The right in each extends to the natural and usual flow of all the water, unless where the quantity has been diminished as a consequence of the reasonable application of it by other riparian owners" for proper riparian purposes. It was also declared (page 394 of 69 Cal., 10 P. 674, 755) that "by our law the riparian proprietors are entitled to a reasonable use of the waters of the stream" for proper riparian purposes and that "what is such reasonable use is a question of fact, and depends upon the circumstances appearing in each particular case." This doctrine has been affirmed and reaffirmed consistently since the decision in that case. In other words, it is the established law of this state that as between riparian proprietors the right of each as against the other is confined and restricted to the amount of water reasonably necessary for useful and beneficial riparian purposes.

[10] It is the contention of the plaintiffs that it always has been and is now the law of this state that as between a riparian proprietor and an appropriator, the doctrine of reasonable use has no application. The plaintiffs are fortified in their position by numerous court decisions in this state. Particular reliance is placed on the cases of Miller & Lux v. Madera Canal, etc., Co., 155 Cal. 59, 99 P. 502, 22 L. R. A. (N. S.) 391, Miller v. Bay Cities Water Company, 157 Cal. 256, 107 P. 115, 27 L. R. A. (N. S.) 772, and Herminghaus v. Southern California Edison Company, 200 Cal. 81, 252 P. 607. There can be no question but that this court since Lux v. Haggin, by numerous decisions, including those particularly relied upon by the plaintiffs, has adhered to the general rule that in a controversy between a riparian owner and an appropriator the doctrine of reasonable use does not apply. Perhaps the most forceful language used by the court in any of the decisions is contained in Miller & Lux v. Madera Canal, etc., Co., supra. That case involved an appeal from an order granting a temporary injunction on behalf of a lower riparian owner against an upper appropriator. It was held that the trial court had not abused its discretion in granting the temporary injunction on a showing that the use enjoined pending a hearing on the merits was against an interference with the usual and ordinary flow of the Fresno river, and that the question of the diversion of an upper appropriator of the unusual and extraordinary flood which could not appreciably affect or substantially injure the riparian rights of the plaintiff, and the application of the doctrine of Modoc Land Co. v. Booth, 102 Cal. 151, 36 P. 431, and Fifield v. Spring Valley Water Works, 130 Cal. 552, 62 P. 1054, was not involved in the case. At pages 64 and 65 of 155 Cal., 99 P. 502, 511, the court said: "The doctrine that a riparian owner is limited to a reasonable use of the water applies only as between different riparian proprietors. As against an appropriator who seeks to divert water to nonriparian lands, the riparian owner is entitled to restrain any diversion which will deprive him of the customary flow of water which is or may be beneficial to his land. He is not limited by any measure of reasonableness. If any doubt ever existed on this point, none can remain since the recent decision of this court in Anaheim Union Water Co. v. Fuller, 150 Cal. 327, 88 P. 978, 11 L. R. A. (N. S.) 1062. * * * Neither a court nor the Legislature has the right to say that because such water may be more beneficially used by others it may be freely taken by them. Public policy is at best a vague and uncertain guide, and no consideration of policy can justify the taking of private property without compensation." This case was followed and applied in Miller v. Bay Cities, supra, to protect the right of a riparian owner to percolating waters as against a diversion beyond the watershed. As indicating that the rule was not as inflexible as now contended by the plaintiffs herein, the court, in the last case referred to, said at page 280 of 157 Cal., 107 P. 115, 125: "There can be no question but that an appropriator of water may divert for use, to any point beyond the watershed any portion of the waters of a stream which can serve no useful purpose either to the riparian owners, or, in the instant case, any waters of the Coyote river which might serve no such purposes in supplying the underground stratum of plaintiff, or which are in excess of the quantity necessary for that purpose. Fifield v. Spring Valley Water Works, 130 Cal. 552, 62 P. 1054." The concurring opinion of Mr. Justice Shaw in that case will be later referred to.

In the Herminghaus Case this court affirmed an order granting an injunction against an upper appropriator upon a finding supported by the evidence that the waters sought to be diverted were a part of the usual and customary flow of the stream and when allowed to flow in their natural way were and would be beneficial to the plaintiffs. As very pertinently noted by the United States Circuit Court of Appeals in Hilbert v. City of Vallejo, supra, the Herminghaus Case did not mention, nor overrule the Gallatin Case. This was so for the obvious reason that the factual situation was not the same. This court, in the Herminghaus Case, reviewed extensively the water law of this state applicable to the facts found by the trial court. In doing so it quoted the foregoing language of Miller & Lux v. Madera Canal, etc., Co., supra, which

contains the statement that "neither a court nor the Legislature has the right to say that because such water may be more beneficially used by others it may be freely taken by them," and that "public policy is at best a vague and uncertain guide." The question of public policy in behalf of a more liberal rule with respect to the appropriation of waters in this state was urged upon the court in Lux v. Haggin, where it was said at page 307 of 69 Cal., 10 P. 674, 702: "A 'public policy' has been appealed to which has not found its expression in the statutes of the state. * * * But the policy of the state is not created by the judicial department, although the judicial department may be called upon at times to declare it. It can be ascertained only by reference to the constitution and laws passed under it, or (which is the same thing) to the principles underlying and recognized by the constitution and laws." Following that case this court has consistently adhered to the doctrine there laid down, and has refused to declare a policy in favor of a reasonable use as between a riparian owner and an appropriator.

In 1913, the Legislature sought to avoid the rule adhered to by this court, by adopting the Water Commission Act (St. 1913, p. 1012), and incorporating therein section 11, which provided that stream waters of the state not theretofore put to a useful and beneficial purpose or reasonably needed for a useful or a beneficial purpose should be deemed public waters of the state and subject to appropriation under its laws; and section 42, which sought to place a limit to the amount of water which should be deemed, per acre, a useful and beneficial use. Under another section of the act (section 15), the state water commission was vested with power to declare what waters in this state were unappropriated. In Tulare Water Co. v. State Water Com., 187 Cal. 533, 202 P. 874, it was held that said section 15 was an unlawful delegation of judicial power to the commission. In the Herminghaus Case, although it was stated that section 11 of the act had no application to the facts in that case, in view of the supported findings of the trial court, it was further declared to be beyond the constitutional power of the Legislature to assume "the right to determine" what are the "useful and beneficial" purposes to which private property—the riparian right—might be put. The right thus attempted to be interfered with was declared to be a vested right protected by an unbroken line of cases since Lux v. Haggin, establishing a rule of property which it was beyond the power of the legislative department to disturb. As indicating that a judicial question is presented in each case, it was said at page 117 of 200 Cal., 252 P. 607, 622: "The extent to which such riparian landowners need and use and are entitled to have the benefit of the flow and overflow of such waters under their vested riparian rights therein is a matter which depends upon the circumstances of each particular case."

In Fall River Irrigation Dist. v. Mt. Shasta P. Corp., 202 Cal. 56, 259 P. 444, 56 A. L. R. 264 (1927), it was declared that section 11 of the Water Commission Act was an unlawful exercise of legislative power; but this court, through Mr. Justice Preston, very significantly stated, at page 68 of 202 Cal., 259 P. 444, 449: "We are by no means intending to say that riparian rights may not under proper circumstances yield to the police power in the interest of public health, safety, comfort, or welfare," and it was held that the facts in the case did not present a situation where the police power might operate.

We are now confronted with the question whether the law of riparian rights in this state must be modified to conform to a direct and positive constitutional declaration.

Immediately following the decision in the Herminghaus Case (December, 1926), the Legislature in 1927 proposed an amendment to the Constitution by adding a new section known as section 3 of article 14. The amendment was adopted by the electors of the state on November 6, 1928, and reads as follows: "It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water. Riparian rights in a stream or water course attach to, but to no more than so much of the flow thereof as may be required or used consistently with this section, for the purposes for which such lands are, or may be made adaptable, in view of such reasonable and beneficial uses; provided, however, that nothing herein contained shall be construed as depriving any riparian owner of the reasonable use of water of the stream to which his land is riparian under reasonable methods of diversion and use, or of depriving any appropriator of water to which he is lawfully entitled. This section shall be self-executing, and the Legislature may also enact laws in the furtherance of the policy in this section contained."

In submitting the foregoing constitutional amendment to the electors of the state, the argument in support thereof made special

reference to the adoption of the common-law rule in this state in 1850, the interpretation thereof in Lux v. Haggin, and the adherence to the rule by the courts of this state since that decision. The purpose of the amendment was stated to be "to prevent the waste of waters of the state resulting from an interpretation of our law which permits them to flow unused, unrestrained and undiminished to the sea," and is an effort "on the part of the state, in the interest of the people of the stated, to conserve our waters" without interference with the beneficial uses to which such waters may be put by the owners of water rights, including riparian owners. That such purpose is reflected in the language of the amendment is beyond question. Its language is plain and unambiguous. In the main it is an endeavor on the part of the people of the state, through its fundamental law, to conserve a great natural resource, and thereby render available for beneficial use that portion of the waters of our rivers and streams which, under the old riparian doctrine, was of no substantial benefit to the riparian owner and the conservation of which will result in no material injury to his riparian right, and without which conservation such waters would be wasted and forever lost. It was because this court felt impelled to adhere to the long-established rule of Lux v. Haggin, that a constitutional amendment was made necessary. Upon the adoption of the amendment, it superseded all state laws inconsistent therewith. Const. art. 22, § 1; People v. Kerber, 152 Cal. 731, 93 P. 878, 125 Am. St. Rep. 93. The amendment is now the supreme law of the state, which the courts are bound to enforce, and it must be made effectual in all cases and as to all rights not protected by other constitutional guarantees.

[11, 12] It is argued by the plaintiffs that the constitutional amendment is susceptible of the construction that it was not intended to interfere with the operation of section 14 of article 1 of the Constitution, providing that private property shall not be taken or damaged for public use without compensation. There is a well recognized and established distinction between a "taking" or "damaging" for public use and the regulation of the use and enjoyment of a property right for the public benefit. The former falls within the realm of eminent domain, and the latter within the sphere of the police power. That the constitutional amendment now under consideration is a legitimate exercise of the police power of the state cannot be questioned. It is the highest and most solemn expression of the people of the state in behalf of the general welfare. The present and future well-being and prosperity of the state depend upon the conservation of its life-giving waters. In his concurring opinion in Miller v. Bay Cities Water Co., 157 Cal. 256, 287, 107 P. 115, 128, 27 L. R. A. (N. S.) 772, Mr. Justice Shaw made the following appropriate comment on general water conditions in this state: "In many parts of the state, especially in the large interior valleys, practically all the flood waters are waste waters. They contribute little or nothing to the saturation of any subterranean gravel beds which are resorted to for a supply of water for useful purposes. They rush in great volume to the sea, carrying destruction in their path, and overflowing the low lands to the great damage of the owners, serving no useful purpose whatever. If they were stored in reservoirs, they might be made to serve a triple purpose. The extreme floods and consequent overflow and destruction would be prevented; the stored water could be used to irrigate large areas of valley land, now left unproductive for lack of water; if distributed upon the plains, for irrigation, a large portion of these waters would in due course of time find their way, by seepage and percolation, to the channels of the streams, giving an increased and more regular flow in the summer months, increasing the amount available for irrigation in the smaller streams, and bettering the navigation of the large rivers—all of which would add tremendously to the growth, prosperity and wealth of the state, and to its ability to support the large population which its climate and productions attract. The question of the right to store such flood waters, and the terms upon which it can be obtained or exercised, is of the greatest importance to the future welfare of the state." In San Joaquin, etc., Co. v. Fresno Flume Co., 158 Cal. 626, 112 P. 182, 183, 35 L. R. A. (N. S.) 832, this court said: "Economic use of the waters of this state are of the utmost importance to its development and well-being." These observations are self-evident, not only under present conditions, but for all time to come. It requires no extraordinary foresight to envision the great and increasing population of the state and its further agricultural and industrial enterprises dependent upon stored water—water that is now wasted into the sea and lost to any beneficial use. The conservation of other natural resources are of importance, but the conservation of the waters of the state is of transcendent importance. Its waters are the very life blood of its existence. The police power is an attribute of sovereignty and is founded on the duty of the state to protect its citizens and provide for the safety, good order, and well-being of society. It is coextensive with the right of self-preservation in the individual. Ingram v. Colgan, 106 Cal. 113, 38 P. 315, 39 P. 437, 28 L. R. A. 187, 46 Am. St. Rep. 221; 12 Cor. Jur. p. 907.

[13] In its inception the police power was closely concerned with the preservation of the public peace, safety, morals, and health, without specific regard to the general welfare. Under modern conditions it includes the gen-

eral welfare which embraces regulations "to promote the economic welfare, public convenience, and general prosperity of the community." Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 592, 26 S. Ct. 341, 50 L. Ed. 596, 4 Ann. Cas. 1175. It has been applied in this sense in cases too numerous to mention. In its exercise in this state one, Hadacheck, was required, without compensation, to dispense with a long-established, valuable, and lawful business on property owned by him in behalf of the well-being of those acquiring residential property surrounding him without regard to whether his business was a nuisance. Ex parte Hadacheck, 165 Cal. 416, 132 P. 584, L. R. A. 1916B, 1248; Hadacheck v. Sebastian, 239 U. S. 394, 36 S. Ct. 143, 60 L. Ed. 348, Ann. Cas. 1917B, 927. It has been applied within recent years to the regulation of the use of property without compensation in zoning cases. Miller v. Board of Public Works, 195 Cal. 477, 234 P. 381, 38 A. L. R. 1479; Dwyer v. City Council, 200 Cal. 505, 253 P. 932; Village of Euclid v. Ambler Realty Company, 272 U. S. 365, 47 S. Ct. 114, 71 L. Ed. 303, 54 A. L. R. 1016. A statute which prohibited the manufacture of carbon black and other products by the use of natural gas, unless the heat generated thereby was put to some beneficial use, was upheld as a proper exercise of the police power. Walls v. Midland Carbon Co., 254 U. S. 300, 41 S. Ct. 118, 65 L. Ed. 276. A statute making it unlawful for the owner of an oil well to permit the escape of natural gas therefrom was upheld in Ohio Oil Co. v. Indiana, 177 U. S. 190, 20 S. Ct. 576, 44 L. Ed. 729. The Oil and Gas Conservation Act of this state, designed to prevent the unreasonable waste of natural gas, was held to be constitutional in People v. Associated Oil Company, 212 Cal. 76, 297 P. 536. In the exercise of the police power the waste of water from artesian wells has been prohibited in this state. Ex parte Elam, 6 Cal. App. 233, 91 P. 811; see, also, Block v. Hirsh, 256 U. S. 135, 41 S. Ct. 458, 65 L. Ed. 865, 16 A. L. R. 165; Marcus Brown Holding Co. v. Feldman, 256 U. S. 170, 41 S. Ct. 465, 65 L. Ed. 877; Levy Leasing Co. v. Siegel, 258 U. S. 242, 42 S. Ct. 289, 66 L. Ed. 595.

[14] It has been stated by this court on numerous occasions that it is of the utmost importance to the welfare of the state that flood waters which have heretofore been permitted to waste into the sea be made available for beneficial uses and purposes. The people of the state through the Constitution have now pointed the way. As already observed the amendment purports only to regulate the use and enjoyment of a property right for the public benefit, for which reason the vested right theory cannot stand in the way of the operation of the amendment as a police measure. A vested right cannot be asserted against it because of conditions once obtaining. Chicago & Alton R. R. v. Tranbarger, 238 U. S. 67, 78, 35 S. Ct. 678, 59 L. Ed. 1204. It has been long established that all property is held subject to the reasonable exercise of the police power and that constitutional provisions declaring that property shall not be taken without due process of law have no application in such cases. Odd Fellows' Cem. Ass'n v. San Francisco, 140 Cal. 230, 73 P. 987.

[15] The constitutional amendment of 1928 is an exercise of that power. This is especially true as applied to the facts of the present case, which is a controversy between the public, represented by the municipality and the water district, on the one hand, and the property owners asserting a vested interest as against the exercise of the power on behalf of the public, on the other hand.

There is nothing novel about the limitation of the riparian right to a reasonable, beneficial use of water. Other western states which first adopted the common-law doctrine of riparian rights have effectually changed it to meet modern conditions.

Nevada originally adopted it and the early Nevada cases recognized it; but in 1885 it was discarded as unsuited to the conditions in that locality. Jones v. Adams, 19 Nev. 78, 6 P. 442, 3 Am. St. Rep. 788.

Arizona, in 1864, adopted the common-law riparian doctrine. Subsequently the rule was abolished. In Boquillas Land & Cattle Co. v. St. David Co-op. Commercial & Development Ass'n, 11 Ariz. 128, 89 P. 504, it was held that the riparian right was not such a vested right as to be immune from statutory change. The holding was affirmed in Boquillas Cattle Co. v. Curtis, 213 U. S. 339, 29 S. Ct. 493, 53 L. Ed. 822.

In the state of Washington the earlier cases were not in harmony, but whatever confusion existed was set at rest in Brown v. Chase, 125 Wash. 542, 217 P. 23, 26, where the court held, that the "waters of nonnavigable streams in excess of the amount which can be beneficially used, either directly or prospectively, within a reasonable time, * * * are subject to appropriation for use on nonriparian lands." This rule was reaffirmed in Proctor v. Sim, 134 Wash. 606, 236 P. 114, State v. American Fruit Growers, 135 Wash. 156, 237 P. 498, and Hunter Land Co. v. Laugenour, 140 Wash. 558, 250 P. 41.

Oregon in 1909 checked the extension of the old common-law doctrine of riparian rights, recognizing, however, certain rights secured prior to 1877. Hough v. Porter, 51 Or. 318, 95 P. 732, 98 P. 1083, 102 P. 728. Thereafter the Legislature adopted a water code limiting the riparian owner to a reasonable beneficial use. The code was upheld. In re Willow Creek, 74 Or. 592, 144 P. 505, 146 P. 475. Its constitutionality was again affirmed in Re Hood River, 114 Or. 112, 227 P. 1065.

Nebraska has limited the riparian owner to a beneficial use. Crawford v. Hathaway, 67 Neb. 325, 93 N. W. 781, 60 L. R. A. 889, 108 Am. St. Rep. 647.

Texas has adopted the reasonable use theory as affecting the riparian right. Biggs v. Lee (Tex. Civ. App.) 147 S. W. 709.

The Supreme Court of the United States has applied the doctrine of reasonable use as between states (Kansas v. Colorado, 206 U. S. 46, 27 S. Ct. 655, 51 L. Ed. 956), where "perceptible" injury resulted to riparian owners.

[16] Additional cases from other jurisdictions might be cited. A general survey of them discloses that whenever the riparian right has been deemed a vested right, such right has become defined to be, or limited to, the right of the riparian owner to make a reasonable or beneficial use of water. Although the riparian right in this state has not heretofore been so defined and limited, a limitation of the right as thus defined has now become the law of this state whenever, under situations of fact calling for its proper exercise in behalf of the people of the state, the doctrine of police power may be applied. The present case presents such a situation of fact, and the eminent domain provisions of the Constitution have no application.

The plaintiffs insist that even if the constitutional amendment of 1928 be deemed to be in harmony with the other provisions of the state Constitution, it is nevertheless in contravention of the due process clause of the Federal Constitution. As a measure adopted in the exercise of the police power, it would seem not to be open to attack on any theory announced by the Supreme Court of the United States. Furthermore, that court has said that "every State is free to change its laws governing riparian ownership and to permit the appropriation of flowing waters for such purposes as it may deem wise. United States v. Rio Grande Irr. Co., 174 U. S. 690, 702, 19 S. Ct. 770, 43 L. Ed. 1136." State of Connecticut v. Commonwealth of Massachusetts, 282 U. S. 660, 51 S. Ct. 286, 289, 75 L. Ed. 602.

[17, 18] It is contended that the terms of the constitutional amendment are too uncertain to be effective; that the amendment uses the words "reasonable" and "unreasonable" without the statement of any facts which, if existing, would constitute reasonableness or unreasonableness. Objection was made in the Herminghaus Case to the terms of section 42 of the Water Commission Act which purported to define what amount of water in acre feet should be deemed a useful and beneficial purpose. The objection was sustained on the ground that it was beyond the power of the Legislature so to provide, and that "the extent to which such riparian landowners need and use and are entitled to have the benefit of the flow and overflow of such waters under their vested riparian rights therein is a matter which depends upon the circumstances of each particular case." Herminghaus v. Southern California Edison Co., 200 Cal. 81, 117, 252 P. 607, 622. This is but another way of saying that what is a useful and beneficial purpose and what is an unreasonable use is a judicial question depending upon the facts in each case. Likewise, what is a reasonable or unreasonable use of water is a judicial question to be determined in the first instance by the trial court. There would seem to be no more difficulty in ascertaining what is a reasonable use of water than there is in determining probable cause, reasonable doubt, reasonable diligence, preponderance of evidence, a rate that is just and reasonable, public convenience and necessity, and numerous other problems which in their nature are not subject to precise definition but which tribunals exercising judicial functions must determine.

As applied to the case at bar, there can be no doubt that the use to which the plaintiffs insist they have the right to put the flood waters of the Santa Ynez river appropriated and used or to be used by the defendants is an unreasonable use as contemplated by the constitutional amendment, since it is an established fact in this case that such use is and can be of no substantial or any benefit to said riparian lands; that the waters to be taken and used by the defendants are not and never can be used or be put to any beneficial or useful purpose by the plaintiffs; that the appropriation and use of said water by the defendants will not result in any injury whatever to said riparian lands; that the waters of the river, exclusive of those taken or to be taken by the defendants, will be more than sufficient to supply all of the riparian needs of the plaintiffs; and that even after the proposed appropriation and use by the defendants an annual run-off of 121,000 acre feet of water will be washed into the sea.

Counsel for the plaintiffs made an extended and critical analysis of the findings in an endeavor to show that they are contradictory and uncertain to such an extent that no judgment for the defendants may be founded thereon. It is argued that if particular findings be taken as supporting the theory of the Gallatin Case, such findings are inconsistent with other findings to the effect that some seepage into the lands of the plaintiffs occurs whenever there is any water flowing in the stream; that some water is pumped from the bed of the stream in the summer time; that some land near the ocean is overflowed in times of flood; and that in the presence of the latter findings the doctrine of Lux v. Haggin and subsequent cases to the same effect are controlling. But under the facts as found by the trial court, considered in the light of any construction placed thereon by counsel for the plaintiffs, the findings support

the judgment under the law as now in effect. We therefore find no inconsistency in the findings which is subject to just criticism.

[19] Finally, it is insisted that in any event costs should have been awarded to the plaintiffs as against the defendants. The trial court directed "that each of the parties bear his, her or its costs." The action is equitable in its nature and costs were allowed, apportioned, or withheld in the discretion of the court under section 1025 of the Code of Civil Procedure. Gallatin v. Corning Irr. Dist., supra.

No other points require discussion.

The judgment is affirmed.

We concur: WASTE, C. J.; LANGDON, J.; CURTIS, J.; SEAWELL, J.; IRA F. THOMPSON, J.

I dissent: PRESTON, J.

217 Cal. 788

F. W. MATTHIESSEN et al., Plaintiffs and Appellants, v. MONTECITO COUNTY WATER DISTRICT (a County Water District), Defendant and Respondent.

L. A. 12832.

Supreme Court of California.

April 3, 1933.

Rehearing Denied May 1, 1933.

In Bank.

Appeal from Superior Court, Santa Barbara County; Frank C. Collier, Judge.

Rehearing denied; PRESTON, J., dissenting.

James F. Peck, of San Francisco, and Charles F. Blackstock, of Oxnard, for appellants.

Heaney, Price & Postel, of Santa Barbara, and W. G. Irving, of Riverside, for respondent.

PER CURIAM.

The appeal in this case involves the same questions presented in the case of Gin S. Chow et al. v. City of Santa Barbara et al. (Cal. Sup.) 22 P.(2d) 5, this day decided, and by stipulation was submitted on the same briefs filed in that case. On the authority of that case the judgment herein is affirmed.

I dissent: PRESTON, J.

217 Cal. 789

F. W. MATTHIESSEN et al., Plaintiffs and Appellants, v. CITY OF SANTA BARBARA (a Municipal Corporation), Defendant and Respondent.

L. A. 12833.

Supreme Court of California.

April 3, 1933.

Rehearing Denied May 1, 1933.

In Bank.

Appeal from Superior Court, Santa Barbara County; Frank C. Collier, Judge.

Rehearing denied; PRESTON, J., dissenting.

James F. Peck, of San Francisco, and Charles F. Blackstock, of Oxnard, for appellants.

Heaney, Price & Postel, of Santa Barbara, and W. G. Irving, of Riverside, for respondent.

PER CURIAM.

The appeal in this case involves the same questions presented in the case of Gin S. Chow et al. v. City of Santa Barbara et al. (Cal. Sup.) 22 P.(2d) 5, this day decided, and by stipulation was submitted on the same briefs filed in that case. On the authority of that case the judgment herein is affirmed.

I dissent: PRESTON, J.

132 Cal.App. 57

SGHEIZA v. JAKOBER et al.

Civ. 4606.

District Court of Appeal, Third District, California.

May 17, 1933.

Hearing Denied by Supreme Court July 14, 1933.

1. Automobiles ⇐184.

Mother, together with father signing minor's application for driver's license, *held* liable for minor's negligence, though parents were divorced and father had exclusive control over minor (St. 1923, p. 532, § 62(a, b), as amended by St. 1929, p. 522, § 23).

2. Automobiles ⇐184.

Father, mother, and minor, signing minor's application for driver's license, were bound by minor's negligence, where minor was engaged in her own or father's business at time of accident, it being immaterial for which one of persons signing she was acting (St. 1923, p. 532, § 62(a, b), as amended by St. 1929, p. 522, § 23).

3. Death ⇐99(5).

$5,000 for death of 29 year old unmarried son contributing $20 monthly, groceries, and help on farm to support of mother, having life expectancy of 17.52 years, *held* not excessive.

Appeal from Superior Court, Sonoma County; T. H. Selvage, Judge.

Action by Rosa Sgheiza against Carl B. Jakober and others. From a judgment for plaintiff, defendants appeal.

Affirmed.

Wallace L. Ware, George W. Murphy, J. W. Ford, and A. W. Hollingsworth, all of Santa Rosa, for appellants.

Barrett & McConnell, of Santa Rosa, and A. R. Grinstead, of Sonoma, for respondent.

MILLER, Justice pro tem., delivered the opinion of the court.

This is an appeal from a judgment for $5,000 in favor of respondent, the mother and sole heir of Vito Sgheiza, her son, who was killed in an automobile accident September 14, 1931, at the intersection of two highways in Sonoma county. At the time of the death of Vito Sgheiza he was 29 years of age and unmarried. He had for years contributed $20 a month and some groceries towards his mother's support, and helped her on her little farm of 13 acres. The plaintiff had a life expectancy of 17.52 years at the time of the death of her son.

At the time of the accident and resulting injuries to the deceased he was riding in an automobile driven by his brother, and Matilda Jakober, a minor of the age of 16 years, was driving another automobile, belonging to, and in which, her father, Carl B. Jakober, was riding. The minor's application for a driver's license was signed by both her father, Carl B. Jakober, and her mother, Matilda Jakober. Some years before the accident the minor's mother and father were divorced, and the exclusive control of the minor was awarded to and remained in the father.

The lower court found that the defendant driver was guilty of negligence that proximately caused the accident and resulting death. Such negligence being imputed to the signers of the application of the minor for a driver's license, judgment went against the three defendants.

There are two appeals before us: One by Carl B. Jakober and his daughter, Matilda, in which they urge as grounds for reversal that the court erred in denying their demand for a jury trial, and that the damages awarded were excessive; the other appeal is by Matilda Jakober, the mother of the minor, and her chief contention is that, because she was not required by the statute to sign the minor's application, inasmuch as she did not have the custody of her daughter, she was a mere volunteer who signed without consideration, and, hence, incurred no liability by reason of her having signed such application.

Under the statute as it now exists, the application of a minor for a driver's license can only be granted when signed by both father and mother, if they are living and have the custody of the applicant, otherwise by the parent, guardian, employer, or other person having the custody of such minor, or by the employer of such minor. Section 62, subd. (a), California Vehicle Act (as amended by St. 1929, p. 522, § 23). Subdivision (b) of the same section of that act declares that the negligence of a minor driving a motor vehicle upon a public highway shall be imputed to the person or persons who shall have signed the application, and that such signers, if more than one, shall be jointly and severally liable for damages caused by the negligence of such minor, except where the minor is driving a motor vehicle as the agent or servant, or upon the business of a person other than the person who signed such application.

[1] At the time of the decision of Buelke v. Levenstadt, 190 Cal. 684, 214 P. 42, the statute contained the provision: "That the application to the department of a minor to operate or drive a motor vehicle, whether as chauffeur or operator, shall not be granted by the department unless the parent or parents having the custody of such applicant or the guardian of such applicant shall have joined in said application by signing the same; and provided, further, that any negligence of a minor * * * shall be imputed to the person or persons, who shall have signed the application of such minor for said license, which person or persons shall be jointly and severally liable with such minor for any damages caused by such negligence." The statute then and now being substantially the same, and the points urged in the case of Buelke v. Levenstadt, supra, being the same as are urged here by appellant Matilda Jakober, the mother, and the court, in the case of Buelke v. Levenstadt, supra, and Pontius v. McLane, 113 Cal. App. 452, 298 P. 541, having determined those contentions adversely to the appellant there, we think that case is determinative of the liability of Matilda Jakober. And inasmuch as we believe her to be liable in either event, the question as to whether the finding of the trial court to the effect that the minor was not engaged in the business of Carl B. Jakober at the time of the accident becomes unimportant, and unnecessary to determine.

The contention of Carl B. Jakober and Matilda Jakober, the minor, that they were entitled to a jury trial has been put at rest by the decision in the case of Dunham v. Reichlin (Cal. Sup.) 18 P.(2d) 664, wherein

the facts are similar to the facts in the case at bar.

[2] We are satisfied from the record before us that the minor was engaged in either her father's business or her own business, or both. She was not engaged in the business of or acting as the agent or servant of a person other than the person who signed her application. Her application was signed by herself and by her father and her mother, and it is immaterial for whom of the three she was acting—all are bound by her negligent acts.

[3] That leaves only the question as to whether or not the damages awarded by the court in the sum of $5,000 are excessive. We find nothing in the amount of damages awarded to suggest passion or prejudice or an abuse of discretion.

The judgment as to each and all of the defendants is affirmed.

We concur: PULLEN, P. J.; R. L. THOMPSON, J.

132 Cal.App. 40

Ex parte OWENS.

Cr. 2326.

District Court of Appeal, Second District, Division 2, California.

May 16, 1933.

Habeas corpus ⊂=25(1).

Misdemeanant whose appeal was dismissed, and who then appealed from order refusing to vacate dismissal and from judgment of conviction, *held* not denied right of appeal, and therefore not entitled to be released on habeas corpus (Pen. Code, § 1468).

Application by John W. Owens for a writ of habeas corpus prayed to be directed to the Chief of Police of the City of Los Angeles, to secure the release of the petitioner on the ground that he was denied the right of appeal.

Writ discharged, and petitioner remanded.

A. P. G. Steffes, of Los Angeles, for petitioner.

Erwin P. Werner, City Atty., and Mark L. Herron and John L. Bland, Deputy City Attys., all of Los Angeles, for respondent.

PARKER, Justice pro tem.

A writ of habeas corpus issued out of this court on December 31, 1932, made returnable January 9, 1933. Due return was made thereon, and on January 9, 1933, there was filed herein a stipulation of facts. The petitioner was given his liberty on bail pending the proceeding.

No further action being taken, this court made its order dated March 31, 1933, requiring petitioner to show cause why the proceeding should not be dismissed for lack of prosecution. This order was returnable April 10, 1933. On this last date petitioner through counsel appeared. The order to show cause was vacated and petitioner granted until April 25, 1933, to file briefs, with time allowed respondent to answer and petitioner to reply. The cause was to stand submitted as of May 12, 1933.

No briefs have been filed nor has any request been made for further time. In this state of the record we might well dismiss the proceeding and order the petitioner remanded. However, inasmuch as the proceeding involves the liberty of a citizen, though he has presented the record without comment, we do inquire into the cause of his detention. The return shows petitioner to be in custody by virtue of a commitment issuing out of the municipal court after conviction of a misdemeanor. No question is raised as to the commission of the offense nor is complaint made concerning the regularity of all proceedings up to and including the trial and conviction. The one point urged is that petitioner was denied the right of appeal. We find no merit in this contention. Written notice of appeal was filed and the petitioner seemed to show the same zeal in pursuing his cause on appeal as he has shown in the prosecution of the instant proceeding. The appeal was dismissed pursuant to provisions of section 1468 of the Penal Code.

An appeal was taken from the order refusing to vacate the dismissal and the action of the municipal court was affirmed. The record before us supports the conclusion that this appeal included likewise an appeal from the judgment. From the return and the stipulated facts we can see no irregularity in the proceedings.

The writ is discharged and petitioner remanded.

We concur: WORKS, P. J.; STEPHENS, J.

⊂=For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

131 Cal.App. 635

In re ROSS' ESTATE.

ROSS et al. v. ROSS.

Civ. 4813.

District Court of Appeal, Third District, California.

May 8, 1933.

Hearing Denied by Supreme Court July 6, 1933.

1. Judgment ⇐199(1).

Language of will contestants' attorney *held* in nature of motion for directed verdict, which court denied, so that court could render judgment for contestants notwithstanding jury's verdict for proponent.

Although counsel for contestants did not in express words apply for directed verdict, he stated he had motion to make, and jury was excused, and counsel then stated that showing was not sufficient to make out prima facie showing for court to submit any questions of fact to jury; that counsel did not consider there were many questions of fact for jury to pass on, and deemed it almost entirely a question for court to decide under law whether instrument was a will; and that, assuming all claims of proponent with respect to letter, still counsel stated in nature of demurrer to testimony that it was not sufficient to indicate testamentary intention, and court's remark, "Let us do what they say, bring the jury in and you put on your defense," denied the motion.

2. Wills ⇐72, 130.

Letter written by husband to wife, who was suing for divorce, asking her to come and see him, and stating there was no one he wished to give place to but wife, showed no testamentary intent, and was not holographic will.

First letter was dated, but not signed, and stated, in substance, that writer wanted to talk to wife, and asked her to come out and talk with him before she got divorce, which husband did not want, and second letter was not dated, but was signed, and stated, in substance, that he wanted to talk with wife, as there was no one he wanted to give place to except her, and that, if she was interested, to come out and see him.

Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

In the matter of the estate of Charles A. Ross, deceased. Leah Ross presented certain sheets of paper for admission to probate as the holographic will of the deceased, and a contest was filed by Elwood Ross and others. From the judgment, proponent appeals.

Affirmed.

King & King, of Gridley, for appellant.

W. T. Belieu, of Willows, for respondents.

Mr. Justice pro tem. KING delivered the opinion of the court.

The proceeding is a will contest.

Charles A. Ross and Leah Ross were husband and wife for many years. They owned farm property near Biggs on which he resided, and she conducted a restaurant in the town of Biggs.

Mrs. Ross instituted an action against her husband for divorce February 26, 1931, and the summons was served March 2, 1931. The testimony also showed that their troubles arose from the fact that Ross was a heavy periodic drinker of intoxicating liquor, and when he was under the influence of liquor he abused her. March 9, 1931, they had a conference at the restaurant in Biggs over their affairs, after which he went out to the farm. March 10, 1931, she received through the mail two sheets of paper inclosed in an envelope bearing the postmark of March 9th, on which sheets was written in lead pencil:

"March 9–31. Dear Leah. I have been putting off writing you as I did not know what to say, and do I know now? I want to talk with you 'Oh, so bad.' I know you think I am a devil but Leah just stop and think, is there two. Will you come out and have a talk with me before you get the derty divorce that I do not want. If so let me know and I will gladly send someone in after you any p. m. you say"

"Dear Leah: I have not slept for at least one month. You think it is boose but I am going crazy and I know it. Would like to talk to you as there is no one I want to give this damed place to but you. So if you are interested come out and see me. Chas. It is not going to be long now."

She did go to see him, but continued the prosecution of the divorce action, resulting in an interlocutory decree rendered April 13, 1931, after default of defendant.

June 19, 1931, Ross died and Mrs. Ross presented the above two sheets of paper to the court asking its admission to probate as the holographic will of the deceased.

A contest was filed by the brothers and sister of deceased, and the contest was heard by a jury, which rendered a verdict upholding the document as the will of deceased.

Contestants filed notice of a motion to set aside the verdict and enter judgment for the contestants. This motion was granted, and the court filed findings and judgment adjudging that the two sheets of paper introduced by proponent did not constitute a holographic or any other character of will of said deceased; that the said two sheets of paper did not indicate or show any testamentary

intent or any intention by him to make a will or dispose of his property by last will and testament; and that said letters show no testamentary intent or disposition by him to leave his property by last will and testament to Leah Ross; and that said deceased died intestate; and that proponent Leah Ross is not entitled to letters of administration with the will annexed. From this judgment the appeal is taken.

[1] The point especially stressed by the appellant is that "the order granting a motion for judgment notwithstanding the verdict is erroneous for the reason that such a motion can only be granted where the moving party before the verdict has requested the court to direct a verdict in his favor." Appellant claims that no such motion for a directed verdict was made, and if the record sustains this contention the judgment must be reversed. In re Easton, 118 Cal. App. 659, 5 P.(2d) 635; In re Estate of Caldwell, 216 Cal. 694, 16 P.(2d) 139.

The record in regard to what respondent specifies as a motion for a directed verdict is contained in the reporter's transcript, and we here reproduce the essential portions thereof. After proponent concluded her case counsel for contestants announced, "I have a motion to make outside of the hearing of the jury," and the jury was excused; counsel then stated that proponent's showing was not sufficient to make out a prima facie showing for the court upon which to submit any questions of fact to the jury. He then continued:

"Of course under the peculiar circumstances of this case, I do not consider that there are many questions of fact for this jury to pass on. I deem it almost entirely and exclusively a question for this court to decide under the law as to whether or not the instrument which has been presented to this court as the last will and testament of the deceased is not such a fact, I further take the view that any extraneous evidence or oral testimony which has been introduced in support thereof, is entirely inadmissible on the ground that the paper produced and presented is not of that character of uncertainty which would justify the court taking oral testimony in explanation thereof. And secondly, admitting all of the testimony in support of the document, it is my contention as a matter of law that this instrument does not indicate or show testamentary intent. Assuming that the letter was written and assuming all of the claims of the proponents with respect to the letter still I say in the nature of a demurrer to the testimony it is not sufficient to indicate a testamentary intention. It will be observed that this proposed will comes to the court in the form of two sheets of paper, one of which appears to have been dated but not signed and the other appears to have been signed but not dated; and it is our contention of course after an examination of the witnesses that this is not one instrument. I say that for the reason that the first sheet or the sheet that I will call the first sheet, being the one dated, was written in a hand which is totally dissimilar to the second sheet; the handwriting is different and one is dated and not signed and one is signed and not dated.

"The Court: Would not that indicate that he intended it all to be one paper?

"Mr. Bellieu: I am assuming for the purpose of the argument probably that the instruments came in the same envelope. * * * For the purposes of my argument I will assume that the letter came in the same envelope and I think that is about the only question to be submitted to the jury, and after having assumed that, I wanted to take up with Your Honor some of the cases which involve the proposition of holographic wills so you can see how the holdings of the court have been with respect thereto. * * * The language of the paper, 'So if you are interested come and see me,' that is an overture, irrespective if she did go or did not go and what they said or did there, the authorities hold that this will must stand or fall by its own language, and that will is not testamentary, in fact it was merely an overture. Even assuming that the language is testamentary in character, and I claim it is not—."

The argument is continued by Mr. Bellieu and was replied to by proponent's counsel, the further argument not being reported. Counsel then admits for the purpose of the argument that the alleged will is one continuous instrument. The court then said to counsel for proponent:

"Show me in this will of yours where he gave anything to anybody. * * * Mr. Bellieu, we have this jury here * * * we have to pay them anyway, and suppose we go on with the case and let them show what they want to show about this will and take up the legal questions later.

"Mr. Bellieu: That is all right but for my enlightenment, do you think there are very many questions of fact for the jury to decide?

"The Court: The only question is whether or not * * * Did this man intend this as a will, and by the will to give this woman that place? Is that a fact whether he did or did not? Can't they find on the question of intention?

"Mr. Bellieu: I thought that was solely a question for the court.

"The Court: Mrs. King has gone to a great expense in getting this jury here and I don't have to abide by their decision, so, let us do what they say, bring the jury in and you put on your defense. Of course the judge is the thirteenth juror.

"The Court: The twelve jurors are here now and proceed, Mr. Bellieu.

"Mr. Bellieu: I suppose after this jury retires to deliberate and return such verdict as it may return, then the matter will be in the hands of the court for consideration.

"The Court: Yes, it will be. (The jury then returns.)

"Mrs. King: Before we start I would like to know what the issues are so I will know what to meet. * * *

"Mrs. King: There is no issue for the jury now, the rest of it is for the court.

"Mr. Bellieu: That is what I have been trying to say.

"The Court: I have been trying to get out of this but you have a jury here.

"Mrs. King: I have no objection to it going to the jury. * * *

"The Court: Go ahead Mr. Bellieu, with your witness."

The foregoing extracts from the record comprise what appears with regard to a motion for a directed verdict. It will be observed that it contains no direct motion by contestant for a directed verdict, and no direct refusal by the court to grant one. It does show, however, that contestants were trying to keep the decision of the case from the hands of the jury, and a direction by the court for contestant to proceed with his witnesses. It seems further to show that all parties conceded that the paper presented to the court was in the handwriting of the deceased, and that the proponent admitted there was no issue remaining for the jury.

However, issues were presented to the jury, which found that the paper was entirely written, dated, and signed by the hand of the deceased; that it was his intention to give his place to Leah Ross; that the two sheets were considered by decedent to constitute one letter; that they were both written at a time when decedent was in good health; that he was a man of intelligence and business experience; that both sheets were mailed to Leah Ross at one time; that the two sheets were wholly written at the same time; that the deceased did wholly write, date, and sign the two sheets in his own handwriting; and finally: "We, the jury, find that proponent's exhibit No. One was intended by the deceased to be his last will and testament."

The court in its finding upon the motion for judgment notwithstanding the verdict explicitly found that the contestants moved the court for a judgment of nonsuit after proponent had rested her case. This finding, however, is not of much aid to this court in determining the fact of a motion for a directed verdict, because (aside from the technical fact that the court's finding denominates it a motion for "nonsuit" instead of a motion for a "Directed Verdict") in a similar case the court held that the record must prevail over the recital. In re Estate of Caldwell, supra.

The findings by the court adopt the answers to the special issues made by the jury except the last general finding and the portion of the jury's verdict to the effect that it was the intention of decedent to want or will to give his place to Leah Ross. These two answers to special issues the court refused to adopt, finding that they "are generally in favor of the proponent and are beyond the province of the jury."

As to the showing of a motion for a directed verdict, it will be observed that counsel for contestants did not in so many words apply to the court for such a direction. He did say: "I have a motion to make." Then the jury was excused and counsel stated that "this showing is not sufficient to make out a prima facie showing for the court to submit any questions of fact to the jury upon." He stated further: "I do not consider that there are many questions of fact for this jury to pass on. I deem it almost entirely and exclusively a question for this court to decide under the law as to whether or not the instrument which has been presented to this court as the last will and testament of the deceased is not such in fact. * * * Assuming that the letter was written and assuming all of the claims of the proponents with respect to the letter, still I say in the nature of a demurrer to the testimony it is not sufficient to indicate a testamentary intention."

[2] The court is inclined to hold that the foregoing language indicates that counsel for contestants making the statements he did, and, as he says, "in the nature of a demurrer to the testimony," did present a motion in the nature of a motion for a directed verdict or for a nonsuit. The court then, by its remark, "Let us do what they say, bring the jury in and you put on your defense, * * * proceed, Mr. Bellieu," undoubtedly denied the motion. This action by the court, if it be considered that a motion was made, was erroneous, and, in such condition, the court had a right to give the judgment which it did give notwithstanding the verdict of the jury. The court's finding that the said two sheets of paper showed no testamentary intent is undoubtedly correct. The paper bears no semblance of a will and was not intended by the deceased to make testamentary disposition of his property.

The judgment is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

131 Cal.App. 376

PEOPLE v. ROBERTS.

Cr. No. 2316.

District Court of Appeal, Second District, Division 2, California.

May 9, 1933.

Hearing Denied by Supreme Court May 25, 1933.

1. Criminal law ⇐1181.

Where two of three sitting justices of division of District Court of Appeal dissented in part, dissent presented law of case to that extent.

2. Criminal law ⇐624.

Where there were two trials, the first under general plea of not guilty, resulting in guilty verdict, the second under special plea of not guilty by reason of insanity, evidence at second trial could not affect verdict already rendered under general plea.

3. Criminal law ⇐464.

Question to defendant's brother as to symptoms or form of insanity manifested by father *held* properly excluded, since question did not seek opinion respecting mental sanity of person, which may be put to intimate acquaintance, and did not ask reasons for opinion (Code Civ. Proc. § 1870, subd. 10).

Code Civ. Proc. § 1870, subd. 10, provides that evidence may be given upon a trial of the opinion of an intimate acquaintance respecting mental sanity of a person, the reason for the opinion being given.

Appeal from Superior Court, Los Angeles County; Fletcher Bowron, Judge.

On petition for rehearing.

Rehearing denied.

Prior opinion, 21 P.(2d) 449.

LeCompte Davis, MacDonald & Thompson, Edwin S. Douglas, Albert E. Coger, Flint & MacKay, Wesley L. Nutten, Jr., and Clive W. Johnson, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Alberta Belford, Deputy Atty. Gen., for the People.

WORKS, Presiding Justice.

In his petition for rehearing appellant treats the concurring opinion of Justice Stephens, joined in by Justice Craig, as if it brought something new into the case. This view is unsound. The effect of the concurring opinion was that the two justices agreed to everything contained in the opinion preceding their concurrence, with one exception. They dissented from what the writer of the main opinion had said to the effect that appellant had either waived or failed properly to present the question which was left open by the trial judge when the district attorney interrupted the opening address being made to the jury by appellant's counsel.

[1] The main opinion took two grounds upon which its writer attempted to base the determination that it was not necessary to decide whether the trial judge erred in limiting testimony concerning the son of appellant to threats. It was as to one of these grounds that Justices Stephens and Craig dissented, and their dissent, of course, presented the law of the case upon the question. What the writer of the main opinion said upon the subject went for naught. The court determined, through the two dissentients, that the first reason assigned by the writer of the main opinion was not a tenable ground for refusing to decide whether the trial judge was in error in saying what he did, twice, as to the limitation to be placed upon the testimony concerning the son.

[2] The second reason given by the writer of the main opinion for the declination to decide the point in question was that, despite what the court said, and even though counsel for appellant did not give the court an opportunity to decide the point in question, the testimony went far, and went far enough, in showing the son's conduct other than threats. This state of affairs is fully set forth in the main opinion, and Justice Stephens, in writing his concurrence, referred to no part of the record except those parts stating the state of affairs referred to. This matter is here made clear because of the ground taken in the petition for rehearing. There were two trials of appellant, the first under his general plea of not guilty, which resulted in a verdict against him, the second under his special plea of not guilty by reason of insanity. It is obvious that no evidence taken at the second trial can work either to affect, uphold or overthrow the verdict which had already been rendered under the general plea. It is said in the petition for rehearing that the evidence in the record as to the acts and conduct of the son, other than testimony as to his threats, is to be found in that part of the record made after the commencement of the trial under the plea of insanity. In making the assertion counsel are in error. All the evidence referred to in the main opinion, upon this particular question, was produced at the trial under the plea of not guilty. None of us had read, before the filing of the petition for rehearing, the testimony of appellant given upon the trial of the issue as to insanity.

As the writer of the main opinion still adheres to his early view upon the first ground he set down as a reason for not passing upon the correctness of the trial judge's two remarks as to the limitation to be placed upon the testimony concerning the son, he thinks

it proper to say something more upon that subject. In his petition for rehearing appellant naturally seizes upon the remark in the concurring opinion that "the point was reopened when the attorney offered to make a showing through the father's testimony of the son's statements to him of the personal relations existing between them but a short time before the tragedy." Appellant then cites instances in support of this assertion. One of these is thus shown by the record:

"Q. And what kind of business were you and Earle in? A. Well, we were into several kinds during that time.

"Q. Well, just tell us about them in your own way.

"The District Attorney: To which we object as immaterial.

"The Court: Objection sustained."

This matter surely does not support the assertion contained in the concurring opinion. The objection was plainly good, as pointed out in the main opinion.

In the petition for rehearing, appellant, in support of the language above quoted from the concurring opinion, also recites that portion of the record quoted in the main opinion, containing this: "The Court: It is not a question of remoteness. The deceased is not on trial. What he said other than by way of threats is immaterial. Just confine yourself to what your son said, if he said anything." Then came the answer of the witness, showing a threat by the son. There was nothing here to show that the judge had departed from the tentative view he had expressed just before the evidence for the defense was opened. He had then left the question open, and appellant's counsel could not have been misled, by the court's latest remark, into a belief that it was no longer open, if the whole record be considered. During the entire trial appellant's counsel never asked a question, to which objection was made, that raised the point. Not a single occurrence had taken place during the trial either to stiffen or to relax the judge's attitude assumed when the question first came up. The record is a blank upon the subject. There is no doubt, in the mind of the writer of the main opinion, from the early statement made by the trial judge, that he was ready at any time to have the point presented and discussed; nor, considering the whole record, could appellant's counsel have been misled to a contrary belief. As was remarked in the main opinion, the trial judge was never given an opportunity finally to pass upon the point.

[3] Strange to say, appellant questions, in his petition for rehearing, the ruling of the trial court upon the following inquiry addressed to the brother of appellant: "[C]an you tell us something of the particular symptoms or form of insanity that your father manifested?" The question was immaterial, because one of that nature cannot be put to an "intimate acquaintance," as well as for the reasons assigned in our opinion. The statute provides that "evidence may be given upon a trial" of "the opinion of an intimate acquaintance respecting the mental sanity of a person, the reason for the opinion being given" (section 1870, subd. 10, Code Civ. Proc.). The question above quoted asked neither for reasons upon which an opinion as to sanity might have been later expected nor did it ask for the opinion itself. The insanity of the father was presupposed by the question, and, under the statute, there was nothing left for the witness to answer.

Rehearing denied.

CRAIG and STEPHENS, Justices.

We concur in the order denying a rehearing, but we adhere to the views expressed in our concurring opinion heretofore rendered.

132 Cal.App. 39

BENJAMIN FRANKLIN BOND & INDEMNITY CORPORATION v. SCHMIDT, Judge.

Civ. 8881.

District Court of Appeal, Second District, Division 2, California.

May 16, 1933.

1. Certiorari ⇐42(2).

Writ of review can be issued only on verified petition (Code Civ. Proc. § 1069).

2. Certiorari ⇐37.

Judge is not proper party to proceeding for writ of certiorari to review order of superior court.

Proceeding by the Benjamin Franklin Bond & Indemnity Corporation for a writ of certiorari to review an order of the superior court of the state of California in and for the county of Los Angeles, Ruben S. Schmidt, Judge, in favor of E. Forrest Mitchell, Commissioner of Insurance of the state of California.

Writ and restraining order set aside, and proceeding dismissed.

F. E. Davis, of Hollywood, Edw. V. Jones, of Los Angeles, and Milton H. Silverberg, of San Francisco, for petitioner.

Everett W. Mattoon, Co. Counsel, and S. V. O. Prichard, Deputy Co. Counsel, both of Los Angeles, for respondent Superior Court.

Frank L. Guerena, of San Francisco, for respondent Mitchell.

WORKS, Presiding Justice.

[1] The writ of review was improperly issued in this proceeding. After return made to the writ our attention is first called in the briefs to the fact that the petition for the writ was unverified. The writ of review can be issued only upon a verified petition. Code Civ. Proc. § 1069.

[2] As we have so often said under similar circumstances, respondent judge is not a proper party to the proceeding.

The writ and the accompanying restraining order are set aside, and the proceeding is dismissed.

We concur: STEPHENS, J.; PARKER, Justice pro tem.

131 Cal.App. 500

CHAMBERS v. DAVIS et al.

Civ. 4823.

District Court of Appeal, Third District, California.

April 28, 1933.

Rehearing Denied May 27, 1933.

1. Mandamus ⇐154(2).

Petition *held* to state facts sufficient to authorize issuance of writ of mandamus compelling high school district trustees to fix and allow permanent teacher reasonable salary for instruction in particular subject.

The petition alleged that petitioner was duly qualified to teach subject of general physical education and hygiene in public schools of state, held valid unrevoked credentials permitting her to teach such subject in any public school of state, and was employed and successfully taught physical education for more than three successive years in high school of respondents' district.

2. Mandamus ⇐107.

Mandamus is proper remedy to compel school district trustees to fix and allow permanent teacher reasonable salary for instruction in particular subject.

3. Schools and school districts ⇐133.

One successfully teaching physical education and hygiene in high school for three consecutive years had vested right to unconditional classification as permanent teacher (School Code, § 5.500; Pol. Code, § 1609).

4. Schools and school districts ⇐133.

Teachers' Permanent Tenure Act was not repealed without saving clause, so as to forfeit right of teacher never actually classified as permanent to such status, and render it optional with school district trustees to classify her as such (School Code, § 5.501; §§ 5.500 to 5.502, repealed and re-enacted by St. 1931, pp. 1394, 1395; and § 5.504, as amended by St. 1931, p. 1395; Pol. Code, § 1609).

5. Statutes ⇐225¾.

All rights and liabilities accruing under statute, repealed without saving clause by act substantially re-enacting it, will be preserved and enforced.

6. Schools and school districts ⇐133.

Statute authorizing trustees of certain school districts to determine whether teachers shall be awarded permanent tenure did not affect such right acquired by teacher before enactment thereof (School Code, §§ 5.500, 5.501).

7. Schools and school districts ⇐144(4).

School district trustees have reasonable discretion in determining teacher's compensation and amount allowed cannot be interfered with by court, except for clear abuse of discretion (School Code, § 5.731).

8. Schools and school districts ⇐144(4).

High school district trustees' allowance of smaller salary to woman teacher of physical education and hygiene than to male teacher of same subjects *held* illegal as unfair discrimination and violation of statute (School Code, § 5.730).

Appeal from Superior Court, Madera County; H. S. Shaffer, Judge.

Action by Lois Chambers, formerly Lois Merwin, for a writ of mandate to J. L. Davis and others, as Trustees of the Madera Union High School District, and such district. From a judgment granting the writ, respondents appeal.

Affirmed.

Sherwood Green, of Madera, for appellants.

Barcroft & Barcroft, of Madera, for respondent.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

This is an appeal from a writ of mandamus directing a board of school trustees to pay petitioner, under the provisions of section 5.730 of the School Code, the same salary for her services as permanent teacher of physical education as that which is paid to a male teacher in the same school for like services.

[1, 2] The petition alleges that respondent has been a successful teacher of general phys-

ical education and hygiene in the Madera Union High School for more than three consecutive school years next prior to May, 1932; that she is fully qualified and holds valid unrevoked credentials legally authorizing her to teach that subject in any public school of California; that she had acquired legal classification as a permanent employee of that school, which has not been terminated by operation of law or otherwise; that the subject of physical education which she was employed to teach has not been discontinued in that school, but upon the contrary that her classes increased in the number of students from year to year; that the sum of $1,760 per year is a reasonable salary for such services in that school, which sum she is willing to accept; and that the Board of Trustees, influenced by bias and prejudice, in bad faith, with the object of compelling her to abandon her employment in said school, tendered her a contract for the continuation of her services as teacher of physical education for the school year commencing in the fall of 1932 for the unreasonable and inadequate salary of only $1,200 a year. The petition asks for a writ of mandamus requiring the Board of Trustees to fix this respondent's salary at the sum of $1,760 per annum.

To this petition the Board of Trustees filed a general demurrer, which was overruled. The cause was heard on its merits. The court found all of the allegations of the petition to be true, and that the sum of $1,760 per year is a reasonable salary for the year 1932–33 in that school for the services which are performed by the petitioner. A writ of mandamus was thereupon issued, directing the Board of Trustees to fix and pay petitioner for her services as permanent teacher of physical education for the school year of 1932–33 the sum of $1,760. From this decree the defendants have appealed.

The appellants contend the petition fails to state facts sufficient to authorize the issuing of a writ of mandamus because it contains no specific allegation that the respondent holds a county certificate authorizing her to teach physical education in the schools of Madera county, and for the reason that boards of trustees of high school districts have the absolute discretion to determine the value of employees' services and to fix and allow teachers' salaries, which may not be interfered with by a court. It is insisted the evidence fails to show that the petitioner was ever classified by the Board of Trustees as a permanent teacher of that school and that she was therefore not entitled to a contract of reemployment at any salary whatever. It is also asserted the evidence fails to show that the sum of $1,200 a year is an unreasonable or inadequate salary for a teacher of physical education in that school, but upon the contrary that it is full market value of such services.

We are of the opinion the petition states facts sufficient to constitute the special proceeding authorizing the issuance of a writ of mandamus to compel a board of trustees to fix and allow a permanent teacher a reasonable salary for services for instruction in a particular subject. Mandamus is the proper remedy. Dutart v. Woodward, 99 Cal. App. 736, 279 P. 493. The petition alleges that the respondent is "duly qualified to teach the subject of general physical education and hygiene in the public schools of the state of California, and holds valid unrevoked credentials permitting her to teach said subject *in any of the public schools of said state of California.*" Without a valid unrevoked certificate which is filed in the office of the county superintendent of schools, a board of trustees has no legal authority to employ a teacher. Section 5.420, School Code. The petition alleges that respondent holds valid unrevoked credentials permitting her to teach in any public school in California. Moreover, it alleges that she was employed in that school and that she successfully taught physical education in the Madera Union High School for more than three successive years next preceding the month of May, 1932. It may not be presumed the appellants violated the inhibition of the statute last cited and employed the petitioner for three successive years without first ascertaining that she held proper credentials which were duly registered. The allegation that she was "duly qualified" to teach that subject "in any of the public schools of said state of California" necessarily includes the high school of Madera. To this statement there was added the assertion that she "holds valid unrevoked credentials" authorizing her to teach in all public schools of California. These allegations are adequate as against a general demurrer.

[3] The appellants contend Mrs. Chambers was never actually classified by the Board of Trustees of the Madera Union High School District as a permanent teacher therein, that she was therefore not entitled, as a matter of law, to be re-employed and could not complain of any salary which the board saw fit to allow her.

There is no merit in this claim. The petition for a writ of mandamus alleges that she had been employed to instruct and successfully taught physical education in that high school "for more than three full consecutive years next preceding the month of May, 1932," and that "she had acquired a classification as a permanent employee of Madera Union High School District." These allegations are not denied. The petitioner testified she had taught physical education in the Madera High School for eight consecutive years prior to May, 1932. Mr. Petty, the clerk of the board, said she had taught in that school under that particular classification during his entire term as a trustee there-

in, which was more than five years. The written notice of re-employment which was addressed to her and served upon her in 1932 contains the following admission of actual classification as a permanent teacher: "You have been classified by this board as a permanent employee under section 1609, third, Political Code, subject to acceptance of this offer." It appears without substantial conflict that the petitioner had been successfully employed as a teacher of physical education in that school for more than three years prior to May, 1932. The board was not authorized to *conditionally* classify her as a permanent teacher. Section 5.401 of the School Code provides that in the absence of formal dismissal and written notice thereof pursuant to sections 5.680–5.682 of the same Code, a probationary teacher "shall be deemed reelected from year to year." Volandri v. Taylor, 124 Cal. App. 356, 12 P.(2d) 462. No action was ever taken in the present case attempting to terminate her services as a teacher of that school. No charges were preferred against her. Her services must be deemed to have been satisfactory. After three consecutive years of successful employment in the Madera high school as a teacher of physical education and hygiene she was automatically entitled by operation of law to classification as a permanent teacher. The board had no power to deprive her of that vested right. Section 5.500, School Code; Owens v. Board of Education, 68 Cal. App. 403, 229 P. 881, 882. Section 5.500 of the School Code provides: "Boards of school trustees * * * shall have power *and it shall be their duty* to classify as permanent employees all persons * * * who shall have been successfully employed by the district for two or three complete consecutive school years in positions requiring certification qualifications."

In the Owens Case, supra, the court says: "Thus a 'probationary' teacher is re-elected and re-employed annually until entitled to classification as a 'permanent' teacher, and the board of education is required to report the employment of such teacher annually to the county superintendent. This, in itself, is sufficient to meet the terms of the statute, and the teacher thereby becomes automatically classified as a permanent teacher at the end of two years of successful service."

[4] The appellants further contend that section 5.500 of the School Code, authorizing permanent tenure of teachers, was repealed without a saving clause (St. 1931, p. 1394), and that since she had never actually been classified as a permanent teacher, her right to that status was thereby forfeited; that section 5.501 of the same Code, which was adopted in 1931, made it optional with school boards of districts "having an average daily attendance of less than 850 pupils" to determine whether the teacher who had served the school for more than three successive years should be classified as a permanent employee thereof, and that since this option was not affirmatively exercised in her favor she may not be deemed to have acquired the status of a permanent teacher under the tenure law.

The appellants are in error in assuming that section 5.500, supra, was repealed without a saving clause. In 1931, the Legislature of California did specifically repeal sections 5.500 to 5.502, inclusive, of the School Code, which constituted parts of chapter 3, article 1, of that Code. But as a part of the same repealing act, under the caption "Article I—Permanent" (teachers), section 5.500 was reenacted in substantially the same language in which it formerly existed. Following this provision a new section numbered 5.501 was enacted, making it optional with trustees of districts having an average daily attendance of less than 850 pupils to award permanent tenure to teachers who had previously taught therein for three or more years. Two succeeding sections were enacted as a part of the same article, the provisions of which do not apply to the present proceeding. Then section 5.504 followed in the same act of the Legislature, as a part of article 1, which reads: "Nothing in this article shall be construed as affecting any permanent employee classified as such at the time this section takes effect nor shall any decrease in the average daily attendance of any school district operate to deprive any permanent employee of the district of his classification as such."

[5] The foregoing section was undoubtedly intended as a saving clause to preserve vested rights of permanent tenure which had been previously acquired by teachers pursuant to section 1609 of the Political Code or section 5.500 of the School Code as they formerly existed. It is a well-recognized rule that when a statute is repealed without a saving clause and as a part of the same act it is simultaneously re-enacted in substantially the same form and substance, all rights and liabilities which accrued under the former act will be preserved and enforced. 25 R. C. L. 934, § 186; Perkins Mfg. Co. v. Clinton Const. Co., 211 Cal. 228, 237, 295 P. 1, 75 A. L. R. 439. The able author of Ruling Case Law above cited says: "Where a statute is repealed and all, or some, of its provisions are at the same time reenacted, the reenactment neutralizes the repeal, and the provisions of the repealed act which are thus reenacted continue in force without interruption so that all rights and liabilities that have accrued thereunder are preserved and may be enforced."

[6] But the appellants claim that since the optional provision of section 5.501 was adopted in 1931 authorizing trustees of districts having an average daily attendance of less than 850 pupils to determine whether a teach-

er should be awarded the status of a permanent instructor, it became necessary for the petitioner to allege and prove that Madera Union High School District had a daily attendance of at least 850 pupils to entitle her to permanent tenure by operation of law. We may concede this would ordinarily be true.

This optional provision affecting the right of a teacher to permanent tenure became the law of this state August 14, 1931. The petition in this case alleges that the respondent successfully taught physical education in the Madera high school "for more than three full consecutive years next preceding the month of May, 1932." The court found that all of the allegations of the petition were true. This finding included the determination that the petitioner was entitled to classification as a permanent teacher. One of the trustees testified she had taught physical education in that school during his entire term, which was over five years. The petitioner testified that she had filled the position in that school without criticism for eight years prior to May, 1932. In support of the judgment in this case, it must therefore be assumed she automatically secured the status of a permanent teacher in that school by successfully teaching therein for more than three years before the optional provision of section 5.501 was enacted. The last-mentioned section, therefore, did not affect her right to permanent tenure as a teacher of that school. She had attained that vested right before it became the law.

The record contains ample evidence to show that the petitioner is a permanent teacher of Madera Union High School; that she acquired a vested right to be classified as such pursuant to the Teachers' Tenure Act of California (see School Code, § 5.500 et seq.), and that she was entitled to reemployment as instructor of physical education for the ensuing school year at a reasonable salary.

The question as to what sum constitutes a reasonable salary for services as a teacher in a public school depends upon the circumstances of each particular case. There are two teachers in the Madera Union High School who are classified as instructors of "physical education and hygiene." One of these teachers is a man by the name of Carlton Wood, and the other is this petitioner, who is a woman. The petitioner held this woman's position for eight successive years, performing her services without substantial criticism. In teaching this subject of physical training each of these instructors performed like services, except that one supervised boys' sports, and the other directed girls' sports. Prior to May, 1932, each of these instructors received exactly the same salary of $1,960 a year. On account of the depression which exists the board reduced the salaries of all teachers in that school for the school year 1932–33 approximately ten per cent. Mr. Wood's salary was fixed at $1,760 for the school year following May, 1932. But without reason, or criticism of the manner in which her services were performed, the petitioner was tendered a contract of reemployment in her former position at a salary of only $1,200 a year.

[7] Under the provisions of section 5.731 of the School Code, it becomes the duty of boards of trustees "to fix and order paid the compensation of persons in public school service requiring certification qualifications." There can be no doubt the board possesses a reasonable discretion in determining the amount of compensation to be paid to teachers under their jurisdiction. Except for a clear abuse of this discretion the amount of salary which is allowed by the board may not be interfered with by a court. The law, however, does prohibit discrimination between the salaries of men and women who perform "like services" for the district. Section 5.730 of the School Code provides: "Females employed as teachers in the public schools of this state shall, in all cases, receive the same compensation as is allowed male teachers *for like services*, when holding the same grade certificates."

[8] It is apparent the Legislature intended by the adoption of the preceding section of the School Code to determine as a matter of law that it is unreasonable for a school board to allow a greater salary to a male teacher than that which is given to a female teacher of the same school for like services for which they hold the same grade certificates. There is no serious dispute in the present case that the services which were performed by Mr. Wood and Mrs. Chambers were alike. Their services were substantially the same. Their subjects were designated and classified in exactly the same terms. There appears to be no excuse for allowing the man $1,760 a year, and reducing the woman's salary to $1,200. This action of the board constitutes an unfair discrimination. It is in direct violation of section 5.730 of the School Code. Since the board fixed Mr. Wood's salary at $1,760 a year, that furnishes substantial evidence that a like sum constitutes a reasonable salary for the petitioner in payment for like services.

The judgment is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

GASTINEAU v. MEYER et al., Trustees of School Dist.

Civ. 4806.

District Court of Appeal, Third District, California.

May 4, 1933.

Rehearing Denied June 3, 1933.

Hearing Denied by Supreme Court June 30, 1933.

1. Schools and school districts ⇐133.

One qualified and serving as teacher in, as well as principal of, high school for six years before enactment of statute, giving district trustees option to classify teachers as permanent, automatically acquired such status, though not formally so classified (School Code, §§ 5.430, 5.500 to 5.502; Pol. Code, § 1609, as amended by St. 1927, p. 1915, § 1, subd. 3(e).

2. Schools and school districts ⇐133.

One successfully serving as teacher, as well as high school principal, for required time, is entitled to permanent tenure as classroom teacher (Pol. Code, § 1609, as amended by St. 1927, p. 1915, § 1, subd. 3(e); School Code, §§ 5.500 to 5.502).

3. Schools and school districts ⇐133.

Trustees of high school district, served by teacher for over three consecutive school years before adoption of statute giving trustees option to award teachers permanent tenure, had no power to deprive him of vested right to such tenure (School Code, §§ 5.500 to 5.502; Pol. Code, § 1609, as amended by St. 1927, p. 1915).

4. Schools and school districts ⇐133.

Permanent tenure, automatically attained by teacher before repeal of statute providing therefor, was not lost because of failure to adopt saving clause as part of repealing act (School Code, §§ 5.501, 5.504, and §§ 5.500 to 5.502, repealed and re-enacted by St. 1931, pp. 1394, 1395; Pol. Code, § 1609, as amended by St. 1927, p. 1915, § 1, subd. 3(e).

5. Statutes ⇐273.

All rights and liabilities accruing under statute, repealed without saving clause by act substantially re-enacting it, will be preserved and enforced.

6. Schools and school districts ⇐133.

Teachers' Permanent Tenure Act *held* not unconstitutional on ground that section giving trustees of districts having average daily attendance of less than 850 pupils optional authority to classify teachers as permanent employees unlawfully discriminates against larger districts (School Code, §§ 5.500 to 5.502).

7. Schools and school districts ⇐133.

Statute giving school district trustees optional authority to award teachers permanent tenure did not affect vested right of teacher acquiring such tenure before enactment thereof (School Code, §§ 5.500, 5.501).

Appeal from Superior Court, Calaveras County; J. T. B. Warne, Judge.

Action by Charles L. Gastineau for a writ of mandate to F. A. Meyer and others, as Trustees of the Calaveras Union High School District. From a judgment granting the writ, respondents appeal.

Affirmed.

Virgil M. Airola, of San Andreas, and Foltz, Rendon & Wallace, of Stockton, for appellants.

George Wadsworth, of Tracy, and Charles H. Vance, of Stockton, for respondent.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

Upon hearing of a petition for a writ of mandamus, the court found that this respondent was a permanent teacher in the Calaveras Union High School District in the school year of 1931–32, and that he is entitled to the annual salary of $1,900, as compensation for services performed during that school year, payable in ten equal installments of $190 each, beginning with September, 1931. A decree and writ of mandamus was accordingly issued, directing the board of trustees to pay petitioner that salary. From this decree the trustees have appealed.

The respondent was regularly employed by the Board of Trustees of the Calaveras Union High School District in June, 1925, as principal of that school, with the requirement that he was also to teach certain designated subjects each day, at a salary of $2,600 a year. The school had an average daily attendance of less than 850 pupils. The respondent was employed in the same capacity from year to year to and including the school year 1930–31 at an increase of salary, which finally amounted to the annual sum of $2,850 for the last-mentioned year. As a part of his duty, he was required by the board to, and did, regularly teach several subjects, consuming three class periods each school day during the entire time he served that school as principal. June 10, 1929, he was served with a written notice of re-employment, signed by the clerk of the board of trustees, which recited, in part: "You have been classified by this board as a permanent employee, under Section 1609, Third, Political Code, subject to acceptance of this offer."

This offer of employment was duly accepted by the respondent. A similar notice of re-employment and classification was served upon him in 1930. In May, 1931, the respondent was served with a conditional notice of employment, reading in part:

"Notice is hereby given you that if you are a permanent employee of the Calaveras Union High School District according to law you are required to do the following:

"1. Teach Algebra I, Algebra II, Plane Geometry, English II, Section of boys Physical Education, Mechanical Drawing I, and such other subjects or courses as may be added thereto. * * *

"And notice is hereby further given you that said board of trustees has never employed you as a teacher and that you have never been and are not entitled to classification as a permanent employee. * * *

"And notice is hereby further given that said board will not pay out any salaries until it appears that it is legal to do so and that the salary of such person lawfully performing the above mentioned duties under employment of the board will be $190 per month for not to exceed ten school months."

Pursuant to this notice, the services of the respondent as principal and superintendent of the school were terminated. He, however, continued to teach in that school all of the subjects required of him by the board, as above specified. His salary of $1,900 was paid for the year 1930–31. He was then notified that his services as a teacher were no longer desired. No charges were preferred against him. He was at all times duly qualified by the possession of necessary credentials and certification to serve as such teacher in that school. Having held himself in readiness to perform his services as a permanent teacher in that school, he demanded that he be assigned to the proper department, and that his salary therefor be paid. This was refused. Thereupon this petition for a writ of mandamus was filed.

The question which is involved on this appeal is whether a duly qualified teacher who is formally employed by a board of trustees as a principal and superintendent of a school, but who, as a part of his duty, is required to, and actually does, also teach regularly in that school continuously for more than three successive years, is entitled under the Teachers' Tenure Act to classification as a permanent teacher of the school.

The appellants assert that: (1) The respondent was hired solely as a principal and that pursuant to the provisions of section 5.502 of the School Code which was adopted in 1931 (p. 1394), providing that "No person employed in an administrative or supervisory position * * * shall be classified as a permanent employee," he was not entitled to classification as a permanent teacher; (2) he lost any right which he may have acquired by virtue of previous service in actually teaching in the school by the repeal of sections 5.500 to 5.502, inclusive, of the School Code in 1931 with relation to permanent tenure, without including in the repealing act a saving clause; (3) the enactment of the new section 5.501 in 1931 (St. 1931, p. 1394) made it optional with boards of trustees in schools "having an average daily attendance of less than 850 pupils" to award permanent tenure, and that since no affirmative action was taken by the board to classify respondent as a permanent teacher he is not entitled to permanent tenure.

[1, 2] During the entire time the respondent was employed in the Calaveras school he was qualified not only as a principal but also as a teacher. The board was without legal authority to employ him as a principal unless he held a valid teacher's certificate. Section 5.430, School Code. During the entire six years that he was employed in that school he was engaged regularly in teaching therein in addition to his services as principal. Until the close of the school year in 1930 he regularly taught in classrooms at least three periods each day. After that time, when he was relieved of his duties as a principal, he devoted his entire time to teaching. We are, therefore, persuaded the petitioner did automatically acquire the status of a permanent teacher in that school before the amendment of section 5.501 of the School Code was adopted, in which section for the first time the board of trustees was vested with an option to grant or refuse to classify a teacher in schools of less than 850 pupils as a permanent employee. In the amendment of section 1609 of the Political Code, section 5.502 of the School Code was adopted with relation to teachers' tenure (St. 1927, pp. 1913, 1915, § 1, third subdivision [e]) whereby boards of school trustees were authorized: "To classify as permanent employees *all persons*, except those hereinafter specified, who shall have been successfully employed by the district for two or three complete consecutive school years in positions requiring certification qualifications. * * * No person employed in an administrative or supervisory position requiring certification qualifications shall be classified as a permanent employee *other than as a classroom teacher*."

Substantially the same inhibition with relation to classification of administrative and supervisory officers, together with the same exception thereto, was re-enacted in section 5.501 of the School Code in 1929.

The language of this statute clearly implies that, while one engaged solely in an administrative or supervisory capacity may not be classified as a permanent principal, yet if at the same time he also successfully performs the required services as a teacher, he is nevertheless entitled to permanent tenure "as a classroom teacher." Any other construction of the law would render the language of the exception above quoted meaningless. Moreover, any other construction of the statute would render the act discriminatory against teachers as a class, and therefore void. We

are satisfied the law does not authorize permanent classification as a principal or supervisor, but that the act does guarantee permanent tenure to all other employees, including classroom teachers who have been successfully employed by the district for two or three complete consecutive school years in positions requiring certification qualifications, in spite of the fact that such employee may have been primarily hired as a principal and actually devotes a part of his time to the performance of the duties of that officer. Since the respondent was qualified as a teacher and actually engaged in teaching for the required length of time and in strict compliance with the requirements of the statute, he certainly should not be deprived of his vested right to permanent tenure as a teacher merely because he also performed other services at the same time. The petitioner is not claiming he is entitled to permanent tenure as a principal of the school, but is insisting that he has automatically attained the status of a permanent teacher therein. In that contention we think he is correct.

[3] Having served the Calaveras Union High School District as a teacher in strict conformity with the requirements of the law for more than three consecutive school years next preceding the adoption of section 5.501 of the School Code in 1931, which section for the first time conferred upon the boards of trustees of districts having an average daily attendance of less than 850 pupils the option to determine whether an employee should be awarded permanent tenure, the petitioner automatically became entitled to classification as a permanent classroom teacher by operation of law. After attaining that status the board had no power to deprive him of his vested right to permanent tenure. Section 5.500, School Code; Owens v. Board of Education, 68 Cal. App. 403, 229 P. 881, 882; Chambers v. Davis (Cal. App.) 22 P.(2d) 27. Section 5.500 of the School Code, following section 1609 of the Political Code (as amended by St. 1927, p. 1913), provides: "Boards of school trustees * * * shall have power *and it shall be their duty* to classify as permanent employees all persons * * * who shall have been successfully employed by the district for two or three complete consecutive school years in positions requiring certification qualifications."

In the Owens Case, supra, the court says: "Thus a 'probationary' teacher is re-elected and re-employed annually until entitled to classification as a 'permanent' teacher, and the board of education is required to report the employment of such teacher annually to the county superintendent. This, in itself, is sufficient to meet the terms of the statute, and the teacher thereby becomes automatically classified as a permanent teacher at the end of two years of successful service."

Unless this construction of the tenure law as it existed prior to the enacting of the optional provisions of section 5.500, supra, is adopted, the very purpose of the law would be defeated. There would then have been no necessity for enacting the optional provisions of section 5.500. Any other construction of the law would give the trustees power to defeat permanent tenure by willfully refusing to formally so classify employees, or their tenure might be defeated by negligence in the performance of the mere ministerial duty of the board. We are therefore of the opinion that formal classification as a permanent teacher was not necessary. Upon the contrary the respondent was automatically classified as a permanent teacher by operation of law.

[4] Assuming that petitioner automatically attained permanent tenure prior to August 14, 1931, at which time the repeal of sections 5.500 to 5.502 of the School Code, as they then existed, occurred, that status was not lost by virtue of failure on the part of the Legislature to adopt, as a part of the repealing act, a saving clause. The Legislature did repeal sections 5.500 to 5.502 of the School Code, which provisions were a part of chapter 3, article 1, of that Code. But as a part of the same repealing act, under the caption "Article I—Permanent" (respecting teachers), section 5.500 was re-enacted in substantially the same language in which it formerly existed. Following this provision a new section, numbered 5.501, was enacted, which contains the optional authority regarding the classification of permanent employees in schools having an average daily attendance of less than 850 pupils. The subject-matter of the two succeeding sections, as amended, has no application to the present litigation. Section 5.504 then follows as a part of the same amendment to article 1, chapter 3, of the act, which reads: "Nothing in this article shall be construed as affecting any permanent employee classified as such at the time this section takes effect nor shall any decrease in the average daily attendance of any school district operate to deprive any permanent employee of the district of his classification as such."

This section was intended as a saving clause to preserve vested rights of permanent employees whose tenure had been previously acquired pursuant to the provisions of section 1609 of the Political Code, or section 5.500 of the School Code as it formerly existed.

[5] It is a well-settled doctrine of law that when a statute is repealed without a saving clause, and as a part of the same act the law is simultaneously re-enacted in substantially the same form and substance, all rights and liabilities which had accrued under the for-

mer act will be preserved and enforced. 25 R. C. L. 934, § 186; Perkins Mfg. Co. v. Clinton Const. Co., 211 Cal. 228, 237, 295 P. 1, 75 A. L. R. 439. The author of Ruling Case Law, above cited, says: "Where a statute is repealed and all, or some, of its provisions are at the same time re-enacted, the re-enactment neutralizes the repeal, and the provisions of the repealed act which are thus re-enacted continue in force without interruption, so that all rights and liabilities that have accrued thereunder are preserved and may be enforced."

[6] Nor is the act unconstitutional on the ground that section 5.501, which was adopted in 1931, discriminates unlawfully between schools having an average daily attendance of less than 850 pupils and those schools which have a daily attendance of a greater number of pupils. Grigsby v. King, 202 Cal. 299, 260 P. 789; Morris v. Board of Education, 119 Cal. App. 750, 7 P.(2d) 364, 8 P.(2d) 502.

[7] Moreover, the last-mentioned section was enacted after the petitioner in this case had acquired permanent tenure by operation of law, and for that reason it could in no way affect his vested right to the enjoyment of that status.

The judgment is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

132 Cal.App. 15

INGA v. BLUM.

Civ. 1056.

District Court of Appeal, Fourth District, California.

May 15, 1933.

1. Appeal and error ⇐801(5).

On defendant's appeal in claim and delivery action against constable, question whether judgment on which execution writ was based was void because brought in wrong place *held* to require examination of entire transcript, warranting denial of motion to dismiss or affirm (Rules of Supreme Court and District Courts of Appeal, rule 5, § 3).

2. Appeal and error ⇐786.

On defendant's appeal in claim and delivery action against constable who acted under execution writ based on allegedly void judgment, *held* appeal should not be dismissed as frivolous where defendant, in opening brief, presented question of reliance by officer on writ regular on face (Rules of Supreme Court and District Courts of Appeal, rule 5, § 3).

Appeal from Superior Court, San Diego County; Arthur L. Mundo, Judge.

Action by Jose I. Inga against Caspar F. Blum. From an adverse judgment, defendant appeals. On motion to dismiss the appeal or affirm the judgment.

Motion denied.

Drumm, Tucker, Martell & Drumm, of Santa Ana, for appellant.

A. L. Hubbell, of Escondido, for respondent.

BARNARD, Presiding Justice.

This is a motion to dismiss the appeal or affirm the judgment made under section 3, rule V, of the Rules of the Supreme Court and District Courts of Appeal. The motion is based upon the contention that the appeal was taken for delay only and presents no substantial questions for review, and upon the further ground that appellant's opening brief does not contain the statement required by rule VIII, section 2, of the rules governing this court.

The appellant's opening brief contains a sufficient compliance with the rule last referred to.

[1, 2] This is an appeal from a judgment in an action in claim and delivery brought in the county of San Diego by the respondent for the purpose of recovering an automobile truck seized by the appellant, who is one of the constables in San Diego county. The appellant seeks to justify his action under a writ of execution issued out of the justice's court of Temescal township in Riverside county, which writ respondent concedes to be valid on its face. It is respondent's position that no substantial question is presented because the judgment on which the writ of execution was based, being a judgment against this respondent, is in fact void, since the action in which that judgment was entered was neither brought in the place where the contract relied on was made nor where the respondent resided at the time suit was filed.

Not only is a question presented in this regard which requires an examination of the entire transcript (City of Los Angeles v. Los Angeles-Inyo Farms Co. (Cal. App.) 14 P.(2d) 339; Brown v. Gow (Cal. App.) 14 P.(2d) 322), but the appellant, in his opening brief, presents a question of reliance by an officer upon a writ regular upon its face, which may not be lightly dismissed as frivolous.

The motion is denied.

We concur: JENNINGS, J.; ANDREWS, Justice pro tem.

132 Cal.App. 16

COLPE INV. CO. v. SEELEY & CO.

Civ. 8630.

District Court of Appeal, First District, Division 1, California.

May 16, 1933.

1. Insurance ⇐103.

Agent employed to keep property insured must exercise good faith and reasonable diligence to procure best terms obtainable.

2. Insurance ⇐103.

Agent employed to keep property insured, if professional agent, must exercise particular skill reasonably to be expected and know different companies and terms available.

3. Insurance ⇐103.

Generally, whether agent employed to keep property insured has exercised good faith and diligence to procure best terms available is jury question.

4. Insurance ⇐103.

Whether agent employed to keep properties insured was chargeable with bad faith in not procuring policies containing coinsurance clauses and three-year policies on two-year premium *held* for jury.

5. Trial ⇐139(1).

Where plaintiff produces substantial evidence which, viewed most favorably, tends to support judgment for plaintiff, nonsuit is improper.

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by the Colpe Investment Company against Seeley & Co. Defendant's motion for a nonsuit as to certain causes of action was granted, and plaintiff appeals.

Reversed.

Henry E. Monroe, of San Francisco (Henriette W. Steinegger, of San Francisco, of counsel), for appellant.

Christopher M. Bradley and Kimball Dyer, both of San Francisco, for respondent.

PER CURIAM.

An action for damages based upon the alleged fraud of the defendant while acting as the agent of plaintiff and its assignors.

It was alleged that defendant concealed, with intent to deceive, the material facts concerning the terms, premiums, and types of insurance coverage procurable upon properties of plaintiff and its assignors which defendant was employed to keep insured, and falsely represented that such terms, premiums, and types of insurance coverage procured upon said properties were the best that could be procured for adequate coverage thereon.

The complaint consisted of six separate causes of action, three of which, namely, the second, fourth, and sixth, are not before us on this appeal. Of the remaining three, the first, third, and fifth, the first is based upon the failure to write certain policies with a coinsurance clause attached. The other two are based upon the alleged failure to procure the attachment of coinsurance clauses to certain policies and to procure policies for a three-year term upon a two-year premium.

Upon the trial the court granted defendant's motion for a nonsuit as to the three causes of action last mentioned.

Defendant contends that there was no proof that the alleged representations were in fact untrue, or that it violated any duty as agent, or that damage resulted to plaintiff.

It was testified on behalf of plaintiff that defendant was employed as alleged to keep the properties insured continuously up to 100 per cent. of their value. Defendant was instructed that full coverage should be carried, and that this should be procured upon the terms most favorable to the owners. Further, that whenever the policies were to be renewed—which happened annually—the owners and defendant's agent would agree as to the correct values of the properties for the purpose of fixing the amounts of the insurance. It was also testified by qualified experts that the practice of writing coinsurance was known to all brokers, who ought to advise their principals with reference to the effect thereof and also as to the discount allowed in such instances, and also the possibility of procuring a three-year coverage for a two-year premium. Plaintiff's president, who represented the owners in the negotiations with defendant during the period when defendant was procuring the policies, testified that he was never advised of the possibility of procuring these discounts. It was further testified that defendant represented from time to time that the insurance placed upon the properties was at the best rates obtainable, but that, contrary to such representations, insurance adequately protecting the insured could have been obtained at rates much lower than those actually charged.

[1-3] The facts testified to were similar to those in Ferrar v. Western Assurance Co., 30 Cal. App. 489, 159 P. 609, 611, and it is clear that defendant was acting as agent for the plaintiff and its assignors in insuring their properties and undertook to keep the same insured from year to year. Where such is the case, it is the duty of an agent to exercise good faith and reasonable diligence to procure insurance on the best terms he can obtain; and, if he is a professional agent, he should be required to exercise the particular

skill reasonably to be expected of such an agent, and to have knowledge as to the different companies and terms available with respect to the commission assumed by him. 2 Couch, Cyclopedia of Insurance Law, pp 1232, 1233, 1366; 32 Cor. Jur. Insurance, § 170, p. 1087; Burges v. Jackson, 18 App. Div. 296, 46 N. Y. S. 326; Id., 162 N. Y. 632, 57 N. E. 1105; Scharles v. Hubbard, 74 Misc. 72, 131 N. Y. S. 848. Whether he has so acted is generally a question for the jury. 32 Cor. Jur. Insurance, § 170, pp. 1087, 1088; Russell v. O'Connor, 120 Minn. 66, 139 N. W. 148; Walker, etc., Co. v. Black, 216 Pa. 395, 65 A. 799.

[4] It appears that, in order to obtain the advantage of the coinsurance clause, the property must be insured for an agreed percentage of its value stated therein; and a failure to insure for this amount results, in the event of loss, in the insured having to bear such a proportion thereof as the amount of insurance carried is less than the stated percentage of actual value; but, where the required amount of insurance is carried, the insured in case of loss recovers in full therefor, not exceeding, of course, the amount of the policy. Where such a clause is attached to the policy, discounts are allowed on the premium rates, which bring such rates materially lower than those charged for straight insurance and without diminution of the protection afforded if the clause be complied with.

It is urged by defendant that the actual value of the properties insured was not shown, and that consequently it does not appear that the insured suffered damage. But, as stated, there is testimony that the parties estimated such values annually and that full coverage was stipulated for. From this circumstance the court might reasonably have inferred that the actual values of the property and the amounts of insurance written thereon were the same. It was also sufficiently shown that policies of insurance upon the several properties involved in these causes of action might have been obtained with coinsurance clauses attached, that such policies would have afforded the protection demanded by the insured, and that the premiums thereon would have been less than those paid. As the natural result of the higher premiums paid, defendant received larger commissions for its services.

It appears without dispute that policies for a three-year term at the two-year rate were procurable, and there was evidence that the properties might have been so insured. It is conceded that the premiums paid were based on the regular rates for straight one-year insurance, and it may be assumed that these rates were as low as could be procured for that class of insurance. Nevertheless there was competent evidence that less expensive adequate coverage might have been obtained; and the question whether defendant's failure to procure it was due to bad faith was under the cases cited a question for the jury.

[5] A nonsuit should not be granted when the plaintiff has produced substantial evidence which, viewed in its most favorable light, tends to support a judgment in his favor. Zilmer v. Gerichten, 111 Cal. 73, 43 P. 408; In re Estate of Ivey, 94 Cal. App. 576, 581, 271 P. 559.

The judgment is reversed.

131 Cal.App. 761

MORRIS PLAN CO. OF ORANGE COUNTY v. KAHEN.

Civ. 1443.

District Court of Appeal, Fourth District, California.

May 13, 1933.

1. Justices of the peace ⇐45.

Counterclaim for over $300 does not oust justice of jurisdiction, but such pleading may be stricken on motion.

2. Appeal and error ⇐32.

Erroneous judgment of superior court in case within its original jurisdiction, though brought to it by appeal from justice court, may be corrected by appeal to upper courts.

Appeal from Superior Court, Orange County; James L. Allen, Judge.

Action by the Morris Plan Company of Orange County against Frederick E. Kahen, who filed a counterclaim. Judgment for defendant, and plaintiff appeals. On defendant's motion to dismiss the appeal.

Motion denied.

Wm. J. M. Heinz, of Anaheim, for appellant.

Chas. D. Swanner, of Santa Ana, for respondent.

ANDREWS, Justice pro tem.

Defendant moves to dismiss this appeal upon the ground that, the action having been commenced in the justice's court where jurisdiction was limited to $300, and thereafter tried de novo on appeal to the superior court, no further appeal can be taken to this court.

The action in the justice's court was upon a note for $198, and in that court defendant interposed an answer and counterclaimed for the sum of $500. The trial in the justice's court resulted in a judgment

for plaintiff in a total sum of less than $300. An appeal was taken by defendant to the superior court and a trial had upon the same pleadings, resulting in a judgment that plaintiff take nothing and defendant have judgment against the plaintiff for the sum of $55, and costs.

[1] It has been determined in this state that the putting in of a counterclaim for a sum greater than $300 does not oust the justice of jurisdiction, and that such a pleading may be stricken on motion. It has also been held that, after appeal to the superior court, pleadings may be amended, but the amendment must be confined, whether on the part of plaintiff or of defendant, to the jurisdictional sum of $300, and that on such appeal the superior court may only try issues and give judgment for an amount within the jurisdiction of the justice.

[2] It cannot be determined whether the justice undertook to try the counterclaim or ignored it and tried only the issue presented by plaintiff's complaint, the judgment rather indicating the latter course. On appeal the superior court undoubtedly did try the issue presented by the counterclaim and rendered an affirmative judgment canceling plaintiff's claim and awarding defendant the sum of $55, which amounted to a sum less than $300.

The point involved in the motion is whether the superior court, having undertaken to try an issue involving $500 on an appeal from the justice's court, exceeded its jurisdiction and rendered a void judgment which could be corrected by appeal to this court. Our courts hold that, where the superior court undertakes to try and give judgment in cases within its original jurisdiction, even where such issue comes to it by reason of an appeal, although not by virtue of the appeal, the remedy is to have such judgment corrected, if erroneous, by appeal to the upper courts the same as if the issue had been brought originally in the superior court.

The motion to dismiss is denied.

We concur: BARNARD, P. J.; JENNINGS, J.

132 Cal.App. 48

FINNERTY v. CUMMINGS.

Civ. 8790.

District Court of Appeal, First District, Division 1, California.

May 17, 1933.

Hearing Denied by Supreme Court July 14, 1933.

1. Judgment ⇐720.

Judgment is, in respect to matter directly adjudged, res judicata of second action between same parties in same capacity (Code Civ. Proc. § 1908, subd. 2).

2. Damages ⇐43.

Parent and child ⇐7(1).

Where usual relationship of parent and child exists in which parent exercises his right to child's services and performs his duty to support it, right to recover for loss of injured child's earnings and medical expenses belongs to parent.

3. Appeal and error ⇐930(2).

Presumption exists that jury obeyed instruction.

4. Judgment ⇐729.

Judgment in personal injury action brought by child, by mother as guardian ad litem, wherein items for loss of child's earnings and medical expenses were not proper subject of litigation, or, if proper subject, were withdrawn by instruction from jury's consideration, *held* not res judicata of second action brought by mother individually to recover for such items (Code Civ. Proc. § 1908, subd. 2).

5. Judgment ⇐954.

Complaint and testimony in personal injury action brought by child, by mother as guardian ad litem, *held* insufficient to establish waiver, or estoppel of mother individually to bring second action to recover for loss of child's earnings and medical expenses (Code Civ. Proc. § 1908, subd. 2).

Facts disclosed that complaint in personal injury action brought by child, by her mother as guardian ad litem, did not plead or pray a recovery for loss of child's earnings or for medical expenses incurred in treating her injuries; that on day of trial, and before impanelment of jury, mother served defendant with copy of amended complaint in which recovery of such items was sought, and moved for leave to file amended complaint; that, when defendant objected, motion was abandoned and amended complaint was not filed; that testimony as to such items was introduced and defendant did not object thereto; and that jury were instructed that no allowance could be made for such items.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action by Abbie Finnerty against Charles Cummings. From a judgment in favor of plaintiff, defendant appeals.

Affirmed.

Barry J. Colding, Theodore Hale, and Carroll B. Crawford, all of San Francisco, for appellant.

James F. Brennan and Edwin V. McKenzie, both of San Francisco, for respondent.

GRAY, Justice pro tem., delivered the opinion of the court.

In a prior action respondent's minor daughter, appearing by respondent as her guardian ad litem, recovered a judgment against appellant for injuries received in an automobile accident. Subsequently respondent brought this action to recover for her loss of her daughter's earnings and for medical expenses incurred in treating her daughter's injuries. Appellant, in addition to other defenses, pleaded that the first judgment was res adjudicata of the second action. The court found adversely to appellant on this plea and rendered judgment against him. From this judgment appellant appeals, claiming that his plea of res adjudicata should have been upheld.

[1] "Among other requirements of a judgment pleaded in bar is this—that the action must be between the same parties in the same capacity and the judgment must be 'in respect to the matter directly adjudged.' Code Civ. Proc. subd. 2, § 1908; Laguna, etc., Dist. v. Charles Martin Co., 5 Cal. App. 172, 89 P. 993; Hughes v. United States, 4 Wall. 232, 18 L. Ed. 303." Elliott v. Hudson, 18 Cal. App. 642, 653, 124 P. 103, 108. Since respondent appeared in the first action as guardian to enforce her daughter's right, and in the second action individually, to enforce her own right, the first judgment was not a bar to the second action. Karr v. Parks, 44 Cal. 46. If, although respondent appeared in the two actions in different capacities, she, in fact, litigated the same right, the first judgment would estop her in the second action. Williams v. Southern Pac. Co., 54 Cal. App. 571, 202 P. 356.

[2] Ordinarily, that is where the usual relationship of parent and child exists in which the parent exercises his right to the child's services and performs his duty to support it, the right to recover for loss of the child's earnings and for medical expenses incurred in treating its injuries belongs to the parent. Karr v. Parks, supra; Sykes v. Lawlor, 49 Cal. 236; Durkee v. C. P. R. R. Co., 56 Cal. 388, 38 Am. Rep. 59; McManus v. Arnold Taxi Corp., 82 Cal. App. 215, 255 P. 755. Where the parent has emancipated the child (Galwey v. Pacific Auto Stages, Inc., 96 Cal. App. 169, 273 P. 866), or, as guardian in the child's action, by pleading or testimony, waived his right or estopped himself from subsequently asserting it, the child is permitted to recover these items. McManus v. Arnold Taxi Corp., supra. These principles are exhaustively treated in an extended note in 37 A. L. R. 11. If the right to these items was litigated in the first action, of course, since there cannot be a double recovery, the first judgment was a bar to the present action. Appellant claims that the record in the first action brings it within the second class of the above-noted exceptions to the general rule.

[3-5] The complaint in the first action did not plead or pray a recovery of these items. On the day of trial, and before the impanelment of the jury, respondent, as guardian ad litem, served appellant with a copy of an amended complaint, in which recovery of these items was sought and moved for leave to file the same. When appellant objected, the motion was abandoned and the amended complaint was not filed. At the trial the daughter testified to the duration of her disability, during which she was unable to work and to the amount of medical bills, rendered to her parents. The attending physician testified to the value of his services and to payment of the greater portion thereof by respondent. Appellant's reference to the transcript does not support his contention that he objected to this testimony. If timely objection had been made, this testimony should not have been permitted because it was outside of the issues framed by the complaint. But even if it were erroneously admitted, it must be presumed that the jury obeyed the instruction, given at appellant's request, that no allowance could be made for these items, and therefore did not include these items in the verdict. Johns v. Pond, 38 Cal. App. 643, 177 P. 293. Since the complaint did not seek their recovery, these items could not have been properly litigated in the first action. Assuming, however, that they were a proper subject of litigation in the first action, the instruction withdrew them from consideration, and therefore the first judgment was not res adjudicata as to them. Southern Pacific Co. v. Edmunds, 168 Cal. 415, 143 P. 597. The facts above recited are insufficient to establish either a waiver or estoppel. Therefore appellant's claim is without merit and the judgment is correct.

Judgment affirmed.

We concur: TYLER, P. J.; CASHIN, J.

131 Cal.App. 747

COLLINS v. JONES.

Civ. 7709.

District Court of Appeal, Second District, Division 2, California.

May 12, 1933.

1. False imprisonment ⇐31.

Where police officer ordered plaintiff sent to psychopathic ward, and there was no evidence or claim she had committed offense or was disordered in mind to extent rendering her being at large dangerous, charge of false imprisonment was established.

2. False imprisonment ⇐22.

Where arrest was shown, burden was on person making arrest to show justification therefor.

3. False imprisonment ⇐4, 13.

Neither actual malice nor want of probable cause is essential element in action for false imprisonment.

4. False imprisonment ⇐31.

Evidence that plaintiff correctly insisted that child found was not her son showed lack of probable cause for her commitment in psychopathic hospital by police officer.

5. False imprisonment ⇐40.

In false imprisonment action, instruction *held* not erroneous as authorizing damages for elements not proven, such as mental suffering, shame, humiliation, loss of good name, reputation, etc.

> Instruction was in substance that, if jury found for plaintiff, jury should award her as actual or compensatory damages sum which would compensate her for any injuries jury might find she sustained because of arrest and detention at psychopathic hospital, and that in awarding such damages jury could consider character of plaintiff's injuries, if any, she sustained, mental suffering, if any, also any sense of shame or humiliation suffered on account of her arrest and detention, if any, and what injuries she sustained to her good name and reputation, if any, and award damages which would be fair compensation.

6. Trial ⇐252(2).

Generally instructions should be based on evidence actually adduced or on reasonable inference from evidence disclosed by record.

7. Damages ⇐20.

Wrongdoer is liable for damages naturally flowing from his wrongful act.

8. Torts ⇐22.

Joint tort-feasors are severally liable.

9. False imprisonment ⇐34.

Police officer ordering plaintiff to psychopathic ward was liable for damages naturally flowing from wrongful act, as against contention he was not liable for damage suffered beyond moment of actual arrest.

10. Appeal and error ⇐882(3).

Defendant could not on appeal be permitted to change theory on which case was tried and present questions not embraced therein.

11. Appeal and error ⇐1067.

In false imprisonment action, modification of defendant's instructions that question was what damage plaintiff suffered by reason of her imprisonment by striking out words "her imprisonment" and adding "act of defendant * * * which court has heretofore instructed you defendant is liable for," *held* harmless.

12. False imprisonment ⇐31.

In action for false imprisonment against officer ordering plaintiff to psychopathic ward, evidence warranted award of punitive damages.

13. Appeal and error ⇐932(1).

In considering excessiveness of verdict, appellate court must treat every conflict of evidence as resolved in favor of respondent, and give him benefit of every inference that can reasonably be drawn in support of claim.

14. Appeal and error ⇐1004(1).

Appellate court will not interfere, unless verdict is so grossly excessive as to shock moral sense and raise reasonable presumption that jury was actuated by passion or prejudice.

15. False imprisonment ⇐36.

$10,000 general damages, and $500 exemplary damages to woman ordered by police officer to psychopathic ward because not recognizing, as lost son, boy who was not her son, *held* not excessive.

Appeal from Superior Court, Los Angeles County; Edwin F. Hahn, Judge.

Action by Christine Collins against J. J. Jones. From a judgment for plaintiff, defendant appeals.

Judgment modified, and, as modified, affirmed.

Schweitzer & Hutton, of Los Angeles, for appellant.

S. S. Hahn, of Los Angeles, for respondent.

PARKER, Justice pro tem.

This is an action to recover damages on account of false imprisonment. The case was tried by jury and verdict returned in favor of plaintiff. After denial of defendant's motion for a new trial, judgment was entered pursuant to the verdict, and defendant appeals.

The facts are novel and interesting and demonstrative of the old adage that truth is stranger than fiction. Mrs. Collins, the plaintiff, was the mother of a boy of the age of nine years. The boy's name was Walter Collins. In March of 1928 the boy disappeared and has never been found. As was to be expected, the matter was reported to the Los Angeles police department and a search instituted. With the diligence characterizing modern police methods, the search covered practically the entire country, extending, perhaps, abroad. In August of the same year information was received from Illinois that a boy identified as Walter had been located and was being held awaiting further details and the consummation of plans for the boy's transportation West. The defendant was a police officer of the city of Los Angeles of the rank of captain. The matter of the disappearance of the boy came under his detail, either as a part of his regular duties or was a matter of special assignment. Regardless of the routine of the police department, the evidence discloses that the defendant ostensibly was in direct charge of the investigation. When the information concerning a boy being held in the East was received, the plaintiff was notified and photographs were sent out to Los Angeles and compared, and likewise there was some correspondence. It was finally decided from the evidence at hand that the boy held was the boy sought, and within a short time a boy thought to be the missing son of plaintiff arrived at Los Angeles. This boy was received by the mother, plaintiff herein, with some misgivings. While there was a striking similarity between the boy found and the lost son, yet in many characteristics they differed. It was thought perhaps that the experiences through which the lad had gone might have contributed in a way to the apparent changes, and this might well be the situation in the case of a boy as undeveloped as the ordinary boy of nine years of age. The plaintiff brought the boy to her home, where he remained for a period of some twenty days or thereabouts. During all of this time there was always an atmosphere of uncertainty and doubt. The boy seemed to recall persons and incidents and neighborhood landmarks to an extent that seemed impossible to one not previously familiar therewith. Some of the neighbors were of the opinion even at the time of trial that the boy was the missing son. Others, from the outset, including the teacher of the school where plaintiff's son had been enrolled, were extremely doubtful. A third group refused from the beginning to accept the returned youth as the boy they had previously known.

Here we may state the fact to be that this new boy was not the son of plaintiff. After the period of doubt had continued for the length of time mentioned, plaintiff became positive that the boy was not her son and so expressed herself. Thereupon the defendant called her to his office and endeavored to convince her that she was wrong. Failing in this, the defendant then expressed doubt as to her sanity or her honesty and ordered her sent to the psychopathic ward for detention and examination. Accordingly she was taken to the said ward on a Saturday afternoon. No complaint had been made against her and no warrant had been issued for her apprehension.

[1] There is a stipulation in the record as follows: "Mr. Hutton (counsel for defendant): If counsel wishes a stipulation, I am willing to stipulate that the responsibility for the sending of this lady to the psychopathic ward was the defendant's." This stipulation was accepted and thereby this phase of the case is closed.

The next fact agreed upon is that she was held there from Saturday until Tuesday without complaint or warrant. There being no evidence nor claim that she had committed any offense or that she was disordered in mind to an extent that would or might render her being at large dangerous to the person or property or health of herself or others, it follows that the charge of false imprisonment was completely made out and established.

[2] The arrest being shown, the burden was on the person or persons making the arrest to show justification therefor. Sebring v. Harris, 20 Cal. App. 56, 128 P. 7; Mackie v. Ambassador Hotel, 123 Cal. App. 215, 11 P. (2d) 3.

No question is presented as to the sufficiency of the evidence; therefore we will not detail the defense offered, excepting in so far as necessary to explain other points raised.

[3, 4] At the conclusion of the trial the court gave the following instruction to the jury: "In the trial of this case considerable evidence has been produced bearing upon the question as to whether or not there was probable cause for the act of the defendant Jones in arresting the plaintiff, Mrs. Collins, on Saturday, Sept. 8, 1928, and directing her commitment in the psychopathic hospital, The court has determined, under the evidence, that that question is one of law and not one for determination by the jury. The court has determined that as a matter of law, probable cause did not exist under the law to justify the defendant Jones in his action in arresting the plaintiff, Mrs. Collins, and causing her commitment to the psychopathic hospital. Under these circumstances, the only question that will be submitted to you for your determination is the amount of damages, if any, the plaintiff suffered by reason of the action of the defendant Jones

in causing her arrest and incarceration in the psychopathic hospital. And if you determine that by reason of the said acts of the defendant Jones the plaintiff suffered damages, you will only consider such damages as she may have suffered resulting from her arrest on Saturday afternoon and her detention in the psychopathic hospital from Saturday until the following Tuesday, when a complaint was sworn to by the defendant Jones charging the plaintiff with insanity." Appellant attacks this instruction with great show of mettle. The point is made that, while probable cause or the lack thereof is always a question to be determined by the court, yet the facts upon which the court bases its conclusion should be determined by the jury. In other words, the claim is that where the evidence is conflicting as to the facts upon which the defendant may have acted, the court should submit to the jury the determination of the conflict. We may concede this claim as being supported by the authorities. The question is exhaustively discussed in the case of Ball v. Rawles, 93 Cal. 222, 28 P. 937, 27 Am. St. Rep. 174, and this case has been generally accepted as the leading California authority on the question of probable cause, with particular relation to the respective functions of court and jury. The concession does not dispose of the point raised. The great weight of authority supports the rule that neither actual malice nor want of probable cause is an essential element in an action for false imprisonment. Meints v. Huntington (C. C. A.) 276 F. 245, 19 A. L. R. at page 671 and cases therein cited. From these authorities it would be evident that the question of probable cause was not in the case and even an erroneous determination on the lack of probable cause would not have been prejudicial. Going further with the discussion, we find that there was no real conflict in the evidence on the point of probable cause. The record would and does support the conclusion that there was no probable cause even if we accept as true the evidence of defendant.

The most that can be made of defendant's case is that he himself thought the plaintiff's mind was disordered. He based this conclusion on the fact that the mother insisted the child was not her son, in the face of what he thought was conclusive evidence to the contrary. It would seem more reasonable that he mistrust his own mentality. The record discloses that after a three weeks' association the plaintiff disclaimed the child, and the record further discloses that her disclaimer was warranted and that the child was not her son. No amount of argument could convince a court or jury that the conduct of a mother under these conditions affords even the slightest basis for a doubt as to her sanity.

[5, 6] It is next claimed that error was committed in giving the following instruction: "The court instructs the jury that if you find for the plaintiff you should award her as actual or compensatory damages such sum as you find from the evidence will compensate her for any injury you find she sustained by reason of her arrest and detention in the hospital from Saturday afternoon until the following Tuesday. In awarding such damages you may consider the character of her injuries, if any she sustained, also the mental suffering, if any, also any sense of shame or humiliation suffered on account of her arrest and detention, if any, and what injury she sustained to her good name and reputation, if any, and award her such damages as will be fair compensation in the premises." The complaint made is that the instruction authorized damages to be awarded plaintiff for elements not proven; namely, mental suffering, shame, humiliation, loss of good name, reputation, etc. No authority supports the argument. The general rule is that instructions should be based upon evidence actually adduced or upon reasonable inference from the evidence disclosed by the record. Risdon v. Yates, 145 Cal. 210, 78 P. 641; Reynolds v. Struble (Cal. App.) 18 P. (2d) 690.

[7-9] The instruction is further criticized on the ground that defendant was not liable for any damage suffered beyond the moment of actual arrest; that, after the arrest, the imprisonment was under the control of the authorities at the psychopathic ward. Authority cited somewhat squints toward the contention. However, a wrongdoer is liable for damages naturally flowing from his wrongful act. Likewise is it the rule that joint tort-feasors are severally liable. There is no showing nor is there claim made that any person had the right or authority to release plaintiff before a hearing after she was once detained by order of the defendant.

Other instructions are attacked, but the attack is based upon practically the same grounds as hereinbefore discussed. The general argument is mainly on the facts, already determined adversely. Few authorities are cited and these few are not in point.

[10, 11] The defendant requested the following instruction: "The only question for you to determine in your deliberation is: What, if any, damage or loss did the plaintiff suffer by reason of her imprisonment?" This clearly demonstrates the theory of the trial and defendant should not now be permitted to change that theory and present questions not embraced therein. This requested instruction admitted the liability and admitted the existence of all of the elements going to constitute the cause of action. The instruction requested was modified by the court by striking out the words "her imprisonment" and adding "the acts of defendant Jones, which the court has heretofore instructed you the defendant is liable for."

Appellant makes no complaint as to the instructions referred to, namely, those wherein the court detailed the acts of defendant Jones "for which said Jones was liable." If there was no error in these instructions, and none is urged, then necessarily the modification of the instruction was harmless.

It is urged that the court erred in sustaining or not sustaining objections to evidence. On the argument supporting the contention we find a portion of the testimony given verbatim. At the conclusion of this recital the argument is condensed to the effect that it is submitted that the testimony was highly injurious to the interests of appellant. It might be said, in passing, that the extent to which evidence adduced by a plaintiff is injurious to the interests of a defendant is one of the tests of relevancy and materiality. Certainly, testimony of a plaintiff, carrying the burden of proof, which in no way affected the interests of a defendant would be worthless. We have carefully analyzed the testimony and the rulings herein and find no error and we might go a step further and state that the argument of appellant partially concedes this.

[12-15] We come now to the question of damages. Here it is interesting to note that the record seems to indicate that this was the only point argued to any extent on defendant's motion for a new trial. The verdict of the jury assessed damages as follows: General damages $10,000; special damages $300; exemplary damages $500. Without a detailed review of the testimony we state that there is not a word of testimony to support the assessment of special damages. Without further comment this item of three hundred dollars is stricken from the judgment. On the subject of punitive damages reference may be had to 8 Cal. Jur., commencing at page 861. Our code provides specifically for the recovery of punitive or exemplary damages where the facts show oppression, fraud or malice, express or implied. These references will suffice the present inquiry. There can be no question that if ever punitive damages may be awarded this case presents the occasion. The main argument here as well as in the court below goes to the excessive amount awarded as compensatory damages. In the case of Riffel v. Letts, 31 Cal. App. 426, quoting from page 428, 160 P. 845, 847, which was a case of false imprisonment the court says: "Next it is claimed that the verdict was excessive in amount. As a general rule, what will be a * * * reasonable compensation for the damages occasioned by injuries to the person is a question committed to the sound discretion of the jury. In considering an attack upon a verdict as excessive, the appellate court must treat every conflict of the evidence as resolved in favor of the respondent, and must give him the benefit of every inference that can reasonably be drawn in support of his claim. Kimic v. San-Jose-Los Gatos, etc., Railway Co., 156 Cal. 273, 277, 104 P. 312." Also, in the case of Lanigan v. Neely, 4 Cal. App. 772, 89 P. 441, 446, the court said: "The rule in this state is so well settled by judicial decision that it has become elementary, that the appellate courts will 'not interfere in such cases unless the amount awarded is so grossly excessive as to shock the moral sense and raise a reasonable presumption that the jury' in the rendition of its verdict was actuated and influenced by passion or prejudice. Marshall v. Taylor, 98 Cal. 55–63, 32 P. 867, 35 Am. St. Rep. 144; Wilson v. Fitch, 41 Cal. 386; Harris v. Zanone, 93 Cal. 59, 28 P. 845; * * * Howland v. Oakland C. Street Railway Co., 110 Cal. 513, 42 P. 983." It may be true that we might feel the award to be somewhat larger than we would have given had the matter been originally within our discretion. This, however, is not a test. Should we disapprove the verdict there would be open a number of courses. We might reduce the verdict and order judgment entered in the court below for the reduced amount. The question instantly presents itself as to what standard we would or could adopt in fixing the reduced amount. The only answer is that we would necessarily adopt the same standard adopted by the jury and the court below. Next, we might reverse the judgment and order a new trial on the issue of damages. Here again we meet the same question. What rule of law would we announce so that a future jury or court might be guided? All that we could do would be to caution against too great liberality and warn against the injection of passion or prejudice into the consideration. And so without a standard we might keep the case for years going back and forth between trial and appeal. The trial judge gave this question of damages earnest and able consideration. He was familiar with the case, the people involved, and the facts presented. He wrote and filed a memorandum of opinion therein, and his views are expressed as follows:

"The one point urged by defendant on his motion for a new trial is that the verdict of the jury is excessive.

"The only power given to the trial court to grant a new trial on this ground is that provided by section 657 of the Code of Civil Procedure, wherein the court is authorized to grant such a new trial when convinced that the verdict was rendered 'under the influence of passion or prejudice.'

"Counsel for defendant urged that in finding a measure to be used in determining whether or not a verdict is excessive, recourse may be had to decisions wherein verdicts of juries in cases of this character have been either sustained or reversed, where the question as to whether or not the verdict was excessive has been considered.

"The cases cited by counsel for the defendant furnish little, if any, aid for the instant case. All authorities, however, do point out that the circumstances of each particular case necessarily determine the measure of damages. In other words, where the conduct of the arresting officer or the one who detains the aggrieved party is lacking in any reasonable justification, or is accompanied by conduct or circumstances that are particularly aggravating, or where the circumstances surrounding the arrest and detention are such as to particularly bring humiliation and mental distress, a larger award will be sustained than where the arrest or detention had some reasonable basis, or judgment, or where the circumstances were attended with little or no publicity or notoriety. The writer of the opinion in Elser v. Southern Pacific Company, 7 Cal. App. 493, 94 P. 852, stresses the factors attending the arrest and detention as coming within that class of cases that justify a relatively small award in damages. On the other hand, in those cases where the arrest has been particularly provocative, or without any reasonable justification, or attended with considerable notoriety, much larger awards have been sustained.

"In the present case, I feel that there was sufficient evidence to warrant the jury in making the following findings:

"1st. That the defendant had no reasonable justification for arresting the plaintiff on the charge of insanity.

"2nd. That the defendant was influenced in his act of arrest by pique and disappointment in that the plaintiff refused to acquiesce in his, the defendant's, beliefs that the child was the son of the plaintiff.

"3rd. That the publicity that attended the arrest and charge of insanity lodged against the plaintiff, in view of the circumstances of the case, and particularly the wide publicity given to the disappearance of Mrs. Collins' son, was not only such as to cause the plaintiff considerable mental disturbance and worry at the time of her arrest and incarceration, but the feeling of embarrassment and chagrin would likely continue for some time after her release.

"4th. That the plaintiff was in a highly nervous state as a result of the worry and strain from the loss of her son. A mother under such circumstances, when arrested and charged with insanity, would experience a greater degree of pain and suffering, and perchance much more extended suffering, than would be the case if such conditions did not exist.

"Upon a motion for a new trial the court must necessarily assume that the jury considered all of those elements that are properly taken into consideration most favorable to the plaintiff's case. In the light of the above suggested findings, as well as others that might be pointed out under the evidence, I do not feel that the court can as a matter of law say that the verdict was rendered 'under the influence of passion and prejudice.'

"As I indicated at the time of the argument on motion for a new trial, when the verdict was announced my first impression was that it was an unusually large verdict. However, after a careful consideration of the matter I do not find myself possessed of that abiding conviction that the verdict is unjust, which is a condition I feel should exist before the trial court sets aside the jury's finding. The motion for a new trial is denied."

The judgment is modified by deducting the amount of $300 as special damages, thus modified, the judgment is affirmed, respondent to recover costs.

We concur: WORKS, P. J.; STEPHENS, J.

131 Cal.App. 718

ECKERT v. GRAHAM et al.

Civ. 8673.

District Court of Appeal, First District, Division 2, California.

May 12, 1933.

1. Continuance ⇐7.

Discretion of trial court on motion for continuance may not be arbitrarily exercised.

2. Continuance ⇐10.

In action to enforce stockholders' liability, denial of plaintiff's motion for continuance on ground of another action pending involving ownership of stock, *held* abuse of discretion.

3. Corporations ⇐268(4).

In action to enforce stockholders' liability, refusal to permit amendment to complaint to allege rescission of defendants' contract for sale of stock, *held* abuse of discretion.

Appeal from Superior Court, City and County of San Francisco; Michael J. Roche, Judge.

Action by L. C. Eckert against D. J. Graham and others. From a judgment in favor of the defendants, the plaintiff appeals.

Reversed.

Tum Suden & Tum Suden, of San Francisco, for appellant.

Ackerman, Wayland & Mathews, of San Francisco, for respondents.

SPENCE, Justice.

Plaintiff was the assignee of C. F. Colmar and Cyclops Iron Works. Plaintiff's assignors were creditors of the Vulcan Iron Works, a corporation. This action was brought to recover against the defendants as stockholders of the last-named corporation. The cause was tried by the court sitting without a jury and, from a judgment in favor of defendants, plaintiff appeals.

In 1926, the defendants herein were the owners of practically all of the outstanding stock of the Vulcan Iron Works, a corporation. In September, 1926, plaintiff's assignor, C. F. Colmar, entered into an agreement with defendants whereby he purchased the stock of said defendants for the sum of $25,000. The stock was transferred into the name of C. F. Colmar and was placed in escrow pending the completion of the payments therefor. The payments were made as agreed, but subsequently C. F. Colmar rescinded the sale because of alleged fraudulent representations and brought an action to enforce the rescission and recover the purchase price paid. Said action was entitled C. F. Colmar, Plaintiff, v. M. E. Pinckard, Defendant, and was numbered action 183066 in the superior court in the city and county of San Francisco. Upon the first trial of said action in one of the departments of said court, plaintiff therein recovered judgment, but a motion for new trial was thereafter granted. Upon the second trial of said action in another department of said court, the trial court indicated that judgment would be entered in favor of the defendant therein, but no findings or judgment were signed or entered. Said action is still pending and the question of whether said Colmar was entitled to rescind and the question of the ownership of said stock as between said C. F. Colmar and defendant M. E. Pinckard has never been finally determined therein.

While the above-mentioned action was pending, said C. F. Colmar and Cyclops Iron Works assigned to plaintiff herein their claims arising out of the indebtedness of the Vulcan Iron Works. In order to avoid the running of the statute of limitations, plaintiff brought this action against defendants herein in the superior court of the city and county of San Francisco, being action numbered 212315, claiming that defendants were the owners of the stock and seeking to recover against them on their liability as stockholders. The complaint was in the customary form of a complaint to enforce stockholders' liability and the action was brought upon the theory that as said C. F. Colmar had rightfully rescinded the sale of the stock, the status of the parties was the same as though no sale had occurred and defendants were therefore at all times the owners of the stock and liable as such stockholders. Stolte v. Kehrlein, 103 Cal. App. 128, 284 P. 221. Defendant Pinckard by his answer admitted the ownership of most of the stock up to September 20, 1926, but alleged that at said time defendants sold the stock to said C. F. Colmar. Said defendant denied the ownership of any of the stock by any of the defendants after September 20, 1926. It was further alleged that said C. F. Colmar had commenced an action in said court against said defendant, being action numbered 183066. A copy of the complaint in said last-mentioned action was attached to said defendants' answer herein as an exhibit and it was alleged that "said action is now on trial."

Plaintiff herein did not attempt to bring the present action to trial pending the outcome of action numbered 183066, but defendant Pinckard proceeded to do so. Plaintiff thereupon made a motion to drop the cause from the calendar pending the outcome of the other action, but his motion was denied. Plaintiff thereafter on the day set for trial made a motion for a continuance based upon the pendency of the other action, but this motion was likewise denied. Upon the trial of the

cause the trial court refused to admit evidence relating to the rescission of the sale and refused to permit plaintiff to amend his complaint to specifically set forth said rescission. Thereupon plaintiff again renewed his motion for a continuance, which was again denied. In the course of the argument on the various motions, the trial court seems to have treated the situation as one in which a final judgment adverse to plaintiff had been entered in the other action, whereas no findings or judgment had as yet been entered on the second trial of said action. The trial court asked, "Do you want me to decide it again? * * * It seems to me it would be idle to take up an amended complaint which deals with the same issue again." Following the rulings denying the motions for continuance, refusing admission to the evidence of rescission, and refusing leave to amend, the trial court entered judgment in favor of defendants upon the evidence which showed that defendants had sold their stock to plaintiff's assignor on September 20, 1926.

[1-3] Appellant contends that the trial court's rulings constituted an abuse of discretion under the circumstances and that appellant was thereby prevented from having a trial upon the merits. In our opinion this contention must be sustained. While the trial court has a wide discretion in acting upon motions for continuances and in acting upon motions for leave to amend, such discretion may not be arbitrarily exercised. We have found no authority directly in point on the situation before us, but the authorities which we have examined indicate that the continuance should have been granted. Houghton v. Superior Court, 187 Cal. 661, 203 P. 765; Baker v. Eilers Music Company, 175 Cal. 657, 166 P. 1008; Greer v. Greer, 142 Cal. 525, 77 P. 1106; Smith v. Smith, 134 Cal. 117, 66 P. 81; Smith v. Jones, 128 Cal. 14, 60 P. 466; Macomber v. Bigelow, 123 Cal. 532, 56 P. 449; Brown v. Campbell, 100 Cal. 635, 35 P. 433, 38 Am. St. Rep. 314; Rose v. Superior Court, 65 Cal. 570, 4 P. 577; 5 Cal. Jur. 985, § 14. In any event if the trial court saw fit for any reason to deny the continuance, it should have permitted a hearing of the cause upon the merits and to that end it should have permitted appellant to amend his pleadings, if such amendment was deemed necessary. The course pursued by the trial court prevented appellant from having any real determination for the purposes of this action of the vital issue of the ownership of the stock at the time in question and in our opinion the rulings complained of constituted an abuse of the trial court's discretion.

The judgment is reversed.

We concur: NOURSE, P. J.; STURTEVANT, J.

131 Cal.App. 557

MOORE v. RE et al.

Civ. 4799.

District Court of Appeal, Third District, California.

May 1, 1933.

1. Automobiles ⇐226(2).

Extending arm outside of automobile in giving statutory slow signal *held* not negligence which proximately caused automobilist's arm to be crushed when automobile and truck coming in opposite direction brushed together (St. 1923, p. 558, § 130, as amended by St. 1925, p. 412, § 15a).

"Proximate cause" is that cause which in natural and continuous sequence unbroken by any efficient intervening cause produces the injury, and without which the injury would not have occurred.

[Ed. Note.—For other definitions of "Proximate Cause," see Words and Phrases.]

2. Automobiles ⇐207.

Driver need not first ascertain if some other car will be affected by it before making statutory slow signal (St. 1923, p. 558, § 130, as amended by St. 1925, p. 412, § 15a).

3. Appeal and error ⇐999(3).
Automobiles ⇐245(60).

Proximate cause of injury when automobile and truck coming in opposite direction brushed together, crushing automobilist's arm extended outside of automobile in giving statutory slow signal, *held* for jury, whose determination was conclusive (St. 1923, p. 558, § 130, as amended by St. 1925, p. 412, § 15a).

4. Appeal and error ⇐996.

Evidence of plaintiff's contributory negligence being open to two deductions, appellate court can only review evidence to determine whether sufficient evidence existed to uphold verdict.

5. Witnesses ⇐396(2).

Entire written statement concerning automobile accident made by witness who, on cross-examination, was interrogated as to one paragraph therein, *held* properly excluded on redirect examination, absent showing that proffered portions of statement referred to same subject touched on in cross-examination (Code Civ. Proc. § 1854).

6. Witnesses ⇐286(4).

Only that portion dealing with same subject-matter touched on in examination may be inquired into on redirect examination (Code Civ. Proc. § 1854).

7. Automobiles ⇐56.

Evidence that truck driver did not possess operator's license as required by statute

under which applicant therefor must be subjected to competency examination *held* admissible on general question of negligence, and also as bearing on driver's ability and qualifications (St. 1923, pp. 531, 532, §§ 58, 63, as amended by St. 1927, pp. 1427, 1428, §§ 15, 17).

Appeal from Superior Court, Merced County; H. S. Shaffer, Judge.

Action by W. J. Moore against Sam Re and others, copartners doing business under the firm name and style of the California Fruit Market, and others. From a judgment in favor of plaintiff, and from an order denying a motion for a new trial, defendants appeal.

Affirmed.

Edward Bickmore, of Merced (John Outcalt, of Merced, of counsel), for appellants.

F. M. Ostrander, of Merced, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

As plaintiff was driving his automobile in an easterly direction on the Pacheco Pass highway, he collided with a truck driven in a westerly direction by defendant Michael Balcovich, who was accompanied by his employer, Sam Re, also a defendant herein. The collision occurred near Los Banos at about 10 o'clock on a rainy evening in April, 1931.

Plaintiff testified that as he saw the truck of defendant approaching he reduced the speed of his car and extended his left arm outside of the car and gave a "slow signal." When the car of plaintiff had proceeded a little past the cab of the truck, the two vehicles brushed together or "side swiped" as the witnesses described it, crushing the arm of plaintiff so severely that it was later amputated, for which injuries a jury awarded to him damages.

Appellants appealed from the judgment and from an order denying a motion for a new trial.

[1, 2] The first point argued for reversal is that the act of plaintiff in extending his arm outside of the car making a "slow signal" was the proximate cause of the injury he sustained. In this appellant is in error. The proximate cause is, as so often defined, that cause which in natural and continuous sequence unbroken by any efficient intervening cause produces the injury, and without which the injury would not have occurred, and it is therefore apparent that the extending of the arm in giving the signal could not have been the proximate cause of the injury. Neither can we say that a driver of a car complying with the mandate of the law as set forth in section 130 of the California Vehicle Act (as amended by St. 1925, p. 412, § 15a), which provides for a signal upon slowing down or stopping by extending the hand or arm downward beyond the left side of the vehicle, is guilty of negligence. That the particular vehicle in question was the only one in the immediate vicinity is not material, for a driver is not required to first ascertain if some other car will be affected by it before making the signal required by law.

[3] Another answer to the argument of counsel and sufficient for the purpose of review by this court is that the question of proximate cause is one of fact for the jury to determine, and having, under proper instruction, determined against the contentions of appellants, they, as well as this court, are bound thereby. Johnson v. Pickwick Stage System, 108 Cal. App. 279, 291 P. 611; Smith v. Occidental and Oriental Steamship Co., 99 Cal. 462, 34 P. 84; Dougherty v. Ellingson, 97 Cal. App. 87, 275 P. 456.

[4] So, too, in answer to the second point of appellant that the evidence of plaintiff shows he was guilty of contributory negligence as a matter of law, we are compelled to say that the evidence was clearly open to two deductions, and, the jury having held against appellants, it is not for this court to review the evidence further than to determine that there was sufficient evidence to uphold the verdict.

Appellants also argue that the evidence is insufficient to sustain a verdict against them and addressed to this court an analysis of the evidence that they undoubtedly made to the jury. Apparently the jury, from the verdict, believed that the appellants were driving on the left side of the highway or that the clearance lights upon the truck were not burning or were so placed as not to conform to the California Vehicle Act (sections 100, 122, as amended by St. 1929, pp. 531, 540, §§ 39, 50), or that all of them contributed to the collision.

We find evidence in the record sufficient to justify a verdict upon each of the points mentioned.

[5, 6] Appellants complain of a ruling by the court requiring them to deliver to respondent a written statement made by the witness upon the stand, and permitting respondent to read portions thereof to him as a part of his cross-examination, and refusing appellants' motion to admit the whole statement in evidence. While a certain witness was under cross-examination by respondent, he was asked if he had ever made a statement in regard to the facts in the action. Upon his affirmative answer a copy was produced by his counsel, and the court directed that it be submitted to counsel for respondent. The witness was then interrogated as to one paragraph dealing with the speed of the approaching car and its position on the highway

and the condition of the lights. Respondent did not offer the statement in evidence, but on redirect examination appellants offered the entire statement. To this an objection was sustained. This was proper, for only that portion dealing with the same subject-matter touched upon in the examination may be inquired into upon redirect examination, and there was here no showing that the proffered portions of the statement referred to the same subject. In the case of Zibbell v. Southern Pacific Co., 160 Cal. 237, 116 P. 513, a witness was interrogated as to the speed of a train, and there was read to him his testimony upon that subject given at the coroner's inquest. On redirect examination defendant offered all of the testimony given by the witness at the inquest, which offer was refused. The Supreme Court upheld the rule that the limitation expressed in section 1854 of the Code of Civil Procedure is to testimony "on the same subject" which may be developed and put in evidence.

[7] The court permitted respondent to show by the driver of the truck involved in the collision that he did not possess an operator's license as required by the California Vehicle Act (section 58, as amended by St. 1927, p. 1427, § 15). This evidence was not admitted as a proximate cause of the injury, but was proper to be considered by the jury on the general question of negligence, and also as bearing on the ability and qualifications of the driver. When an operator's license was issued merely as a means of identification, its lack of possession would make but little difference, but the California Vehicle Act (section 63, as amended by St. 1927, p. 1428, § 17) required at the time of the accident herein, and now requires, that the applicant must be subjected to an examination by the division of motor vehicles as to his qualifications for such a license, including a test of applicant's hearing and eyesight, and his ability to understand highway warning and direction signs, and he shall give an actual demonstration of his ability to exercise ordinary and reasonable control of a motor vehicle as well as other matters necessary to enable the division to pass upon the qualifications of the applicant. The situation is similar to that passed upon in Andreen v. Escondido Citrus Union, 93 Cal. App. 185, 269 P. 556, where it was held that defendant's failure to procure a license required by section 2322a of the Political Code, before attempting to spray trees, was relevant. To the same effect was the case of Cragg v. Los Angeles Trust Co., 154 Cal. 663, 98 P. 1063, 16 Ann. Cas. 1061, where defendant employed an elevator boy to operate the elevator in a building, who had not received a license as required by an ordinance of the city of Los Angeles, the court holding such employment to be negligence per se.

The same rule is stated by Schwartz in his work entitled "Trial of Automobile Accident Cases," on page 184, wherein he says: "Statutes and ordinances require operators of automobiles to be licensed. Such licenses are usually issued only after appropriate examination of the applicant's competency. The holding of such a license for any length of time, is, therefore, some evidence of competency. However the failure of the chauffeur to have a license or permit as required by law, is not ordinarily the proximate cause of a collision, and will not of itself preclude a recovery for such unlicensed driver's injuries. The fact that the automobilist was unlicensed may, of course, be considered by the jury on the question of negligence, and is some evidence of negligence but is not conclusive."

Appellants also cite two instructions given by the court to which they objected not as abstract propositions of law, but taken in connection with the evidence of the lack of an operator's license on the part of the defendant's driver, they contend prejudicial to the rights of the defendants, but, as heretofore pointed out, the lack of an operator's license was not offered as a proximate cause of the injury, and therefore the instructions could not be held to have been objectionable.

After a review of the entire evidence in the case, having in mind the arguments of appellants that the evidence did not support the verdict as well as the points noted above, we can find no error in the record, and are satisfied that there was ample evidence in the case to support the finding of the jury and the amount rendered therein.

The judgment appealed from is affirmed.

We concur: PLUMMER, J.; R. L. THOMPSON, J.

131 Cal.App. 706

BRASHEARS v. GIANNINI et al.

Civ. 683.

District Court of Appeal, Fourth District, California.

May 11, 1933.

Rehearing Denied June 7, 1933.

Hearing Denied by Supreme Court July 10, 1933.

1. Intoxicating liquors ⇐329(1).

Contract for sale of sacramental wine to one not a rabbi, minister, priest, or agent of church or congregation, and not licensed as dealer, was unenforceable (National Prohibition Act, tit. 2, §§ 3, 6 [27 USCA §§ 12, 16]).

2. Contracts ⇐138(3).

Recovery of initial payment on illegal or unenforceable executory contract may be had unless moral turpitude or intentional evasion of law or public policy designed to promote public welfare was involved.

3. Intoxicating liquors ⇐329(1).

Action for money had and received could be maintained by buyer for initial payment on executory contract for purchase of sacramental wine where, unknown to parties who intended to obey law, buyer was not person to whom such wine could be sold (National Prohibition Act, tit. 2, §§ 3, 6 [27 USCA §§ 12, 16]).

4. Intoxicating liquors ⇐329(1).

Where contract for sale of sacramental wine was unenforceable, seller was liable for return of entire initial payment, notwithstanding that he had parted with more than half of it before making of contract to one whom he considered to be entitled to commission (National Prohibition Act, tit. 2, §§ 3, 6 [27 USCA §§ 12, 16]).

5. Intoxicating liquors ⇐329(2).

Where contract for sale of sacramental wine was unenforceable and buyer was informed by prohibition department that no permit to her would be issued, failure to make formal application therefor would not bar action for money received to recover initial payment (National Prohibition Act, tit. 2, §§ 3, 6 [27 USCA §§ 12, 16]).

6. Intoxicating liquors ⇐329(2).

Where parties to contract for sale of sacramental wine erroneously proceeded on theory that permit by buyer was unnecessary, seller could not defeat recovery of initial payment by urging buyer's failure to apply for permit (National Prohibition Act, tit. 2, §§ 3, 6 [27 USCA §§ 12, 16]).

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Action by M. W. Brashears against Frank Giannini and another. From judgment for plaintiff, named defendant appeals.

Affirmed.

See, also, 14 P.(2d) 320.

Russell & Heid, of Tulare (Hugh L. Preston, of Ukiah, and J. L. Royle, of Oakland, of counsel), for appellant.

Walker R. Flint, of Los Angeles, for respondent.

ANDREWS, Justice pro tem.

This action is brought to recover that portion of the purchase price paid by plaintiff to defendant under a written contract entered into between the parties on the 14th day of December, 1929. The contract was for the sale of a large quantity of wine designed to be used for sacramental purposes, the wine being then in the possession of the defendant, it being stipulated that withdrawals or deliveries were to fully comply with federal and state prohibition laws.

The contract included sales of the same character made on previous occasions, which earlier sales were superseded by the last contract. All the dealings related to wine for sacramental purposes and the understanding of the parties was that the purchase was made by plaintiff for resale to rabbis. It was within the general knowledge of the parties that plaintiff had no permit to buy or make delivery of sacramental wine and that she did not contemplate obtaining permits for withdrawal to herself but that withdrawals were to be made under permits to be obtained by purchase from her.

Early in January, 1930, plaintiff, being advised that the contract was unlawful and that performance of the same was impossible by reason of the national prohibition laws and the regulations of the prohibition department, demanded of defendant a return of the $5,600 paid on the purchase price. Defendant refused payment and this action was instituted.

[1] 1. Was the contract illegal and void? It is the contention of both sides that it was understood to be lawful and enforceable at the time it was made and that it was entered into in good faith and was intended to enable the parties to promote the distribution of sacramental wine and was entirely within the letter and spirit of prohibition legislation.

The method by which the contract was to be carried out was, however, in violation of the laws and regulations for the handling of sacramental wine in force at the time. The section of the prohibition law dealing with sales of sacramental wine reads: "No person to whom a permit may be issued to manufacture, transport, import, or sell wines for sacramental purposes or like religious rites shall sell, barter, exchange, or furnish any such to any person not a rabbi, minister of the gospel, priest, or an officer duly authorized for the purpose by any church or congregation. * * *" Section 6 of title 2 of the National Prohibition Act (27 USCA § 16). Under this provision no contract of sale would be valid unless the purchaser was one of the classes specified in the act. That she was not one of these classes was known to both parties.

Section 3 of title 2 of the National Prohibition Act (27 USCA § 12) provides, so far as is here material, as follows: "Liquor for nonbeverage purposes and wine for sacramental purposes may be manufactured, purchased, sold, * * * transported, * * * but only as herein provided, and the commissioner may, upon application, issue permits therefor." Under this provision it would have

been necessary for the plaintiff to have been licensed as a dealer and have what is generally called a basic permit before she could lawfully enter into the contract. Such a basic permit she did not have, as was known to the parties, but it seems not to have been understood by either of them that such a permit was necessary in order to make the purchase of the wine in question or to sell the same as contemplated to purchasers.

No effort seems to have been made by plaintiff to obtain such a permit, and had such permit been applied for it could not have been granted under the laws and regulations governing this transaction. It would seem, therefore, to be easy legal reasoning that if plaintiff was not of the class who could purchase sacramental wine and was not one authorized to deal in that commodity, that a contract made by or with her would be a plain violation of law and incapable of enforcement.

It is urged that if the transaction as a whole is not opposed to the general purposes of the prohibition laws, technical regulations should not be held to make it unlawful. The obvious answer is that the method provided by the laws and regulations enter into the general purpose as much as the laws themselves. Defendant upon this phase of the case relies on the case of Ciocca-Lombardi Wine Co., Inc., v. Fucini, 204 App. Div. 392, 198 N. Y. S. 114, as a case squarely in point.

The contract in that case was an agreement to sell and deliver wine "for lawful use under government permit" and gave to the purchaser the option to reject the contract within a period of fourteen days. After the fourteen days the purchaser, as a guarantee of the fulfillment of the contract, paid to the seller $3,500, but thereafter failed to obtain the government permits referred to in the contract and was, therefore, unable to carry out the contract. The action was brought to recover the balance of the purchase price.

The question of the sufficiency of the complaint and the legality of the contract attached thereto was not raised, the only question being the sufficiency of the defense and counterclaim. The answer set up that the wines were intoxicating liquors and were intended to be used for beverage purposes. The court held the answer insufficient upon the ground that the contract was legal upon its face and that this would overcome any contention of illegality.

The other defense was that the contract was impossible of performance for the reason that no government permit contemplated by the contract could be obtained from the prohibition department. With reference to the permit the court held that the contract was not impossible of performance if there were purposes for which the sale was lawful, which was assumed to be the case, and points out that it was the duty of the buyer to have applied, under a certain section of the act, for a basic permit to be a purchaser, which would be issued if he could establish his qualifications and give the bond required, and after being thus authorized to deal it was his duty to obtain the permits referred to in the contract in order to handle the merchandise, and that doubtless the fourteen-day option may have been designed to enable him to ascertain whether he would be able to get such permits, and that by paying the money to guarantee its performance he must be held to have assumed the risk of being able to carry out the contract along legal lines, and that his failure to obtain the permits, which must have been held to have been within his power, constituted a violation of the contract. The plaintiff recovered and the answer and cross-complaint were stricken out.

Thus it will be seen that none of the questions in the instant case were involved in the Ciocca-Lombardi Case, where the contract was held to be valid but failed of being carried out only because defendant did not obtain the permits which he should have known whether he could procure at the time he paid his money.

In the instant case the contract was unlawful when made and the application of plaintiff to the prohibition department for permits to carry out the same could not be granted and were refused and the same was unenforceable as a matter of law from the beginning.

2. A further defense is offered based upon the contention that if the contract is a violation of the prohibition laws, the parties to the contract must be held to be in pari delicto for making a contract subversive of the high purposes intended to be worked by such act.

[2, 3] The contract being executory, if found to be illegal or unenforceable in its inception, recovery may be had of the money paid as an initial payment unless the contract is one which involves moral turpitude or intentional evasion of some law or public policy designed to promote the public welfare. It being conceded that the contract was entered into in the belief that it related to merchandise salable under the prohibition regulations and one that could be lawfully carried out in accordance with those laws and that there was, as to the law itself and the provisions for its execution, a mutual mistake involving no element or intent of wrongdoing, the question does not arise as to whether they were mutually engaged under the contract in an unlawful undertaking. The contract is to be construed as one where, by reason of technical rules of law, it had no legal basis and afforded no consideration for the money paid, and recovery could be had in an action for money had and received.

3. The defendant makes further contention that, inasmuch as the form of action only enables recovery of money actually received

and unconscionably retained, and that after he had received the $5,600 he paid $3,000 to Kessler as part of the transaction, therefore, recovery should be limited to the $2,600 which he actually benefited from the transaction.

In his briefs defendant repeatedly makes the assertion that the $3,000 was paid after the final contract made in December and that the delay on the part of plaintiff to assert her claim of illegality and demand rescission was such that defendant was justified in making the payment.

He also asserts that the arrangement bebetween Kessler and himself for this payment was understood and agreed upon between the parties. An examination of the record indicates that he is in error as to the time of payment which from the testimony appears to have been at the time of making the contract of September 3d, or at the time shortly thereafter when a payment of $500 was made. The testimony seems to so read and reference to the exhibits indicates this to be the fact, particularly the letter written by Lossman to defendant, dated October 20, 1929, referring to the parties here represented: "They never knew and never heard of Kessler, until our trip to Tulare. It was I that sold them the merchandise, not Kessler, and I warned you upon our first visit to your place not to give him any commission and you have carelessly thrown away Three Thousand dollars which he has obtained from you under false pretense. * * * Without any doubt you could recover the money from him, and we will all help you to prosecute him to the full extent of the law. * * * By all means go after him for the $3000.00 which I am sure he will be compelled to return to you with all costs."

[4] It might still be true that defendant only profited to the extent of $2,600, but as there is nothing in the record to justify the contention that there was a general understanding that Kessler should be paid anything, it is also true that the loss to plaintiff was the entire amount. The testimony of Kessler that he paid Lossman $500, which Lossman did not testify about, is not met directly but seems to have been disregarded as having no bearing or may have been discredited by the trial judge. At any event the contract made December 14th, long after the payment had been made to Kessler, may have been designed to definitely fix responsibility as to the amount which should be regarded as then paid on that contract, and measured by that agreement there seems to be no escape from the conclusion that it fixes the measure of recovery.

[5, 6] 4. Defendant earnestly contends that there is a technical failure in the evidence contained in the record to show that plaintiff was "not a rabbi," or some person who was entitled to obtain a permit to purchase sacramental wine, or that proper application had been made to the prohibition department, or as to efforts to comply with the contract. The answer is that the department gave the information that under the regulations no permit could be had for the purposes of this contract, so no written or formal application was filed. The testimony does disclose who plaintiff was and in what business engaged, and fairly interpreted precludes any inference that she could have been a person entitled to obtain the permit. But perhaps more than this the entire history of the transaction leaves no doubt that it was understood and the case was tried upon the theory that plaintiff did not have and did not expect it was necessary to have a permit. A simple answer would be that the contract being held to be illegal any attempt to carry it out would be immaterial.

The judgment of the trial court is affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

218 Cal. 178

PEOPLE of State of California, on relation of John O'GARA, Plaintiffs, v. SUPERIOR COURT of State of California IN AND FOR CITY AND COUNTY OF SAN FRANCISCO and Hon. Louis H. Ward, a Judge of said Court, Defendants.

S. F. 14913.

Supreme Court of California.

May 22, 1933.

In Bank.

Application for writ of mandate prayed to be directed to the Superior Court, City and County of San Francisco, Louis H. Ward, Judge, to prevent respondent from proceeding with the trial of a certain case.

John O'Gara, of San Francisco, for plaintiffs.

PER CURIAM.

The application for an alternative writ of mandate is denied on the ground that John O'Gara, the purported relator herein, is, in the opinion of the court, without capacity to commence this proceeding on behalf of the People of the state of California, without the consent of the Attorney General, and that this present proceeding must, therefore, fail for want of a proper party plaintiff.

STENDERUP v. BROADWAY STATE BANK OF LOS ANGELES et al.*

Civ. 9009.

District Court of Appeal, First District, Division 2, California.

May 18, 1933.

Rehearing Denied June 17, 1933.

Hearing Granted by Supreme Court July 17, 1933.

1. Judgment ⇐443(1).

To set aside judgment or decree for fraud, it must have been extrinsic or collateral to questions examined and determined in action.

2. Judgment ⇐443(1).

Proof of actionable fraud will support decree vacating judgment in adversary proceeding, and there is no occasion to impress trust.

3. Judgment ⇐460(4).

Complaint *held* not to allege actionable fraud supporting decree vacating judgment in suit against bank and purchaser thereof for accounting of money collected on notes not purchased.

The complaint alleged that bank officers falsely testified in accounting suit that bank collected less than amount actually collected on notes for fraudulent purpose of deceiving court and plaintiff, and that bank fraudulently withheld from court information that amount of overdrafts and charges, constituting "suspense account," had been collected, in violation of its duty as trustee for stockholders, who assigned their rights to plaintiff.

4. Money received ⇐17(1).

Count of complaint for money had and received, based on facts specifically stated in insufficient count for vacation of judgment, was also insufficient, and demurrer was properly sustained to entire complaint.

Appeal from Superior Court, Los Angeles County; Minor Moore, Judge.

Action by Peter Stenderup against the Broadway State Bank of Los Angeles and others. Judgment for defendants, and plaintiff appeals.

Affirmed.

Edwin J. Miller, of Los Angeles, for appellant.

Bicksler, Smith, Parke & Catlin, of Los Angeles, for respondents.

STURTEVANT, Justice.

Claiming that a judgment in an accounting suit was fraudulently obtained, the plaintiff commenced an action against the defendants. The defendants appeared and filed a demurrer; the demurrer was sustained without leave to amend, and judgment was entered in favor of the defendants for their costs. From that judgment the plaintiff appealed. After the demurrer was sustained, the plaintiff appeared and moved to set aside the order sustaining the demurrer and to allow him to file an amended complaint. The motion was denied, and from that order the plaintiff has appealed. The order herein last mentioned contained a direction that the action be dismissed. The defendants thereafter made a motion that said language be stricken out. The motion was granted. From the order granting that motion, the plaintiff has also appealed. The briefs are confined to, and this opinion will be confined to, a consideration of the appeal from the judgment.

In language reasonably free from objection, the plaintiff alleged the following facts: Prior to March 15, 1928, the Broadway State Bank had been duly organized and was transacting business in Los Angeles. It had a capital stock and the shares were owned by a number of stockholders. W. D. Howard, representing L. B. Howard, his wife, purchased the bank. The purchase was accomplished by purchasing all of the stock from the stockholders and obtaining from the directors written resignations. The price paid was $35,000. At the time of the purchase, the bank held certain notes of doubtful value. Under the terms of the purchasing agreement, those notes aggregating $31,100 were not purchased, but were taken out of the assets of the bank, and impounded and left in the possession of the bank for collection and liquidation. They were to be so held by the bank from the date of the purchase, March 15, 1928, to March 15, 1929. On the latter date, on demand made, the bank agreed to turn over to the former stockholders all moneys collected from the impounded notes, or other notes in lieu thereof, and all of the notes that had not been collected. For some reason the bank did not make the settlement on March 15, 1929, and the stockholders assigned their rights to the plaintiff, and he commenced an action for an accounting. He sued the bank and Mrs. Howard. The defendants answered, and a trial was had before the trial court sitting without a jury. The trial court made findings in favor of the plaintiff. Among other things, it found that the defendant bank had collected $14,021.68 prior to March 15, 1929, and $1,227.97 after March 15, 1929. For the $14,021.68 collected the court found that the bank elected to retain the same and to surrender several notes specified in the findings. It also found that the defendant bank held impounded notes which, with those just mentioned, aggregated $27,107.69, which it had placed in the possession of the court. The court awarded the plaintiff judgment for $1,227.97 with interest, and it also directed that

*For subsequent opinion see 28 P.2d 14.

said unpaid notes in the sum of $27,107.69 which were then in the possession of the court should be turned over to the plaintiff as the property of plaintiff's assignors. The judgment on said findings was thereafter entered. No appeal was taken. After the plaintiff obtained possession of the notes so turned over to him, he attempted to collect them. After he had proceeded for a while in his effort to collect, he alleges that he learned that five of the notes aggregating $9,816.78, which had been turned over to him as uncollected, had, in fact, been wholly paid. In the accounting suit the bank admitted that it had held the impounded notes as trustee. It is alleged that Mr. W. D. Howard, as manager, and Mr. Charles S. Lewis, as cashier, testified that the bank had collected, between March 15, 1928, and March 15, 1929, the sum of $14,021.68, and after March 15, 1929, it collected $1,090.73 and no more, and that the defendants produced the impounded notes in open court, placed them in the custody of the clerk, and offered to surrender them to the plaintiff. It is also alleged that the plaintiff knew nothing as to what collections had been made; that no testimony was offered except the testimony of the defendants; that the plaintiff relied on that testimony; and that the trial court accepted it and acted on it and rendered the judgment above mentioned. Continuing, it is alleged that, after the decree in the accounting suit had become final, the plaintiff learned and the fact is alleged that the testimony given by the officers of the defendant bank was false and fraudulent, and that the bank had in fact collected $9,816.78 more than as testified by its officers, and that it did these things for the fraudulent purpose of deceiving the court and deceiving the plaintiff in the accounting suit, and that the bank and its cashier knew that the bank had collected $9,816.78 not mentioned in said testimony.

In this connection by proper averment it is stated that the defendants conspired to do these things. Furthermore, it is alleged that they concealed the facts from the plaintiff and from the court. Continuing, the plaintiff alleges that the impounded assets, $31,100, included some overdrafts and charges constituting a "suspense account" aggregating $4,980.59; that prior to the trial of the accounting suit all of said sum had been collected, but that the bank fraudulently withheld said information from the court and violated its duty as a trustee of plaintiff's assignors. Then follows similar allegations of false testimony by the defendants, reliance on the same by the plaintiff and the trial court, and the deception of the court. As a second cause of action the plaintiff pleaded a common count as for moneys had and received. However, in numerous places, it clearly appears from the statements of counsel that the second cause of action is based on the specific facts set forth in the first count. The demurrer of the defendants was addressed to the complaint and to each of the counts contained therein.

The plaintiff states five points, the burden of which is that the record presents a case of extrinsic fraud. The plaintiff contends that his pleading was sufficient, and he earnestly claims that the fraud alleged was not intrinsic. Parsons v. Weis, 144 Cal. 410, 77 P. 1007, does not assist him. The judgment there attacked rested on service of a summons by publication. An order to publish the summons was obtained by Weis by causing to be made and to be presented to the court an affidavit that Susan H. Parsons resided at Chicago, Ill., whereas in truth and in fact she never resided there, but did reside at Des Planes. That was a fraudulent imposition on the jurisdiction of the court. Bacon v. Bacon, 150 Cal. 477, 89 P. 317, was an action brought by a legatee against the residuary legatees both in their individual and representative capacities to impress a trust. After the death of their ancestor, some of the defendants by mistake or fraud represented the legacy of the plaintiff to be $2,000 instead of $10,000. In that manner the plaintiff was kept out of court. Thereafter the representatives of the decedent so administered the estate that she received only $2,000. Her action was commenced for the purpose of obtaining the remaining $8,000. As shown by the decision, the acts of the defendants operated to fraudulently impose on the plaintiff by depriving her of her day in court. Curtis v. Schell, 129 Cal. 208, 61 P. 951, 79 Am. St. Rep. 107, involved fraudulent concealment of facts from the probate court, and in this manner created an obstacle preventing some of the creditors of the decedent from being paid. Such creditors had not had their day in court. Wickersham v. Comerford, 96 Cal. 433, 31 P. 358, also involved a fraudulent imposition on the probate court to which Wickersham, a creditor, was not a party. In reply the defendants cite and rely on Pico v. Cohn, 91 Cal. 129, 25 P. 970, 27 P. 537, 13 L. R. A. 336, 25 Am. St. Rep. 159.

[1] The plaintiff stresses the fact that between himself and the defendant bank the relation of trustor and trustee existed, and that the officers of the bank conspired against him, and that the officers of the bank concealed the facts. He also stresses the fact that he alleged "there never was any adversary trial on said issues." Thereupon he claims that the instant case is not governed by the doctrine of Pico v. Cohn, supra. We think that he is mistaken. Those facts, together with all other facts pertaining to the accounting, were before the court, and were not collateral to the hearing in that action. They were tried, or should have been tried, therein. As stated by Mr. Chief Justice Beatty on page 133 of 91 Cal., 25 P. 970, 971, in writing the opinion for the court: "That

a former judgment or decree may be set aside and annulled for some frauds there can be no question, but it must be a fraud extrinsic or collateral to the questions examined and determined in the action." That rule has been followed and applied in numerous cases; some of the last ones being Hendricks v. Hendricks, 216 Cal. 321, 14 P.(2d) 83; San Diego Trust, etc., Bank v. Heustis, 121 Cal. App. 675, 10 P.(2d) 158. As applied to an adversary proceeding, the exceptions to the above rule are stated in Pico v. Cohn, 91 Cal. 129. at page 133, 25 P. 970, 971, 27 P. 537, 13 L. R. A. 336, 25 Am. St. Rep. 159, as follows: "What, then, is an extrinsic or collateral fraud, within the meaning of this rule? Among the instances given in the books are such as these: Keeping the unsuccessful party away from the court by a false promise of a compromise, or purposely keeping him in ignorance of the suit; or, where an attorney fraudulently pretends to represent a party, and connives at his defeat or, being regularly employed, corruptly sells out his client's interest. United States v. Throckmorton, 98 U. S. 65, 66 [25 L. Ed. 93], and authorities cited." But it is not claimed that the instant case falls within any one of these exceptions.

It will be conceded that cases can be found that do not agree with the rule as stated in Pico v. Cohn, supra. Toward the end of that case, Mr. Chief Justice Beatty refers to some of them. However, in this state the doctrine enunciated in Pico v. Cohn, supra, has never been questioned. No useful purpose will be subserved by attempting to distinguish the instant case from each of the numerous cases from other jurisdictions cited by the plaintiff nor by analyzing each excerpt quoted.

[2, 3] Where, as here, the original proceeding was an adversary proceeding, actionable fraud, if proved, will support a decree vacating the first judgment, and there is no occasion to impress a trust as was done in Bacon v. Bacon, 150 Cal. 477, 487, 488, 89 P. 317. However, as pointed out above, it is our opinion that plaintiff did not plead such actionable fraud as will support a decree vacating a former judgment, and there is no occasion to impress a trust.

[4] We understand the plaintiff to claim that, even though under his first count, in which he pleaded the specific facts, he is not entitled to recover, nevertheless he is entitled to recover under the count as for money had and received. That is a misconception of the law. If he had been able to show that the defendants kept the plaintiff away from court by a false promise of a compromise, or purposely kept him in ignorance of the suit, or that his attorney fraudulently pretended to represent him, but connived at his defeat, or, being regularly employed by the plaintiff, corruptly sold out the plaintiff's interest, then and in that event the plaintiff's cause of action could have been presented on a pleading alleging the facts or alleging a common count. However, as recited above, it is clear from the record that the first count is a specific statement of the facts on which the second count is based. As the first was insufficient, so is the second. It follows that the demurrer was properly sustained to the entire complaint. Hamberger-Polhemus Co. v. Hind, Rolph & Co., 81 Cal. App. 624, 254 P. 615.

The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

132 Cal.App. 60

PEOPLE v. HOFFMAN.

Cr. 85.

District Court of Appeal, Fourth District, California.

May 17, 1933.

As Amended June 1, 1933.

Hearing Denied by Supreme Court June 15, 1933.

1. Indictment and information ⇨87(4).

Information which showed on its face that statute of limitations had run against prosecution *held* insufficient basis for conviction on defendant's plea of guilty (Pen. Code, § 800).

2. Criminal law ⇨1026.

Defendant's failure to appeal from original judgment entered on plea of guilty *held* not waiver of right to appeal from order refusing to set aside judgment for want of jurisdiction, where judgment was void upon face of record.

3. Criminal law ⇨1023(11).

Judgment void upon face of record is equivalent to no judgment, and attack thereon cannot be prevented by technical rules.

Appeal from Superior Court, Riverside County; G. R. Freeman, Judge.

William J. Hoffman was convicted on his plea of guilty of violating section 606 of the Penal Code, and from an order denying his motion to set aside the judgment, he appeals.

Reversed with directions.

William J. Hoffman, in pro. per.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

ANDREWS, Justice pro tem.

On the 16th day of February, 1931, the information in this case was filed wherein defendant was charged with a violation of sec-

tion 606 of the Penal Code, a felony, committed on the 28th day of February, 1927. Section 800 of the Penal Code requires that information must be filed within three years after the commission of the crime. The time elapsing from the commission of the crime, as set forth in the information, and the time of its filing, was three years and more than eleven months. When arraigned defendant entered a plea of guilty and the court pronounced judgment sentencing him to the state's prison. Subsequently, on the 19th day of December, 1932, defendant filed a notice of motion to vacate and set aside the judgment on the grounds that the court had no jurisdiction to pronounce said judgment in that the information was not filed within the three-year limit prescribed by the Code, and that the proceeding was in violation of defendant's constitutional rights and a denial of due process of law, and that the judgment and all proceedings had thereon were null and void. The motion was denied and this appeal taken to this court.

[1] On behalf of defendant it is here contended that the information was void upon its face in that it appeared affirmatively therein that the statute of limitations had run against any prosecution or judgment for the alleged crime. Opposed to this contention the state maintains that the statute of limitations is a mere matter of defense which must be asserted by defendant, failing in which, it is by him waived. This question, whether regarded as one of pleading or substantive law, has for long years divided the various jurisdictions of this country and carefully considered opinions have been rendered by state and federal courts and different conclusions have been reached.

The question came before the Supreme Court of this state at an early date, and in 12 Cal. 291, in the case of People v. Miller, the court took the position contended for by defendant, using the following language: "The allegation of a day within the period of limitation is material, whether the offense is subject to limitation. * * * It is true that the Statute of Limitations excludes from computations the time the defendant may be out of the State, but the rule is, that this exception must be stated in the pleading. Prima facie, the lapse of time is a good defense, and if the statutory exception is relied on, the State should set it up." The same question has been before our upper courts on numerous occasions and the same rule has been consistently upheld.

It appears from the face of the information that it did not state a public offense and that defendant could not be prosecuted thereunder, and no judgment of conviction could be based upon it. It might illustrate the application of the rule if we suppose the information to have stated on its face, after setting forth the acts constituting the crime, that defendant had theretofore been placed on trial for this crime before a jury and acquitted. If defendant, under such an indictment, should enter a plea of guilty it would nevertheless be the judgment of the law that he could not be put on trial or be convicted of the offense and his discharge would thereupon be ordered. The statement of former acquittal is no different in law than a statement that the statute of limitations had run on the crime, the result of both being that defendant could not thereafter be prosecuted for the offense whether originally guilty or not. The humane purpose designed by the Legislature to be brought about by the statute of limitations affords immunity and protection to the citizen who thereby is free, and the public authorities who for three years failed to file a presentment for the alleged crime are thereafter precluded from pursuing him in a criminal prosecution.

[2, 3] The state contends that an appeal from an order made after judgment will not lie where an appeal from the original judgment was not taken, and that because defendant failed to take an appeal from the judgment of conviction entered on his plea of guilty, he has waived his right of defense and is precluded from any attack upon the judgment. This has been held in certain cases where the matter involved related to errors and irregularities occurring in the exercise of a lawful jurisdiction, but can have no application to a judgment entered without legal justification and which is wholly void. It may be admitted that the court had jurisdiction of the subject-matter and of the defendant. The term "want of jurisdiction" is sometimes used when referring to orders made in excess of the powers of the court and which are void although made at the time of and in connection with ordinary administration of law.

In one of the cases cited from our upper courts [1] it was declared that such an order was a dead limb on the judicial tree and should be lopped off either by the judge of his own motion or on motion of defendant and that such a judgment being entirely void could be attacked collaterally or by motion, which is a direct attack, without limitation as to time.

Habeas corpus can only be resorted to where the question of jurisdiction is involved and cannot be used to correct or test errors or irregularities; but it has been held in this state that it would lie to test a judgment of this character and to release the prisoner.

This being the nature of the proceeding of which defendant complains, it cannot be the law that to secure his right he must resort to the trouble, delay, and expense incident to an appeal from the void judgment when by a motion made in the trial court it would be expected that his rights would be fully protected and his release from imprisonment promptly follow.

[1] People v. Greene, 74 Cal. 400, 16 P. 197, 5 Am. St. Rep. 448.

Where the judgment is void upon the face of the record, it is as if no judgment existed and no technical rule can prevent the correction of such a wrong. The procedure adopted by defendant brings the matter fairly and fully into this court for determination.

The order appealed from is reversed with directions to the trial court to grant the motion to vacate the judgment.

We concur: BARNARD, P. J.; JENNINGS, J.

132 Cal.App. 29

GUINOU et ux. v. WEBSTER.

Civ. 8791.

District Court of Appeal, First District, Division 2, California.
May 16, 1933.

Rehearing Denied June 15, 1933.
Hearing Denied by Supreme Court July 14, 1933.

1. Appeal and error ⇐1066.

Instruction in automobile collision action that violation of statute was negligence as matter of law, could not be complained of as applying to defendant's speed, where no issue on speed was before jury, and statute, if governing case, fixed no specified speed limit (Gen. Laws 1931, Act 5128, § 113(b), subd. 7).

2. Appeal and error ⇐216(1).

Instruction containing only part of statute regarding motor vehicle headlights, *held* not prejudicial where defendant did not request that remainder of statute be read, and where omitted parts were not put in issue (Gen. Laws 1931, Act 5128, § 101).

3. Automobiles ⇐245(38).

In automobile collision suit, whether defendant's headlights were lawful and whether their blinding effect was caused because automobile traveled uphill, *held* for jury (Gen. Laws 1931, Act 5128, § 101).

4. Automobiles ⇐245(52).

Whether construction, arrangement, or adjustment of defendant motorist's headlights proximately caused or contributed to accident, *held* for jury (Gen. Laws 1931, Act 5128, § 101).

5. Trial ⇐241.

Instruction in automobile collision action quoting in full statute pertaining to spotlights, *held* not error where question whether defendant's spotlight conformed to statutory requirements was prominent issue in case (Gen. Laws 1931, Act 5128, § 108).

6. Trial ⇐296(3).

Instruction that driver's negligence could not be imputed to guest unless guest exercised some management or control over automobile, *held* not misleading in view of other instructions.

Other instructions were that defendant motorist was not responsible unless he was guilty of some negligent act or omission which proximately contributed to the cause of the accident, and that verdict must be for defendant if driver of automobile carrying guest was negligent, and such negligence was the sole proximate cause of the accident.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by Marius Guinou and wife against Percy Edward Webster. From a judgment for plaintiffs, defendant appeals.

Affirmed.

Redman, Alexander & Bacon and Herbert Chamberlin, all of San Francisco, for appellant.

M. Mitchell Bourquin, of San Francisco (Clinton L. Markley, of San Francisco, of counsel), for respondents.

STURTEVANT, Justice.

On the night of June 7, 1930, near San Carlos in San Mateo county, the plaintiff Mrs. Guinou was injured in an automobile collision. She was riding in a Ford coupé as the guest of Mr. and Mrs. Le Blanc. The car collided with a Pontiac being driven by the defendant. For the injuries sustained by Mrs. Guinou the plaintiffs commenced this action to recover damages. From the judgment entered on the verdict against him, the defendant has appealed.

[1] 1. The trial court of its own motion gave an instruction that the violation of a statute is negligence as a matter of law. The defendant calls to our attention that the plaintiffs introduced evidence to the effect that the defendant was driving 45 miles per hour at the time of the accident. Continuing, he argues that as the statute was worded at the time of the trial such speed was not a violation of the statute. 2 Deering's Gen. Laws 1931, p. 2507, Act 5128, § 113 (b), subd. 7. The plaintiffs reply that the instruction objected to stated nothing to the contrary. The record contains the opening statement by the plaintiffs. Nothing therein is said regarding the defendant's speed. The same remark may be made of the complaint. No one of the instructions was addressed, in terms, to excessive speed. However, several other statutory provisions were read to the jury. It cannot be ascertained from the record how the jury could have applied the instruction complained of

to speed when no issue on that subject was before it. If it be conceded, as defendant claims, that the statute in force at the time of the trial governs the case, it follows that a speed of 45 miles per hour is not ipso facto negligence, but other facts must be established showing the negligence. Under that assumption the force of the defendant's objection falls; because, it then appears that no certain speed limit is prohibited by statute and the instruction could not have been considered as referring to speed.

[2] 2. The first paragraph of section 101 of the California Vehicle Act (Deering's Gen. Laws 1931, Act 5128) is as follows: "The headlights of motor vehicles shall be so constructed, arranged and adjusted that they [will, at all times mentioned in section 99 and under normal atmospheric conditions, produce ample driving light for the use of the operator of such vehicle but,] will not project a glaring or dazzling light to persons approaching such lights or to persons whom such headlights may approach." (Brackets ours.) Omitting the part in brackets the court read it as an instruction. The defendant asserts (1) it garbles the law; (2) there was no evidence that his headlights were unlawful; and (3) there was no evidence that the construction, arrangement, or adjustment of his headlights was the proximate cause or the contributing cause of the accident. To the objection that the instruction did not contain the whole of section 101 there are two answers. If the defendant desired the rest of the section read, he was at liberty to make the request. In the next place it was not disputed that the accident happened after dark and that it was the duty of the defendant to have his lights lit and it was not contended that normal atmospheric conditions did not exist. Therefore the omitted reference to those subjects could not have been prejudicial to the defendant.

[3] As to the second objection, the defendant quotes the evidence that Mrs. Guinou was blinded by the defendant's lights. He then asserts that he was going uphill; and, although his lights were lawful, the centers were raised while going uphill and he was not to blame. We may suppose that the same facts were argued to the jury. It being, under all these circumstances, a pure question of fact, this court may not disturb the verdict.

[4] As to the contention lastly made, it rests on exactly the same basis. Both parties presented their evidence. If the jury had believed the evidence produced by the defendant, it is clear the verdict would have been in his favor. Our statute provides certain specifications and certain tests for lawful lights. The defendant claims he complied therewith. But we do not understand him to assert that his mere claim was conclusive as to the facts.

[5] 3. Acting on the request of the plaintiffs the trial court gave an instruction which quoted section 108 of the California Vehicle Act (Deering's Gen. Laws 1931, Act 5128) in full. Whether defendant's spotlight conformed with the provisions of the statute was one of the prominent issues in the case. On that subject each party introduced some evidence. We think the court did not err in giving the instruction.

[6] 4. In the same way the trial court instructed the jury as follows: "I instruct you that it will not constitute a defense to this action for the defendant to show that Le Blanc, the driver of the Ford automobile, was negligent, or that negligence upon his part proximately contributed to the happening of this accident. If he, the driver of the Ford car was negligent, his negligence, if any, is not imputable to the plaintiffs, and the plaintiffs cannot be charged therewith unless you find that the plaintiffs had some dominion over or exercised some control over the management and operation of the Ford automobile involved in the accident." Standing alone it might be misleading; but, when read in connection with the other instructions, the ambiguity is removed. Instructions XXIII and XXIV were as follows:

"I instruct you that Mr. Webster is not responsible in this case unless he was guilty of some negligent act or omission which proximately contributed to the cause of the accident.

"If you find that the driver of the Ford car violated the law or was careless and negligent in driving that car along the highway on the evening in question; and if you also find that such carelessness and negligence, if any, on the part of the driver of the Ford car was the sole proximate cause of the accident, then you must not award any damages against Mr. Webster in this case, and your verdict must be in his favor." All read together showed to the jury that the defendant was liable for his own tort only and not for the torts of others and that if the accident was caused by the acts of plaintiffs' driver and not the act of the defendant, that then the latter was not liable.

We think the jury was correctly advised and that the trial court committed no prejudicial error.

The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

131 Cal.App. 743

SPARKS v. PRYOR et al.

Civ. 7770.

District Court of Appeal, Second District, Division 2, California.

May 12, 1933.

1. Physicians and surgeons ⇐11(3).

Board of dental examiners which ordered suspension of dentist's license to practice, and not members thereof, is proper party defendant to petition for writ of review.

2. Certiorari ⇐28(1).

Writ of review lies only to correct exercise of power without jurisdiction.

3. Physicians and surgeons ⇐11(3).

Evidence supported board of dental examiners' finding that unlicensed person practiced dentistry in dentist's office where he entered into contracts with patients for performance of dental services and exercised good deal of control of professional work performed in office, warranting suspension of dentist's license to practice (Gen. Laws 1931, Act 2048, § 11, subds. 4, 5).

Appeal from Superior Court, Los Angeles County; J. Walter Hanby, Judge.

Petition for writ of review by Perl A. Sparks against C. E. Pryor and others, members of the Board of Dental Examiners of the State of California, sued as the Board of Dental Examiners of the State of California, which had ordered the suspension of petitioner's license to practice dentistry. From a judgment annulling the order of suspension, defendants appeal.

Reversed, with directions.

Anthony J. Kennedy, of Sacramento, for appellants.

Fall & Fall, of Los Angeles, for respondent.

WORKS, Presiding Justice.

[1] The board of dental examiners had before it for hearing a petition or complaint in which it was averred that Dr. Sparks was a "regularly licensed and practicing dentist" in the state, as defined by law. The document also alleged that Sparks "did knowingly and wilfully and unlawfully aid and abet an unlicensed person, to wit, David Michaud, to practice dentistry unlawfully in the State of California, in that the said Perl A. Sparks did then and there permit, authorize and allow said David Michaud to make and enter into contracts, for the performance of dental services, with the public in his office located at 506 South Hill Street, in the City of Los Angeles, County of Los Angeles, State of California, which office was a place where dental operations are performed; and that said David Michaud did then and there, and has for two years last past immediately preceding the date hereof, managed and conducted, as manager or conductor, the office or place of business of said Perl A. Sparks, which office was a place where dental operations were performed, all of which the said Perl A. Sparks well knew, that during all of said time David Michaud was and said David Michaud now is an unlicensed person and was not and is not entitled to practice dentistry in the State of California." Upon this complaint, after due hearing, the board ordered the suspension of Sparks' license to practice dentistry in the state for five years, with a certain condition under which the license might be restored in one year. Sparks petitioned the superior court for the writ of review, the writ was ordered, and upon final hearing after return, the court annulled the order of the dental board. Defendants, none of whom is a proper party except the board itself, appeal from the judgment of annulment.

[2] The complaint before the board plainly stated grounds, under the State Dental Act, for the rendition of the order which the board made. Indeed, respondent does not contend otherwise. Nor is the point made that there was a failure to prove, before the board, any single fact necessary to enable it to exercise its jurisdiction under the complaint. As the writ of review lies only to correct the exercise of power without jurisdiction, there is but one remaining point open to respondent, and that point he embraces. He contends that there was no evidence whatever before the board to the effect that Michaud was practicing dentistry in the office of respondent. It is admitted by respondent that Michaud was at least in the same situation as that ascribed to Cohn in Messner v. Board, 87 Cal. App. 199, 262 P. 58, 60. It was said in that case: "Cohn had charge of the purely business end of the dental office, * * * but there is no evidence that he had or exercised the slightest control or direction of the professional work performed in such office." The court then held that within the language of the State Dental Act hereafter to be cited, Cohn had not practiced dentistry. It is upon this peg that respondent hangs his claim of right to the writ of review. He insists that there was no jurisdiction in the dental board to make its order, for the reason that the evidence before it was all on one side, and that was the side favorable to him. We are thus required to review to some extent the evidence upon which the order of suspension was made.

Viola Jenkins, a nurse employed in the office of Sparks, testified that Michaud showed patients of the office samples of different styles of dentures which might be put into their mouths, and contracted with them for the insertion of the kind finally selected. He

told them what he thought "they would enjoy and get better service out of." Michaud would recommend certain materials for dentures to patients, and "would usually go ahead and say that certain plates * * * would take probably most of the lines out of the face and bring back more of a youthful appearance." He said to patients that certain plates would help "facial corrections." These conversations between Michaud and patients took place in operating rooms of the office, with the patient sitting in a dental chair. Sometimes one of the dentists employed in the office would be present at these conversations, sometimes not.

One of the witnesses at the hearing was B. Albert Ash, a patient. When he first went to the office of Sparks, he lay in a dental chair and Michaud inserted a dental mirror into his mouth and made an examination of it. Michaud then called Dr. Merrifield, one of the dental operatives in the office, and the doctor examined Ash's mouth by the same means. Ash had some old bridgework in place, and Michaud said, "All those bridges will have to come out and your mouth is in plenty bad shape." Merrifield then said that "they would have to take out all the upper teeth." Michaud said to Ash: "We will make these extractions and we will give you an upper set of teeth and a lower lingual bar for the sum of $60.00. * * * We will allow you $10.00 for that gold that is in your mouth." Michaud said the work would help Ash's looks. "Dr. Merrifield didn't have much to say at all." It was then agreed that the work was to be done and Ash commenced his visits to the office. Sometimes when he went there Michaud, as well as Merrifield, who was doing the work, looked into Ash's mouth. One day Merrifield was absent from the office and Michaud took Ash to another operative and said: "Paint his mouth up for him, he has some pain in his upper gums." The dentist then made an application of mercurochrome.

Dr. Merrifield was also a witness. He testified: "Did you ever hear him [Michaud] advise a patient that a certain kind of plate would improve their looks or appearance? A. Yes." When Michaud had contracted the work with a patient he told Merrifield "what the patient was going to have." Merrifield further said that when he "had not been in at the examination of a patient," Michaud told him "to go in and for instance take impressions for full plates or partial plates or whatever the case may be." Merrifield also testified: "Q. And you and the other dentists who were employed there didn't have anything to say about the price of the work or the character of the restoration that was to take place, if Mr. Michaud was there and made that arrangement, is that right? A. Well, we used to talk it over in front of the patient oftentimes. Q. Talk it over with Mr. Michaud? A. Yes, sir, in front of the patient. Q. But he had the final say on it? A. Yes, sir, generally. Q. As to the amount or as to the quality of work that went into the mouth, is that right? A. Yes."

[3] This evidence supports the finding of the dental board that Michaud practiced dentistry (Act 2048, Deering's Gen. Laws 1931, § 11, subds. 4 and 5) although it may be that the complaint did not sufficiently charge an offense under subdivision 4 of the statute. The proceeding is therefore not within the rule stated in Messner v. Board, 87 Cal. App. 199, 262 P. 58.

The evidence before the board showed that Michaud had no license to practice; that he was "in authority" in the office of Sparks; and that Sparks knew what he was doing. Indeed, no point is made by respondent as to these questions.

Judgment reversed, with directions to the trial court to enter judgment affirming the order of the board of dental examiners.

We concur: CRAIG, J.; STEPHENS, J.

132 Cal.App. 33

RUSS LUMBER & MILL CO. v. HELLMAN COMMERCIAL TRUST & SAVINGS BANK.

Civ. 7607.

District Court of Appeal, Second District, Division 2, California.

May 16, 1933.

Rehearing Denied June 15, 1933.

Hearing Denied by Supreme Court July 14, 1933.

1. Banks and banking ⇐67.

Evidence *held* to support finding that plaintiff was not creditor of commercial department or savings department taken over by successor bank, so as to render successor bank liable to plaintiff (St. 1909, p. 95, § 31, as amended).

2. Banks and banking ⇐67.

Evidence *held* to support finding that successor bank did not take over assets of trust department of another bank so as to give rise to trust in favor of creditor, as against assets taken over, for payment and discharge of indebtedness (St. 1909, p. 95, § 31, as amended).

3. Appeal and error ⇐882(3).

Where case is tried on theory that pleadings present specific issues, and evidence is adduced thereon, it is too late, after determination, to present claim of negative pregnants and faulty denials.

Appeal from Superior Court, Los Angeles County; Fletcher Bowron, Judge.

Action by the Russ Lumber & Mill Company against the Hellman Commercial Trust & Savings Bank. From a judgment in favor of the defendant, the plaintiff appeals.

Affirmed.

E. S. Williams, of Los Angeles, for appellant.

Freston & Files, of Los Angeles (Ralph E. Lewis, of Los Angeles, of counsel), for respondent.

PARKER, Justice pro tem.

This case is a sequel to the case of Russ Lumber & Mill Company v. People's Trust & Savings Bank, reported in 76 Cal. App. 438, 244 P. 934. In that case the plaintiff herein recovered a judgment against the People's Trust & Savings Bank on certain orders for lumber and building material which had been given to the Russ Lumber & Mill Company in the name of the People's Trust & Savings Bank by its president, J. C. Odell. It was decided in the former case that these orders were obligations of the bank. That judgment being paid only in part, the Russ Lumber & Mill Company brought the present action against the Hellman Commercial Trust & Savings Bank, which, pursuant to section 31 of the California Bank Act, as amended, had purchased the whole of the business of the People's Trust & Savings Bank and had taken possession and control of all of its assets. This action was brought against the Hellman Commercial Trust & Savings Bank by the plaintiff herein as a judgment creditor of the People's Trust & Savings Bank. The complaint sets up two causes of action. The first count seeks to recover from the defendant on the ground that it in writing expressly assumed and agreed to pay all of the debts and liabilities of the commercial department and of the savings department of the People's Trust & Savings Bank. The second count (together with the supplemental complaint as an addition to the second count) seeks to recover from the defendant on the ground that the latter received the assets of the People's Trust & Savings Bank under a trust to apply the same to the payment and discharge of the indebtedness and liabilities; that is to say, of the creditors, of the People's Trust & Savings Bank. The only issue under the first count is whether the plaintiff is a creditor of the commercial department or savings department of the People's Trust & Savings Bank.

It would be useless to detail all of the facts of the case further than by reference to the same as outlined in the case of the plaintiff against People's Trust & Savings Bank, as found in the cited report.

It is not seriously contended by appellant that either of the departments named were indebted to it. True, there are facts from which an inference may be drawn supporting the theory of appellant, but the same facts do permit the inference drawn by the trial court to the contrary.

The claim of plaintiff arises out of a transaction which may be here set forth. One Schliem, a general contractor, had come upon a difficult business situation where his financial ability was not sufficient to carry on. He had attached to himself many anxious creditors, who were pressing for settlement. Among these was the People's Trust & Savings Bank, which will hereafter be referred to as People's Bank. An arrangement was effected whereby Schliem and his wife entered into a trust agreement with the People's Bank. The plan was that the Schliems should turn over to the bank, in trust, a number of pieces of real property and other securities, which property should be held by the bank to secure payment of the indebtedness accrued and such additional advances as might be necessary and advisable. The trust expressly stipulated that People's Bank had no interest in the property, either real or personal, nor did it pay any part of the consideration for any thereof. The entire scheme was conducted through the trust department of the People's Bank, and the business of Schliem carried on through means of the trust. It worked out to the extent that all creditors were satisfied save and except the creditor People's Bank. The trust was therefore carried along, and in furtherance thereof the real property was improved and other things done.

It was after this that the present plaintiff enters into the affairs of the trust. The plaintiff did furnish, sell, and deliver to the trust certain lumber and material upon which the debt rests. Some time thereafter the present defendant, Hellman Commercial Trust & Savings Bank, which will hereinafter be referred to as the Hellman Bank, began negotiations for the purchase of two departments of the People's Bank. These two departments entering into the purchase and sale negotiations were the commercial department and the savings department. The negotiations were consummated on May 21, 1920, and the result set forth in an agreement of that date between Hellman Bank as purchaser and People's Bank as seller. The agreement recites that the same is executed in pursuance of the terms of section 31 of the Bank Act, as amended, and limits the agreement to the assets and liabilities of the commercial and savings departments of the People's Bank. Section 23 of the Bank Act, as amended, provided for the division of a bank into departments and that the capital and surplus of each department should be considered and treated as the separate capital and surplus of such department as though each department was a separate bank. Noth-

ing appearing to the contrary, we assume the organization and conduct of the departments of the People's Bank was in accord with the law cited. To repeat, the agreement of May 21, 1920, provided for and contemplated the sale of the commercial and savings departments only, and thereafter, according to the record before us, the trust department of the People's Bank continued to operate independent of the agreement. The trial court found that the obligation existing on the part of People's Bank was an obligation of the trust department and not a liability of either the commercial or savings department.

[1] We think the facts support the finding, inasmuch as the final analysis leads to the conclusion that the commercial department of the People's Bank was simply a creditor under the trust arrangement. In passing, we might note that, in the absence of express statutory provision, we would look somewhat askance at the idea of a division of the entity. However, and perhaps unwisely, the lawmakers have sanctioned the creation of strange financial hybrids, and we may indulge the thought that some sufficient reason prompted the legislation. We cannot disregard the statute.

[2] Under a second count of the complaint, plaintiff seeks to fasten liability upon Hellman Bank on the theory of a trust, express or implied. The basis of the claim seems to be that the Hellman Bank did eventually absorb all of the assets of the trust department as well as the other departments, and that under the express terms of the Bank Act (section 31, as amended), as well as upon recognized principles of equity, an obligation was thereupon imposed to the end that all creditors be paid at least pro rata. An extended review of the law or of the authorities becomes unnecessary, for the compelling reason that there is a lack of facts to which application of the law may be made. There is evidence to the effect that such trusts as were taken over by the Hellman Bank were individual trusts, assumed through substitution following consent of beneficiaries and arrangement between the parties interested in each transaction.

There is a mass of records involving the entire matter, and a fair analysis thereof will support the trial court's finding that the Hellman Bank purchased certain securities only, and that the Hellman Bank in consideration therefor paid certain specified liabilities of the People's Bank. It does affirmatively appear that, pursuant to the Bank Act, the People's Bank had deposited with the state treasurer the sum of $100,000, represented by approved securities. This deposit was for the faithful performance and due execution by People's Bank of its court and private trust business. When it was shown to the superintendent of banks and to the state treasurer that the condition of the deposit had been fulfilled, the securities were returned to People's Bank, and by the latter transferred to Hellman Bank. There is not a single bit of evidence disclosing the source of this fund. Nothing indicates it to have been at any time the property of the trust department. This fund was turned over to Hellman Bank, and by the latter accepted as a part consideration for the discharge of certain liabilities of People's Bank. It was not retained as an asset; the admitted fact being that all that the Hellman Bank ever received from People's Bank was insufficient, by a considerable margin, to liquidate the deposit and banking liabilities assumed. While held by the state treasurer, this fund was subject to any claims that plaintiff might have urged, and the fact of its being in deposit was known to plaintiff. The fund, when released, was released to the People's Bank, and again might have been made the source of satisfaction of plaintiff's claim. No action of any sort was taken.

The trial court found the transaction between the banks one of purchase of definite assets. The assets of the trust departments as a whole were not involved. There is not the slightest suggestion of fraud in the record, nor is there any suggestion of the inadequacy of consideration paid by the Hellman Bank for each and every asset of the People's Bank transferred. We are not inclined to detail the various schedules of items involved in the transaction, as no helpful result would follow.

The whole case presents an oft met situation in appellate practice. The situation is one where sufficient background exists to support the claim of appellant, in the abstract. On the other hand, permissible construction leads to another conclusion negativing the contention. The trial court's findings have evidentiary support and are sufficient to sustain the judgment.

Just how far the provisions of the Bank Act might go in sustaining the claim of constructive trust it is needless to determine. At this particular time it would be a dangerous experiment to attempt any strange or fanciful construction of the Banking Act, or by academic array of theories to cast uncertainty upon the general banking plan as outlined in the statute.

It is unnecessary to consider the question of the statute of limitations.

[3] Certain arguments are presented regarding the form of the pleadings and the issues arising therefrom. These questions are beside the inquiry. It is the settled law of this jurisdiction that, when a case is tried upon the theory that the pleadings present specific issues, and evidence pro and con is adduced thereon, it will be too late, after determination, to present the claim of negative pregnants and faulty denials. And, it may

be added, if the denials are held admissions, the result would not be changed, inasmuch as the findings contrary thereto would not be essential to the judgment.

Judgment affirmed.

We concur: CRAIG, Acting P. J.; STEPHENS, J.

132 Cal.App. 1

PEOPLE v. CHESTER.

Cr. 2364.

District Court of Appeal, Second District, Division 1, California.

May 15, 1933.

1. Criminal law ⇐982.

Whether probation in given case should be revoked rests in sound discretion of court on submission of facts pertinent to inquiry.

2. Criminal law ⇐982.

Under evidence showing defendant, while on probation, was arrested in automobile containing revolvers and in which two men having police records were riding, order revoking probation would not be disturbed (Pen. Code, § 1203, subd. 2).

Appeal from Superior Court, Los Angeles County; B. Rey Schauer, Judge.

Joe Chester was charged with having violated the terms of his probation, and, from an order revoking probation and remanding defendant to state prison, dependant appeals.

Affirmed.

Keith R. Jensen, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Bayard Rhone, of Los Angeles, for the People.

DESMOND, Justice pro tem.

[1, 2] In this case appellant was charged with having violated the terms of his probation, and upon a hearing the court made an order revoking probation and remanding defendant to the state prison at San Quentin. From this order defendant appeals, claiming that it is contrary to law and unsupported by the evidence, and that it constitutes an abuse of the discretion vested in the court in probation matters. It appeared upon the hearing that defendant, convicted of second degree burglary, was granted probation; the term of probation being fixed at 10 years, conditions of probation including a period of 18 months' incarceration in the county jail. After his release from custody, November 1, 1932, and while still on probation, the defendant was arrested shortly after midnight on January 13, 1933, in an automobile in which two other men were riding. These two men had police records, one of many items extending over a period of years, the other a juvenile record, and, in the car at the time of arrest were two revolvers, one a Smith & Wesson .32, the other a German 765 automatic, together with six .32-20 cartridges and eight .32 automatic shells, all of which were found together by the arresting officer on the floor of the car immediately under a seat that tipped forward or back where defendant was sitting. One of defendant's companions, who at the time of arrest was driving the car, entered a plea of guilty to violating the Deadly Weapon Act (St. 1923, p. 695, as amended), and was sentenced to 6 months in jail. He appeared as a witness for appellant at the hearing upon the violation, and stated that the weapons belonged to two men who frequented a club where he was employed, and that he intended to deliver them to the owners, whose names he did not know, that night when the other men, the defendant, and the third man whose sister owned the automobile in which the three were riding should have taken him to the club. This witness did not know whether or not the revolvers were loaded, not having examined them when he received them from the owners, nor when he put them in the car for the purpose of returning them. The defendant claimed that he had no knowledge of the criminal records of his associates, including, besides his two companions at the time of arrest, another witness who appeared for him and who also had a lengthy record; also claimed that he knew of no conditions that would make these men unfit associates for him. He denied that he knew the revolvers and shells were in the automobile.

The instructions of the probation department which now form part of the transcript prohibited the probationer from being on public streets or highways at late or unusual hours of the night, and enjoined upon him the necessity of conducting himself in every way as an upright law-abiding citizen. By these instructions the probationer was expressly forbidden to have in his possession any firearms or deadly weapons, and was advised that any violation of his probation would be considered as sufficient cause for his return to court for further action. At the end of the instructions appeared the following: "I have read and fully understand the above instructions. Joseph L. Chester."

Section 1203, Penal Code, provides in item 2 entitled "Re-arrest and revocation of probation" that, "if the interests of justice so require, and if the court in its judgment, shall have reason to believe from the report of the probation officer, or otherwise, that the person so placed upon probation is violating

any of the conditions of his probation, or engaging in criminal practices, or has become abandoned to improper associates or a vicious life," probation may be revoked and terminated. It is further provided that, "if the judgment has been pronounced and the execution thereof has been suspended, the court may revoke such suspension, whereupon the judgment shall be in full force and effect, and the person shall be delivered over to the proper officer to serve his sentence, less any credits herein provided for."

This course was followed in the present case, the court saying: "I am sorry that the defendant did associate with these people; it is most unfortunate for him that he was found with those deadly weapons," and ordering the defendant to be credited with 469 days upon the term of any sentence that might be fixed by the board of prison terms and parols.

Whether or not probation in a given case shall be revoked rests in the sound discretion of the court upon the submission of facts pertinent to the inquiry. In re Young, 121 Cal. App. 711, 714, 10 P.(2d) 154. Having reviewed the testimony taken at the hearing of this case and having observed the purpose of the court not to act on that occasion until all the facts were before it, we see no reason to disturb the order that was made.

Order affirmed.

We concur: HOUSER, Acting P. J.; YORK, J.

132 Cal.App. 55

McCLUNG v. CAMP et al.

Civ. 8819.

District Court of Appeal, Second District, Division 2, California.

May 17, 1933.

Witnesses ⊂⇒275(2).

In action on note admitted by pleadings, cross-examination of payee-plaintiff regarding consideration, on which his testimony was silent, *held* improper, want of consideration being matter of defense.

Appeal from Superior Court, Los Angeles County; Joseph L. Call, Judge.

Action by F. A. McClung against Edwin L. Camp and another. From the judgment, defendants appeal. On motion to dismiss the appeal or affirm judgment.

Judgment affirmed.

W. L. Pollard and H. E. Gleason, both of Los Angeles, for appellants.

Carson B. Hubbard, of Huntington, Park, for respondent.

STEPHENS, Justice.

This is a motion under rule V, section 3, of the Supreme Court to dismiss the appeal or affirm the judgment upon the ground that the appeal was taken for delay only.

The plaintiff was the sole payee of a promissory note and took the stand on his own behalf and testified that he owned the note, that the defendants, the makers on the note, executed it, and to the balance due and unpaid. Defendants asked on cross-examination: "Mr. McClung, did you or Mrs. McClung give anything of value to the defendants or either of them, for the promissory note which has just been introduced in evidence?" Plaintiff objected on the ground that the question was incompetent, irrelevant, and immaterial. The court added the objection that it was not cross-examination and sustained his own objection. Defendants took no other action in the trial and appeal upon the one ground that the court's ruling was error.

The court was right upon the simplest rules governing cross-examination—there was nothing asked and no action had been taken to which this question was a proper inquiry. The note is admitted by the pleadings and it needed no testimony beyond its introduction, and the answer to the question was therefore properly excluded. 2 Cal. Jur., § 477. The answer pleaded no consideration, but this was a matter of defense. Mitchell v. Excelsior Water & Mining Co., 41 Cal. App. 240, 182 P. 326; Braly v. Henry, 77 Cal. 324, 19 P. 529. Even if the appellants are right in all that they claim, they are in no better position. A trial at law is no mere play of wits. Every attorney is an officer of the court and must be frank with the court. If appellants had any proof to support their allegation that the note lacked consideration, it was their duty to have offered it. If they thought the plaintiff could aid them, they could have called the plaintiff to the stand and under the terms of section 2055, Code of Civil Procedure, could have had every advantage of cross-examination.

Judgment affirmed.

We concur: WORKS, P. J.; CRAIG, J.

⊂⇒For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

132 Cal.App. 21

HAMILTON et al. v. ELVIDGE et al.

Civ. 8758.

District Court of Appeal, First District, Division 1, California.

May 16, 1933.

1. Descent and distribution ⇐84.

Where deceased died testate, devisees, not heirs at law, were persons in whom estate in land vested immediately on decedent's death, and oil and gas lease executed by persons describing themselves as "heirs" had no validity, unless they were also devisees.

2. Executors and administrators ⇐388(7).

Executor's deed to purchaser at probate sale *held* to relate back to decedent's death, cutting off any rights acquired by third persons under lease and ratification executed prior to executor's deed by decedent's alleged devisees (Code Civ. Proc. § 1555).

Lessees could take no greater rights than their lessors had, and, since estate which passed to testator's devisees on his death was subject to administration and sale for purposes thereof, and was actually sold for such purposes, attempted oil lease was of no force or effect, and created no right, title, license, option, or privilege as against purchaser at probate sale.

3. Executors and administrators ⇐388(4).

Purchaser of land at probate sale is subject to maxim of caveat emptor, and takes without warranty of title of decedent, but this applies only to condition of title at time of decedent's death, not cloud arising thereafter (Code Civ. Proc. § 1555).

Such purchaser is not bound to beware of anything which may have clouded title since decedent's death, but, under plain terms of Code Civ. Proc. § 1555, is entitled to all right, title, interest, and estate that decedent owned at time of his death or which estate may have acquired subsequently.

4. Quieting title ⇐21.

Action to quiet title *held* to lie against claimants under oil lease, even if lease created only license or option to enter on land and develop it for oil (Code Civ. Proc. § 738).

5. Quieting title ⇐21.

Quiet title action lies against claimant in respect of land, though claim is based on mere pretension or asserted right therein or thereto, or issues out of, or concerns, or is annexed to or exercisable in connection with, such property (Code Civ. Proc. § 738).

Appeal from Superior Court, Santa Barbara County; William D. Dehy, Judge.

Action by Fred Hamilton and another against William Elvidge and others. From a judgment in favor of plaintiffs, all defendants who appeared in the action appeal.

Affirmed.

Fred Schaeffer, of Santa Maria, and Walters & Mauk, of Los Angeles, for appellants.

Glen Behymer, of Los Angeles, for respondents.

COMSTOCK, Justice pro tem.

This is an action to quiet title to certain lands in Santa Barbara county. Four of the original defendants defaulted, and the action was dismissed as to several fictitious defendants. Judgment went for the plaintiffs, and all of the defendants who appeared in the action appeal from the judgment.

The essential facts are as follows: Joseph Elvidge, the former owner of the lands in controversy, died testate on March 18, 1922. William Elvidge, a son, was appointed executor of his will. During the course of administration of the estate, pursuant to regular proceedings for a sale of real estate therein, said property was sold to the plaintiff Fred Hamilton and an executor's deed, dated April 11, 1925, was made, executed, and delivered to him by said executor. This deed and all of the proceedings for the probate sale purported to dispose of "all of the right, title, interest and estate of the said Joseph Elvidge, deceased, at the time of his death and all of the right, title and interest that the estate of said decedent has by operation of law or otherwise acquired other than and in addition to that of said decedent at the time of his death," in and to the real estate in question, without mention of any outstanding oil and gas lease or other cloud upon the title or claim against the property. Prior to this sale, during the administration of the estate, and by a document bearing date of January 23, 1924, signed "William Elvidge Owner," the said Elvidge purported to lease and convey to the defendants J. W. Starkweather, Henry Goedinghaus, and Tom Ballester the "exclusive privilege and right to prospect for, drill wells for the development of, and sell or otherwise dispose of, petroleum oil, naptha, gas, or any form of carboniferous products found upon or lying within or under" the premises in question and other lands not in controversy. This document contains other provisions common to oil and gas leases, concludes with a witness clause, and is signed as aforesaid by Elvidge and also by the said three defendants. Following these signatures, there is a general form of notarial certificate showing the acknowledgment of the execution of said instrument by the said three defendants, but not by Elvidge, on the 11th day of February, 1924, before a notary public. Attached to said document so acknowledged

is a further writing, describing the parties as "William Elvidge, the lessor, and J. W. Starkweather, Tom Ballester and Henry Goedinghaus, the lessees," reciting, among other things, that "the purpose of the grant of this lease is to secure the active influence of these lessees in encouraging capital or some operating company" to sink a prospect well for oil in the limits of a territory in the floor of the Santa Maria Valley, now unexplored (describing by metes and bounds a territory apparently of considerable extent and not purporting to be owned by the lessor), or, failing in that, to organize themselves into an operating company and drill said prospect well "under the terms and conditions as set forth in the hereto attached lease end of this agreement." This writing is also signed by all of said parties at the end thereof, but is not itself dated nor further acknowledged. It appears, however, that the two writings constituted but one agreement. They were recorded as one document in the office of the county recorder of Santa Barbara county on February 13, 1924. No authority for the execution of this oil lease was obtained from the probate court. It does not purport to have been executed by Elvidge in his capacity as executor. An agreement ratifying the act of William Elvidge in signing said lease was executed between the said William Elvidge himself and nine others, describing themselves as heirs of Joseph Elvidge, and J. W. Starkweather, Henry Goedinghaus, and Thos. F. Ballester, bearing date of January 23, 1924. This instrument was not acknowledged before a notary and was not recorded. The signatures were actually affixed at various times between its date and approximately the 13th day of February, 1924. None of the plaintiffs had knowledge of its existence or contents before the execution and delivery of said executor's deed. All of the signatures were identified as genuine except that of Stella Geering, one of the parties thereto, whose name was signed by William Elvidge under the purported authority of a letter in the handwriting of Stella Geering, dated February 5, 1924, addressed "Dear Sister Sarah" and signed "Stella," in which the writer stated, "Well Dear you all have my say (yes) about leasing the ranch so go a head."

The plaintiffs claim title under and through the executor's deed. The defendants base their claims upon the oil lease and certain subleases and partial assignments thereof.

We have found it extremely difficult to comprehend exactly what legal propositions appellants rely upon. One of their contentions is set forth in their brief in the following language: "The contention of the plaintiff in this action is that the oil and gas lease is a conveyance of an interest in the property, or if not, then an encumbrance, and we contend it is neither one or the other, that it being executed by the widow and heirs at law of the decedent, and the property is sold for the payment of debts. That therefore the lease was of no force or validity whatsoever. We contend that an oil and gas lease is neither a conveyance or an encumbrance, while it is fundamental law that the title, upon the death of the deceased, vests in the widow and heirs of the deceased, subject to the payment of the debts of the estate, while the deceased left a great deal of other property than the property in controversy, and whether or not it was necessary to sell this particular property, the evidence does not disclose." This language is so uncertain and unintelligible that we find ourselves unable to gather therefrom any clear idea of the points intended to be made. From reading the entire brief, however, we gather that appellants urge that the widow and heirs of Joseph Elvidge, deceased, as his heirs at law, had a right to execute the oil lease, and that said lease is valid; that an oil lease is merely a license or option to explore for oil, gas, or other hydrocarbon substances does not create an interest in lands, and that an action to quiet title against such rights as are conferred thereby will not lie against the lessees or those claiming under them; and that Fred Hamilton, the purchaser at the probate sale, took the executor's deed with knowledge of the oil lease, and hence subject thereto. There is also an estoppel urged in behalf of the defendant George O. Gorham, who, it is contended, drilled a well on adjoining land in reliance upon acts of Fred Hamilton claimed to have been in recognition of the validity of the lease on the land in controversy.

[1] It does not appear from the record before us whether any of the persons who assumed to execute or ratify the oil lease were devisees under the will of Joseph Elvidge, deceased. Counsel for plaintiff offered to stipulate who were such devisees, as shown by the decree of distribution, but counsel for defendants rejected this stipulation and asked for one to the effect that the surviving wife and nine children, being the same persons whose names appeared on the ratifying agreement, were the heirs at law, as distinguished from devisees, of Joseph Elvidge, deceased, which was granted. It is plain that, since Joseph Elvidge died testate, his devisees, and not those who might have been his heirs at law entitled to take by succession if he had died intestate, were the persons in whom his estate vested immediately upon his death. In the absence of a showing of who the devisees were, there was an utter lack of foundation for the claim that the lease and ratification were of any more validity than if executed by absolute strangers to the title. However, this point is not urged by respondents, so we shall proceed to consider whether said documents were of any validity or conferred any rights as against the purchaser at the probate

sale as if it were established that the signers thereof were all devisees under the will of said deceased.

[2, 3] Respondents make the point that the executor's deed related back to the death of the decedent and cut off all rights which may have been acquired under the lease and ratification. This contention is sound and must be sustained. Such is the plain effect of section 1555 of the Code of Civil Procedure in effect at the time of these transactions, and is well settled by authority. The general rule is stated in Re Estate of Benvenuto, 183 Cal. 382, 191 P. 678, that property of a decedent vesting in an heir upon his death is subject to sale for such reasons and purposes as may be then authorized by law. See, also, Blair v. Hazzard, 158 Cal. 721, 112 P. 298; 9 Cal. Jur. 474. In Gutter v. Dallamore, 144 Cal. 665, 79 P. 383, it was held that a probate sale vested in the purchaser the title of the decedent as of the date of his death as against the asserted lien of a mortgage and assignment of his interest made by an heir prior to the sale. The lessees could take no greater rights than their lessors had, and, since the estate which passed to the testator's devisees upon his death was subject to administration and sale for the purposes thereof, and was actually sold for such purposes, the attempted oil lease was of no force or effect, and created neither right, title, license, option, nor privilege as against the purchaser at the probate sale. This being so, it is unnecessary to discuss whether such purchaser had knowledge of the lease recorded without Elvidge's acknowledgment or of the unrecorded instrument of ratification. The buyer at such a sale, it is true, is subject to the maxim of caveat emptor, and takes without warranty of the title of the decedent, but this applies only to the condition of the title at the time of the decedent's death. He is not bound to beware of anything which may have clouded the title since that time, but under the plain terms of the statute is entitled to all of the right, title, interest, and estate that the decedent owned at the time of his death or which his estate may have acquired subsequently.

[4, 5] Appellants cite the case of Brookshire Oil Co. v. Casmalia Ranch, etc., Co., 156 Cal. 211, 103 P. 927, and many cases from other jurisdictions defining the nature of oil leases and the rights which they confer. They argue from these that, since they hold that such leases in their usual form do not create an estate in land or in the undiscovered and uncaptured oil therein, but only a license or option to enter upon the land and develop it for oil, in the nature of an incorporeal hereditament, actions will not lie to quiet title against them or the claims of those asserting rights thereunder. Granting the premise without attempting here to define the exact nature of the right or title created, nevertheless appellants' conclusion does not follow and is incorrect. Under our practice it matters not whether a claim is based upon a valid title or interest in real estate or upon a mere pretension or asserted right therein or thereto, or issues out of, or concerns, or is annexed to or exercisable in connection with such property; it may still be the subject of an action to quiet title such as is provided for by section 738 of the Code of Civil Procedure. As was said in Castro v. Barry, 79 Cal. 443, 447, 21 P. 946, 947: "The statute 'does not confine the remedy to the case of an adverse claimant setting up a legal title or even an equitable title; but the act intended to embrace every description of claim whereby the plaintiff might be deprived of the property, or its title clouded, or its value depreciated, or whereby the plaintiff might be incommoded or damnified by the assertion of an outstanding title already held or to grow out of the adverse pretension.' [Citing cases]. And the rule may be even more broadly stated, viz., that the action may be maintained by the owner of property to determine any adverse claim whatever, for, if the defendant, by his answer, disclaims all interest whatever, judgment may, nevertheless, be entered against him, though in such case it must be without costs."

Defendants' answer denies plaintiffs' ownership of title in fee, and admits defendants' claim of right and interest in the real property in controversy. It further affirmatively pleads the oil lease, and prays that their right and title thereto be quieted against plaintiffs. In view of this, appellants' argument that an action to quiet title against the claims arising under the lease will not lie is somewhat surprising. But, regardless of the contents of the answer, the law is plain that an action will lie to quiet title against the claims here asserted. Dorris v. McManus, 3 Cal. App. 576, 86 P. 909; Castro v. Barry, supra; Head v. Fordyce, 17 Cal. 149; Jolliffe v. Steele, 9 Cal. App. 212, 98 P. 544; 22 Cal. Jur. 115.

The court found against defendant Gorham's claim of equitable estoppel. We have carefully read the transcript and find this finding fully sustained by the evidence. Even taking the defendants' version of the facts relied upon as constituting such estoppel, we find them wholly insufficient for that purpose.

A further point is urged by appellants. Objection was made to the introduction in evidence of the executor's deed upon the ground that it showed a consideration different than that specified in the order confirming the sale. The deed, in one of its opening paragraphs, recites the sale for the sum of $28,000, and in a later clause mentions the consideration as being $12,850. The court admitted the deed over this objection. Appellants contend this was error, but cite neither authority nor legal principle in support of their contention. We know of no principle which excludes from

evidence a conveyance reciting a cash consideration other than the true one or which contains a recital of consideration in inconsistent amounts. The deed might properly have mentioned but a nominal consideration and been perfectly valid and admissible in evidence. If appellants had been in a position to question the legality of the sale in this proceeding, the court would have been justified in taking evidence to ascertain the true consideration. Whether or not this was necessary is immaterial. It did receive evidence which established not only that the true consideration was $28,000, out of which the estate paid a commission and expenses totaling $1,410, but also that the sale was duly confirmed by an order of confirmation which had become final. The objection constituted a collateral attack upon the legality of the sale, and such an attack may not be made. Dane v. Layne, 10 Cal. App. 366, 101 P. 1067; Rountree v. Montague, 30 Cal. App. 170, 157 P. 623.

We find no error in the record. The judgment is affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

131 Cal.App. 714

KEHRLEIN v. BUILDERS' MORTG. CO. et al.

Civ. 8754.

District Court of Appeal, First District, Division 1, California.

May 12, 1933.

1. Licenses ⇐39.

Second trust deed and bonds secured thereby, issued without permit from commissioner of corporations, could not be canceled as void where purchasers of bonds were innocent third parties not in pari delicto with parties issuing securities without permit (St. 1917, p. 673, § 2 as amended; p. 679, § 12).

2. Licenses ⇐39.

Purchasers of bonds secured by second trust deed, without knowledge bonds and trust deed were issued without permit of commissioner of corporations, *held*, as regards right to cancel bonds, not in pari delicto with parties issuing securities without permit (St. 1917, p. 673, § 2 as amended; p. 679, § 12).

Appeal from Superior Court, Los Angeles County; Fletcher Bowron, Judge.

Action by Mary Osburn Kehrlein against the Builders' Mortgage Company and others. From a judgment dismissing the action, plaintiff appeals.

Affirmed.

Kimball Fletcher, of Los Angeles, for appellant.

Tanner, Odell & Taft, of Los Angeles, for respondents.

PER CURIAM.

This action was brought by plaintiff to restrain the sale of property under a second deed of trust and to recover the sum of $45,000 alleged to have been paid thereon by her. At the trial defendants objected to the introduction of any evidence upon the ground that the complaint did not state facts sufficient to constitute a cause of action, and this objection being sustained a judgment dismissing said action was thereupon entered. From this judgment plaintiff appeals.

The complaint contains three counts, the first of which alleges that in 1925 Kathryn Elliott and Karl Elliott became associated in the building of a hotel in the city of Los Angeles; that in order to obtain the necessary funds to construct and furnish said hotel they executed first mortgage gold bonds, secured by deed of trust, for the sum of $280,000; that permit therefor was obtained from the commissioner of corporations; that it became necessary to raise an additional sum to complete and furnish the said hotel, and said parties arranged a further issue of securities to the amount of $100,000 to be secured by a junior deed of trust on said hotel. This second or junior deed of trust was executed to respondent Title Guarantee & Trust Company, as trustee, to secure notes aggregating $100,000. It recites an indebtedness of $40,000 to respondent Christ Thoren, and provides for securing loans from others from time to time. Then follows a list of notes for loans from others aggregating, with the Thoren indebtedness, something less than $100,000. It is further alleged that no permit was ever obtained from the commissioner of corporations for the issuance of any of the evidences of indebtedness covered by this second or junior deed of trust; that the said Elliotts were acting as promoters of the Normandie Corporation, organized in 1925, in the execution of the said deed of trust and in issuing the said evidences of indebtedness; that the execution of the deeds of trust and issuance of the evidences of indebtedness by the said Elliotts were for the sole benefit of the Normandie Corporation, and that the said evidences of indebtedness that were issued to said Kathryn Elliott or Christ Thoren were issued to said payees as agents of said Elliotts if the same were actually issued prior to the organization of said Normandie Corporation, or as agents of said corporation if actually issued after its formation; that said hotel building

was completed and furnished about May, 1926, and thereafter the said hotel building, including its furnishings, was conveyed to appellant and Emil Kehrlein, Jr., and subsequently the said Emil Kehrlein, Jr., conveyed his interest therein to appellant, said conveyances being made subject to the said two deeds of trust; that default was made upon the first mortgage bonds and, agreeably to the provisions of the deed of trust securing them, S. W. Straus & Co. took over the operation of said hotel and is now in possession of and operating same; that the said Title Guarantee & Trust Company has noticed the said hotel and furnishings for sale and will proceed to sell same under said second deed of trust unless restrained by an order of court.

Appellant alleges in the second count of the complaint that, upon the representations of respondents that the said trust deeds and notes were valid subsisting obligations and liens, she paid about $45,000 for which she has received no consideration.

For a third cause of action she alleges that a controversy exists between her and defendants as to their respective rights under the second deed of trust and notes issued thereunder.

The sole contention of appellant is that the deed of trust and notes secured thereby are void for the reason that no permit authorizing them was ever issued by the commissioner of corporations. The Corporate Securities Act, as it existed in 1925, provided that every security issued by any company, without the permit of the commissioner authorizing the same then in effect, shall be void. Section 12 of said act, Stats. 1917, p. 679. The word "company" included private corporations, partnerships, and individuals. Section 2 of said act (as amended). The word "security," in so far as it applies to individuals, includes all bonds, debentures, or evidences of debt offered to the public by an individual. Section 2 of said act.

[1, 2] Conceding that the second deed of trust and the indebtedness it secured were issued in violation of the Corporate Securities Act, for the reason that no permit therefor was issued by the commissioner of corporations, we have a situation where a cancellation of these instruments is sought, not against the wrongdoer, but against what appears from the complaint to be innocent third parties. It is not alleged in the complaint that the trustee in the second deed of trust or the beneficiaries thereunder had knowledge that it, and the notes it secured, were issued without a permit. In Pollak v. Staunton, 210 Cal. 656, 662, 293 P. 26, 29, the court said: "Where stock has been issued without a permit it is void by the terms of the act (section 12), and the purchaser who is ignorant of such unauthorized issue may recover payments made by him on account of the purchase price. [Citing authorities.] * * * The purchaser, for whose benefit the Corporate Securities Act has been enacted, is not in pari delicto with the corporation or its agents. 'Where contracts or transactions are prohibited by positive statutes, for the sake of protecting one set of men from another set of men; the one from their situation and condition, being liable to be oppressed or imposed upon by the other; there, the parties are not in pari delicto; and in furtherance of these statutes, the person injured, after the transaction is finished and completed, may bring his action and defeat the contract.' [Citing authorities.]"

Again, in Hemmeon v. Amalgamated C. Mines Co., 95 Cal. App. 400, 273 P. 74, 75, the court held: "The trial court found, and it is not denied by appellant, that the respondent had no knowledge of the failure to obtain a permit, but it is argued that she must be presumed to have known the law and that the notes were void; that having failed to demand proof of the existence of a permit, respondent 'passively if not actively became a participant in violating the law.' True, respondent must be presumed to have known the law requiring the possession of a permit as a prerequisite to the issuance and sale of securities, but it does not follow that she should be presumed to have known the fact that appellant had violated the law. The statute does not make it an offense innocently to *buy* securities issued without a permit first having been obtained by the seller, nor does it require that it shall be exhibited to the purchaser. Until the contrary appears, it will be presumed that a person is innocent of crime or wrong, and that the law has been obeyed. Code Civ. Proc. § 1963. Respondent was entitled to assume that the law had been complied with." Further along in this case the court said: "In Smith v. Bach, 183 Cal. 259, 191 P. 14, * * * the Supreme Court there said: 'There are authorities which, while not denying the general rule that an illegal contract cannot be enforced whether malum in se or malum prohibitum, hold that all the consequences which attend a contract contrary to public morals do not attend one which is purely malum prohibitum, and that in the latter case courts will take notice of the circumstances and will give relief if justice and equity require a restoration of money received by either party thereunder. 13 Corpus Juris, p. 411, § 341. In such a case the complaining party is protected, the prohibition being for his benefit, and not being in pari delicto he is entitled to relief.'" Tatterson v. Kehrlein, 88 Cal. App. 34, 263 P. 285.

In the case now under consideration the respondents are not in pari delicto with the parties who caused the securities to be issued without first obtaining a permit so to do.

They occupy the position of third parties who have paid value received for the notes secured by the second deed of trust, without notice or knowledge that a permit had not been issued authorizing their issuance. It would be inequitable to penalize respondents for wrongs committed by others.

The judgment is affirmed.

132 Cal.App. 51

WASHINGTON v. POLICY HOLDERS' LIFE INS. ASS'N OF LOS ANGELES.

Civ. 8917.

District Court of Appeal, First District, Division 2, California.

May 17, 1933.

1. Appeal and error ⇐1127.

Where parties stipulated on appeal that, if motion to dismiss or affirm were denied, cause might stand submitted on merits on points and authorities on file, motion was denied (Rules of Supreme Court and District Courts of Appeal, Rule 5, § 3).

2. Appeal and error ⇐1011(1).

Findings supported by substantial evidence will be upheld, notwithstanding conflict in evidence.

3. Pleading ⇐36(1).

Findings that life policies were in effect when insured died *held* supported by evidence, in view of admissions in pleadings.

It was contended that policies had lapsed for nonpayment of certain assessments, but pleadings admitted that all dues and assessments had been paid as required, and insurer alleged in answer that insured was reinstated after alleged lapse, and such reinstatement was not denied by plaintiff.

4. Trial ⇐64.

Objections that questions concerning deceased's height and weight were incompetent, irrelevant, immaterial, and improper surrebuttal *held* properly sustained; witness having previously testified to such height and weight.

Appeal from Superior Court, Santa Clara County; F. B. Brown, Judge.

Action by Samuel S. Washington against the Policy Holders' Life Insurance Association of Los Angeles, a corporation. Judgment for plaintiff, and defendant appeals. Motion to dismiss or affirm.

Motion denied, and judgment affirmed.

See, also, 19 P.(2d) 516.

Hugh Martin Young, Charles D. Warner, and Thomas W. Hughes, all of Los Angeles, for appellant.

Charles A. Thompson and Robley E. Morgan, both of Santa Clara, for respondent.

SPENCE, Justice.

Plaintiff brought this action to recover upon two life insurance policies. The cause was tried by the court sitting without a jury, and, from a judgment in favor of plaintiff, defendant appeals.

[1] After the filing of appellant's opening brief, respondent made a motion to dismiss or affirm under section 3 of rule V of the Rules of the Supreme Court and District Courts of Appeal. Points and authorities were filed by respondent in support of his motion, and appellant filed its points and authorities in opposition thereto. Upon the hearing, the motion was argued and submitted, and the parties stipulated that the cause might stand submitted upon the merits on the points and authorities on file in the event that said motion was denied. In our opinion, this is not a proper case to grant the motion to dismiss or affirm under the rule. The motion is therefore denied, and we shall proceed to a consideration of the appeal on its merits.

In July, 1930, two life insurance policies were issued by appellant to Grace May Washington, the wife of respondent, in which policies respondent was named as beneficiary. Said Grace May Washington died in March, 1932. After the death of the assured appellant attempted to cancel the policies because of alleged false statements regarding her weight and state of health made by the assured in her application. An inspection of the pleadings shows that it was admitted by appellant's failure to deny that the assured had paid all dues and assessments on each policy "which became due and payable to the defendant under and by virtue of the terms of said policies of insurance within the time and in the manner specified in said policy of insurance." It was alleged in the answer, however, that in 1931 the assured had failed to pay certain assessments, and thereby forfeited her membership, and was thereafter reinstated pursuant to her written application for reinstatement dated April 9, 1931. Appellant then alleged that the statements contained in the written application for reinstatement were likewise false. Pursuant to the provisions of section 448 of the Code of Civil Procedure, respondent filed a denial of the execution and genuineness of the alleged written application for reinstatement set forth in appellant's answer. The trial court found against appellant on the issue of the alleged falsity of the statements of the assured, and entered judgment for plaintiff.

[2, 3] Appellant first contends that the findings are not supported by the evidence. It would serve no useful purpose to set forth the evidence of the various witnesses relating to the weight and state of health of the assured. The controversy arose over the alleged false statement regarding the weight of the assured, and all of appellant's testimony regarding her state of health was based upon the testimony relating to her alleged overweight. The assured had stated her weight as 187 pounds, and several witnesses testified to the correctness of this statement. Appellant offered evidence for the purpose of showing that the assured weighed more, but the most that can be said is that there was a conflict. The trial court's findings to the effect that the statements of the assured were true and not false as alleged by appellant were supported by substantial evidence, and the fact that there may have been a conflict in the evidence is immaterial on this appeal. It is further contended that there was no evidence to support the findings to the effect that the policies were in full force and effect at the time of the death of the assured. On this point appellant argues that the policies had lapsed for failure to pay certain assessments at the time required in 1931, and that the "purported reinstatement was denied" by respondent. This contention is wholly without merit. It was admitted by the pleadings that all dues and assessments had been paid as required, and appellant affirmatively alleged in its answer that the assured "was reinstated in and again became a member" after the alleged lapsation referred to in its answer. Such reinstatement was not denied by respondent. Respondent merely denied the genuineness and due execution of the particular written application for reinstatement which appellant had set forth in its answer. The last-mentioned findings find ample support in appellant's admissions in the pleadings, and there is nothing in the evidence contrary thereto.

[4] Appellant further contends that the trial court committed prejudicial error in its rulings excluding certain evidence offered by appellant. These rulings were made while Dr. Nelson was on the witness stand on surrebuttal. The doctor had performed the autopsy, but had never seen the deceased prior to her death. He had previously testified to his estimate of the height and weight of the deceased at the time of her death. When called on surrebuttal, he was asked the following questions: "What was her size, abnormal in comparison with her height?" "Did it require any assistance to move her?" "Doctor, considering the weight that this woman had and her size, would you say that that was an excessive weight?" In our opinion, respondent's objections to these question upon the ground that they were incompetent, irrelevant, and immaterial and not proper surrebuttal were properly sustained. Appellant has failed to show that these questions were proper on surrebuttal, but in any event they lacked materiality, particularly in view of the fact that the doctor had already been permitted to freely testify as to his estimate of her size and weight.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

131 Cal.App. 763

PEOPLE v. RATLIFF.

Cr. 237.

District Court of Appeal, Fourth District, California.

May 13, 1933.

Hearing Denied by Supreme Court June 12, 1933

1. Indictment and Information ⇐111(1).

Indictment of broker for selling corporation stock in violation of Corporate Securities Act *held* to state public offense, though not alleging that shares were not defendant's property (Pen. Code, §§ 950–952; Gen. Laws 1931, Act 3814, §§ 3, 18).

2. Licenses ⇐42(4).

Evidence *held* sufficient to support conviction of broker for selling corporation stock in violation of Corporate Securities Act (Gen. Laws 1931, Act 3814, §§ 3, 18).

3. Criminal law ⇐430.

Copy of foreign corporation's articles of incorporation, certified by secretary of state in which incorporated, *held* admissible, without further certificate, to prove corporation's existence in broker's trial for unlawfully selling stock thereof (Code Civ. Proc. § 1918; Civ. Code, §§ 370a, 372; Gen. Laws 1931, Act 3814, §§ 3, 18).

4. Criminal law ⇐436.

Portions of foreign corporation's minutes, reciting occurrences at directors' meeting, including acts and statements of one charged with unlawfully selling corporation's stock *held* admissible in trial therefor (Civ. Code, § 371; Gen. Laws 1931, Act 3814, §§ 3, 18).

5. Criminal law ⇐829(1).

Refusal of instructions on subject covered by instructions given was not error.

Appeal from Superior Court, San Diego County; Charles C. Haines, Judge.

S. A. Ratliff was convicted of violating the Corporate Securities Act, and he appeals.

Affirmed.

Joe C. Burke, of Los Angeles, Charles B. De Long, of San Diego, and Mark L. Herron and Russell Graham, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Warner I. Praul, Deputy Atty. Gen., for the People.

CAMPBELL, Justice pro tem.

The appellant, S. A. Ratliff, was charged in an amended indictment returned by the grand jury of San Diego county, with the crime of violation of the Corporate Securities Act of the State of California, and was convicted of the charge contained in count 2 of the indictment, which is as follows: "2. The said S. A. Ratliff and W. B. Bird, on or about the 2nd day of April, 1929, in the County of San Diego, State of California, and before the finding of this indictment, did wilfully, unlawfully, knowingly and feloniously and for the purpose and with the intent then and there to evade the provisions of the Corporate Securities Act and the laws of the State of California, did then and there engage in the business of selling, offering for sale, negotiating for the sale of and dealing in the shares of the capital stock of the Pacific Copper Company, a foreign corporation, and as agents and brokers for and on behalf of said corporation, did then and there sell, offer for sale, authorize, direct and aid in the sale of, and cause and assist in causing to be sold to one Mrs. Lulu S. Edis, certain securities, to wit: ten thousand shares of the capital stock of the said corporation, whereas in fact no permit had then and there or theretofore been issued to or obtained by or on behalf of said corporation, from the State of California or the Department of Corporations of said State of California, authorizing the sale of the shares of the capital stock of said corporation, or its securities in said State of California, which the said defendants and each of them then and there well knew. * * *"

This is an appeal from the judgment of conviction and from the order denying appellant's motion for a new trial. It appears from the evidence that during the early part of the year 1926, one Jarmouth entered into negotiations with appellant for the purpose of procuring the aid of the latter in raising funds to develop mining property belonging to the Tecopa Mines Company. The negotiations resulted in an understanding to the effect that appellant would receive a block of stock to sell in order to put the mine on production. When sufficient stock had been sold for that purpose, appellant was to receive additional stock so as to make his interest in the company at all times equal to that of Jarmouth. Altogether appellant came into possession of approximately 350,000 shares of the company's stock. Shortly after these negotiations, another corporation was formed in the state of Nevada, known as the Pacific Lead Silver Mines Company for the purpose of acquiring the assets of Tecopa Mines Company. On July 7, 1927, a contract was entered into between Jarmouth and appellant which recited in substance that the old company was being dissolved and stock of the new company issued to stockholders of the former company on a pro rata basis; that of the new stock there was issued to Jarmouth 1,039,653 shares and to appellant 1,008,500 shares; and that the latter was disposing of some of these shares, a portion of the proceeds from which was being applied to the development of the company's property. In January, 1929, appellant informed Fred F. Stevens, one of the witnesses, that he proposed to organize a company to be known as Pacific Copper Company, for the purpose of getting Pacific Lead Silver Mines Company stock away from people who were not entitled to hold it.

A certified copy of the articles of incorporation of Pacific Copper Company was introduced in evidence. The list of names of the first board of directors of the corporation did not contain the name of appellant. There is no testimony or other evidence tending to show that appellant was ever an officer or director of the Pacific Copper Company.

In the month of December, 1928, appellant had told the witness Keller that he had just returned from inspecting a mining property at Lordsburg, N. M., known as the Bonney mine; that it would be to the best interests "of the enterprise in all of its phases," to acquire this mine, and with that plan he had decided "to incorporate a new company to succeed the Pacific Lead Silver Mines Company to a degree." Appellant also said that he had contracted to buy the mine for a price in the neighborhood of $300,000. The new corporation was to have the same number of shares as the old company except that the par value would be $1 instead of 25 cents. The shareholders in the old company, who had acquired their stock through appellant, would receive an even exchange of shares, but those who had not obtained their stock through him would be left out of the new organization and thereby prevented from depressing the price in the outside market. The shares acquired in exchange were to go into the new company. Appellant also proposed to create a pool so that he would have absolute control of the market when the shares of the new company were listed on the stock exchange. The reasons for incorporating in Nevada are best shown by the following testimony of the witness Keller:

"Q. Did he discuss with you why he was incorporating this company in Nevada? A. Yes.

"Q. What did he say in that respect? * * * A. By incorporating in the state of

Nevada we would be able to make the exchange of shares in the manner which he had described without interference of any kind, without being compelled to recognize these recalcitrant elements among the Tecopa shareholders and that he likewise would be placed in the same legal position with reference to the sale of shares in the Pacific Copper Company that he had been in during the time when shares were being sold by us in the Pacific Lead Silver Mine Company, and that—

"Q. What condition was that? A. The condition referred to was the sale of shares as his personally owned stock in the Pacific Lead Silver Mines Company and he would be placed in the same position excepting that he would be improved in this, that the Pacific Copper Company would own the property in Arizona, known as the Selman Mine and would own a property in New Mexico known as the Bonney Mine and it would not own any property itself in California, but through the ownership of shares in the Pacific Lead Silver Mines Company which it would acquire under a plan of exchange which he had proposed, which he intended to propose."

Subsequent to this conversation the Pacific Copper Company was organized under the laws of the state of Nevada, in the month of December, 1928.

Evidence was introduced to the effect that appellant made a written offer to the board of directors of Pacific Copper Company, at Las Vegas, Nev., dated January 8, 1929, to sell to the Pacific Copper Company a certain option agreement dated December 5, 1928, by and between Bonney Mining Company, a corporation, and S. A. Ratliff, which option agreement conveyed to appellant an option to purchase what was generally known as the Bonney mine in the state of New Mexico, for the sum of $300,000, to be paid in installments therein set forth. The written offer included, in addition to the option agreement, all of the mining machinery, tools, and equipment located on the mining property and used in connection therewith, all of which was, by the written offer, proposed to be transferred to the Pacific Copper Company in exchange for $2,999,500 shares of the unissued capital stock of Pacific Copper Company, which offer was accepted and said number of shares of stock issued to appellant.

Appellant then organized a sales force in the state of California and began the exchange of shares in the Pacific Copper Company for shares of Pacific Lead Silver Mines Company; also the sale of shares in the former company for the purpose of financing its operations. On May 29, 1929, appellant wrote to the board of directors of Pacific Copper Company and stated in effect that 1,886,159 shares of Pacific Lead Silver Mines Company stock had been delivered to him by the owners; that of said shares 1,508,769 had been exchanged for a like number of shares of Pacific Copper Company; that of the remainder, 303,140 shares were held in escrow with the Pacific National Bank of Los Angeles pursuant to certain pool agreements and 75,250 shares were in process of exchange. A certificate for 1,508,769 shares of lead stock was tendered to the corporation. Appellant also advised that there were 3,000,000 shares of lead stock issued and outstanding, and that the 1,508,769 shares delivered to the new company represented a majority of the 3,000,000 shares. It is to be noted also that during this time, both appellant and Pacific Copper Company occupied an office at 705 Foreman building, Los Angeles, Cal.

Again on May 29, 1929, appellant wrote a letter to the board of directors of the Pacific Copper Company at 705 Foreman building, Los Angeles, in which it was stated by appellant that he had, on and after July 1, 1928, agreed with stockholders of the lead company to sell certain of its shares of stock and donate from the proceeds approximately $250,000 to the company for the purpose of providing it with working capital. Subsequent to the execution of such agreement, additional agreements were entered into providing that said sum, in cash or its equivalent, should be donated to Pacific Copper Company in lieu of Pacific Lead Silver Mines Company. The letter further stated that between July 1, 1928, and May 29, 1929, he had advanced to Pacific Copper Company from the proceeds of stock sales the total sum of $160,480.28, in connection with the operations of the Bonney mine at Lordsburg, N. M., and the Selman mine at Superior, Ariz., and in connection with the Tecopa mine of the Pacific Lead Silver Mines Company; that appellant was handling in connection therewith 23 promissory notes "properly transferred to Pacific Copper Company," in the aggregate amount of $83,620, together with appellant's personal check for $5,899.72. In the aggregate these items amounted to $250,000.

At a meeting of the board of directors of the Pacific Copper Company held on May 31, 1929, 169,000 shares of stock of the company were issued to appellant in consideration for services rendered by him to and including the 31st day of May, 1929, in superintendence and operation of the properties owned by the company, and large sums of money advanced on behalf of the corporation, and other efforts in its behalf enumerated as follows: Advertising, traveling expenses, telephone and telegraph, maintenance of office, legal expenses, acquiring and advancement of funds necessary for the proper operation of the properties of the corporation, pending the completion of its financing.

The evidence further shows that appel-

lant maintained an office in the city of Los Angeles and employed salesmen to sell the stock so issued to him; that in said office he employed a stenographer and bookkeeper and the books of Pacific Copper Company were kept in the same office by one Fred F. Stevens. It appears therefrom that the appellant superintended and controlled the operation of the company, paid the bills of the company, and also paid the salaries of the employees of the Pacific Copper Company. The evidence shows clearly that a number of salesmen were employed and retained by appellant for the purpose of selling this stock. It also shows that some of the money so derived from the sale of the stock ostensibly issued to appellant was used for operating the company. Stockholders' meetings were held on various occasions and those present were urged by appellant to buy more stock in order to provide funds for further development of the company's properties. Literature and bulletins describing the company's property and the desirability of becoming an investor were prepared and distributed under the supervision and direction of appellant.

Appellant concedes that on or about April 2, 1929, in the county of San Diego, W. B. Bird, a salesman employed by appellant, sold 10,000 shares of the stock of the Pacific Copper Company to Mrs. Lulu S. Edis. Appellant also concedes that pursuant to such employment as salesman by appellant, one K. R. Pitcher sold to the said Lulu S. Edis on June 12, 1929, 15,000 shares of stock of said Pacific Copper Company. He concedes that during the months of April and June, 1929, salesmen in the employ of appellant sold a large number of shares of stock to various individuals residing in San Diego.

The testimony further shows that appellant attended many of the meetings of the board of directors of the Pacific Copper Company and that at many of the meetings matters affecting the corporation were discussed with appellant by the board of directors. The evidence shows that before the witness Fred M. Stevens became the secretary, treasurer, and a director of Pacific Copper Company, he discussed with appellant the matter of accepting a position as such officer and director. The testimony shows that before Frank L. Purinton became president of Pacific Copper Company he was requested to do so by appellant. The testimony further shows that in the month of December, 1928, appellant gave the sum of $18,643.76 to the Pacific Copper Company, which sum included the $10,000 initial payment upon the Bonney mine; that in January, 1929, he gave the company the sum of $20,009.21; and in February, 1929, he gave said company the sum of $19,407.22. The testimony further shows that from July 1, 1928, to January 30, 1929, appellant advanced to the Selman mine $50,471.29, which mine was, on May 8, 1929, sold to Pacific Copper Company by appellant for the sum of $100; that appellant advanced to Pacific Copper Company in the month of August, 1929, the sum of $15,500 and in the month of September, 1929, $10,800.

The foregoing statement shows, in substance, the facts of the case as they are gleaned from the transcript of the testimony.

The points urged by appellant for reversal are: (1) That the court erred in overruling appellant's demurrer to count 2 of the indictment; (2) that the evidence is insufficient to support the verdict of guilty as to count 2 of the indictment; (3) that the court erred in admitting evidence over the objection of appellant; (4) that the court misdirected the jury in matters of law; and (5) that the court erred in refusing to clarify its instructions to the jury.

Appellant was tried on the original amended indictment containing two counts. The jury found him not guilty on the first count and convicted him on the second count. Appellant now complains that the second count did not state facts sufficient to constitute a public offense.

[1] While the indictment in question is not as skillfully drawn as it might have been, still we think it conforms to sections 950, 951, and 952 of the Penal Code. Appellant is informed by the said indictment in ordinary concise language of the acts constituting the offense. The gist of the offense, as charged in the indictment, is that appellant sold, assisted, authorized, directed, and aided in the sale of stock for and on behalf of the corporation, which had no permit from the commissioner of corporations authorizing such sales.

Throughout the case the prosecution maintained the theory that the corporation was directly engaged in the sale of its stock in this state through the agency and instrumentality of appellant and that the issuance of the stock to appellant in the first instance was a subterfuge designed to make it appear that the stock was personally owned by appellant and, therefore subject to sale by him without regulation or supervision of the commissioner of corporations.

Section 3 of the Corporate Securities Act (Deering's Gen. Laws, 1931, Act 3814) provides that: "No company shall sell any security, * * * or offer for sale, negotiate for the sale of, or take subscriptions for any security of its own issue until it shall have first applied for and secured from the commissioner a permit authorizing it so to do."

Section 18 of the act provides that: "Every officer, agent, or employee of any company and every other person, who knowingly authorizes, directs, or aids in the issue or

sale of, or issues or executes, or sells, or causes or assists in causing to be issued, executed, or sold, any security, in nonconformity with a permit of the commissioner then in effect authorizing such issue, or contrary to the provisions of this act, or of the constitution of this state, * * * is guilty of a public offense. * * *"

We are of the opinion that count 2 of the indictment contains all the elements necessary to state a public offense. It was not necessary to allege in the indictment that the shares were not the property of appellant and were securities of the corporation's own issue. People v. Main, 75 Cal. App. 471, 242 P. 1078.

[2] Appellant next contends that the evidence is insufficient to show whether or not appellant was the owner of the shares sold to Mrs. Edis and whether the sale to her was for appellant's own account.

The evidence heretofore quoted satisfies us that the entire transaction was but a scheme of appellant to evade the Corporate Securities Act, and that the transfer of the stock to appellant by the company was simply a subterfuge. The evidence shows that appellant formulated a scheme of having shares issued in his name in order to sell them under the guise of personally owned stock for the purpose of financing the corporation without obtaining a permit from the commissioner of corporations of the state of California. The entire scheme is merely a sham to give the color of validity to a transaction otherwise unlawful, and allow an unscrupulous promoter to prey upon the unsuspecting public.

The evidence taken as a whole is not conflicting and the jury properly drew the inferences of guilt therefrom. People v. Smith, 111 Cal. App. 177, 295 P. 105; People v. Eiseman, 78 Cal. App. 223, 248 P. 716; People v. McCalla, 63 Cal. App. 783, 220 P. 436.

[3] Appellant contends that the court erred in receiving in evidence a copy of the articles of incorporation of Pacific Copper Company as certified to by the secretary of state of Nevada, without a further certificate as contemplated in section 1918 of the Code of Civil Procedure. Sections 370a and 372 of the Civil Code answer this contention:

"§ 370a. Proof of existence of foreign corporations. In any action or proceeding, civil or criminal, in any court of this state, a copy of the articles or certificate of incorporation of a foreign corporation duly certified by the secretary of state or other proper official of the state under the laws of which such corporation purports to be incorporated shall be prima facie evidence of the incorporation, existence and powers of such corporation, but such presumption may be rebutted by a statement under oath by such secretary of state or other official, or otherwise by competent evidence.

"A certified copy of the articles or certificate of incorporation of a foreign corporation issued by the secretary of state or other officer of this or any other state in whose office the incorporation papers are filed as required by law shall be admitted in evidence by all courts and shall be prima facie evidence of the corporate existence and capacity of the corporation."

"§ 372. Judicial notice of foreign law. In any action or proceeding, the court shall take judicial notice without proof in court of the constitution and statutes applying to foreign corporations, and any interpretation thereof, the seals of state and state officials and notaries public, and of the official acts affecting corporations of the legislative, executive and judicial departments of the state, territory or country under the laws of which said corporation purports to be incorporated."

It follows that the ruling of the court in admitting the document was not error.

[4] The court admitted in evidence, over the objection of appellant, portions of the minutes of Pacific Copper Company, which contained recitals of what took place at the meeting of the board of directors, and particularly as to what appellant is alleged to have done and said at such meetings.

By section 371 of the Civil Code the regular meetings or a copy of the by-laws or of the minutes thereof are made prima facie evidence of the facts or actions stated therein.

Appellant contends that the court misdirected the jury in matters of law, and complains that the court instructed the jury that Pacific Copper Company was a corporation. The trial court's instructions, taken in their entirety, make it clear that it was for the jury to determine whether Pacific Copper Company was a corporation. For example, we quote the following: "Again, if the Pacific Copper Company was a corporation," etc.

[5] Appellant also complains of other instructions, but there is no merit to his contentions. We have read the instructions given by the court and find no inconsistencies or contradictions in them and they fairly state the law applicable to this case. The trial court refused to give instructions requested by appellant on the subject of sales and the passing of title to personal property, and this refusal is assigned as error. This requested instruction could not have added anything the jury should have known. The subject had already been covered. This likewise applies to instructions requested by appellant

when the jury returned from its deliberations. The instructions given were framed in good English, and in view of that fact, it cannot be presumed that they were misunderstood.

The judgment and order appealed from are affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

132 Cal.App. 10

STATE COMPENSATION INS. FUND v. THACKERY.

Civ. 7761.

District Court of Appeal, Second District, Division 2, California.

May 15, 1933.

As Amended June 12, 1933.

Hearing Denied by Supreme Court July 13, 1933.

1 Master and servant ⇨389.

State compensation insurance fund could not recover from tort-feasor damages for employee's injuries, in amount of previous settlement between tort-feasor and employee entered into without consent of employer or Industrial Accident Commission, since statute does not authorize double recovery (St. 1917, p. 854, § 26 as amended).

2. Statutes ⇨181(2).

Reasonable construction should be adopted rather than mischievous or absurd construction, where statute is fairly susceptible of two constructions.

Appeal from Superior Court, Los Angeles County; George H. Thompson, Judge.

Action by the State Compensation Insurance Fund against E. F. Thackery. Judgment for plaintiff, and defendant appeals.

Modified and affirmed.

Norman S. Sterry, of Los Angeles, for appellant.

A. H. Blum, of Los Angeles, for respondent.

CRAIG, Justice.

In an action in the superior court against the defendant, an automobile driver, by the state compensation insurance fund, as insurance carrier of Gates & Son, an employer, for damages and for medical expenses and compensation paid by the employer to John B. Brent, an injured employee, judgment was rendered in favor of the plaintiff notwithstanding a previous settlement and release from liability between the immediate parties. The entire judgment was for $1,330.44, made up of three items—medical treatment, $77.50; money paid by the insurance carrier, $252.94; and $1,000 damages for the injuries sustained by Brent. The defendant appealed.

The issues as to the negligence and the expenses and compensation as found in favor of the plaintiff by the trial court are conceded. The previous acceptance of a fair and reasonable amount in full settlement and compromise of all general damages was pleaded below, and is advanced by the appellant upon the contention that it should constitute a legal bar to recovery or neutralizing credit against any judgment rendered. By section 26 of the Workmen's Compensation, Insurance and Safety Act (St. 1913, c. 176, p. 279; 1917, c. 586, p. 831, as amended), the Legislature has ordained that no release or settlement of any claim for damages by reason of such injury shall be valid "without the written consent of either both employer and employee, or one of them, together with the consent of the commission." The people of this state through amendment of article 20, section 21, of the Constitution, expressly vested in the Legislature "plenary power, unlimited by any provision of this constitution, to create and enforce a complete system of workmen's compensation," with authority to create and enforce "full provision for adequate insurance coverage against liability to pay or furnish compensation; full provision for regulating such insurance coverage in all its aspects, including the establishment * * * of a state compensation insurance fund; * * * and full provision for vesting power, authority and jurisdiction in an administrative body with all the requisite governmental functions to determine any dispute or matter arising under such legislation, to the end that the administration of such legislation shall accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character; all of which matters are expressly declared to be the social public policy of this state, binding upon all departments of the state government. The legislature is vested with plenary powers, to provide for the settlement of any disputes arising under such legislation by arbitration, or by an industrial accident commission, by the courts, or by either, any, or all of these agencies. * * *" Neither the employer nor the Industrial Accident Commission was consulted nor did either consent to the settlement or release here involved. By its judgment the trial court awarded to the respondent in the same transaction, for

the same injury, the same amount of $1,000, for which theretofore "after full and fair negotiations between the parties it was agreed * * * that $1,000 would fully and fairly compensate the said Brent for all damages by reason of personal injuries which he had sustained." This is construed as an invalid enactment, and as unjust, arbitrary, and discriminatory and an invasion of constitutional guaranties of the liberty of contract, if construed as requiring the consent of an employee and a third party not affecting the amount which the employer may recover.

[1] Construing the act and the constitutional provisions on which it is based, as we do, the question presented is just this: Where it is determined that the amount of damage sustained by the employee is exactly the same as the amount which the employee has received as payment for his injury and has received it from the injurer who is a stranger to the employer, simply from this relation, has the state compensation insurance fund the right to compel such injurer to pay the same sum to him, making a double payment, because the settlement previously made was without the consent of the commission? Such a legal consequence would be an anomaly.

The objects of this act have been held to be insurance to the employee of a right of independent action against a negligent third person for damages arising from injuries received without the scope of employment and of a lien to the employer for amounts expended or incurred in behalf of the employee by reason of such relation upon any judgment recovered therein. Conversely, the employer is afforded a right of action against such tort-feasor and if he recover more than the amount he has paid or become obligated to pay as compensation he shall pay the excess to the injured employee or representative. But "if either such employee or employer shall bring such action against such third person he shall forthwith notify the other in writing" and enable the other to join therein if so advised. The statute imposes a restriction that no settlement of any claim for damages by reason thereof shall be valid without the written consent of both or of one, together with the consent of the Industrial Accident Commission. But we are unable to construe these provisions to sanction double recovery upon the same right or cause of action.

This appeal is determined by the conclusion that it is not the intent of these enactments to allow a double recovery of the amount of damages which the employee has sustained under such circumstances as are shown in the record herein. This we think is clear. Therefore it is not necessary to pass upon the constitutionality of the law in question as if we had construed it in some other way. Nor is it necessary that we decide what might be the rights of the parties if the trial court had determined that the damage sustained by the employee was more than $1,000.

To say that a release so obtained would be void is not equivalent to approval of a second demand for damages paid and satisfied, nor of the exaction of a penalty not justified by the wording of the statute construed. The decision below to the effect that the respondent by the relationship and incidents of the transaction became subrogated to the rights of the employer and was authorized to enforce a legitimate claim in its own name, and that the injured party sustained damages in the sum of $1,000 from an injury proximately caused by the negligence of the appellant, is in harmony with the statute and with the conclusion of the employee and the tort-feasor, fairly arrived at between them after full and fair negotiations. Neither upon the facts presented nor from any contention of the parties does it appear essential that cited authorities dealing with dishonest transactions be considered here pertinent. We agree that a "release" forbidden by law and held worthless for any purpose may not be pleaded in bar of existing rights nor specifically enforced; and "where the contract is illegal or against public policy, the courts will refuse to enforce it and will leave the parties where it finds them, regardless of the fact that one of them may be retaining benefits received thereunder. * * * A contract that is unlawful as being against the express provisions or general policy of any particular statute is void and will not be enforced by the courts." Pacific Elec. Ry. Co. v. Bonding Insurance Co., 55 Cal. App. 704, 204 P. 262, 263. But the instant case raises no issue other than whether or not the admitted fact of payment absolved appellant from the obligation to compensate for the jury sustained.

[2] It would lead to the height of absurdity to accredit to the Legislature an intention without definite express provision therefor to create a cause of action for physical injury once fully paid and satisfied and without restoration of the tort-feasor to status quo, solely upon noncompliance with the letter of a statute with relation to the legal representative of the plaintiff in interest. "A construction or conclusion plainly not contemplated by the Legislature should not be given to a statute if it can be avoided. When a statute is fairly susceptible of two constructions, one leading inevitably to mischief or absurdity and the other consisting of sound sense and wise policy, the former should be rejected and the latter adopted." In re Haines, 195 Cal. 613, 234 P. 883, 886; In re Mitchell, 120 Cal. 384, 52 P. 799.

Appellant makes no contention that the claims for medical expenses and insurance carrier's charges were discharged through

the agreement between the injurer and the injured employee.

It is ordered that the item of $1,000 be stricken from the judgment as well as the item for costs and that as so modified it be affirmed and that appellant be allowed costs on appeal.

We concur: WORKS, P. J.; ARCHBALD, Justice pro tem.

132 Cal.App. 115

WOODHEAD LUMBER CO. v. E. G. NIEMANN INVESTMENTS, Inc., et al.

Civ. 7792.

District Court of Appeal, Second District, Division 2, California.

May 19, 1933.

Rehearing Denied June 17, 1933.

1. Payment ⇐73(4).

In action against owner and its surety for labor and materials furnished in construction of apartment house, evidence did not show that materialman's acceptance of owner's unpaid note and second trust deed constituted payment.

2. Payment ⇐1(1).

Nothing is payment in fact, but that which is in truth such, unless something else is expressly agreed to be received in its place.

3. Payment ⇐50.

If note given in payment of debt is not paid, action may be had upon original debt.

Appeal from Superior Court, Los Angeles County; Harry W. Falk, Judge.

Action by the Woodhead Lumber Company against E. G. Niemann Investments, Incorporated, and the Detroit Fidelity & Surety Company. From a judgment in favor of plaintiff against the second defendant, it appeals.

Affirmed.

Lobdell & Watt, of Los Angeles, for appellant.

O. R. Hansen and Wendell P. Hubbard, both of Los Angeles, for respondent.

CRAIG, Justice.

In an action commenced in Los Angeles county against the owner and its surety for the alleged value of services and materials furnished in construction of an apartment house, judgment was rendered in favor of the plaintiff and against the surety. The appellant assigns an asserted insufficiency of the evidence as a ground for reversal.

[1-3] It is conceded by the parties that the pivotal question to be determined is whether payment to the respondent had been made by the owner. A building loan on said premises was secured by a first deed of trust, and was followed in order of execution and record by a promissory note and second deed of trust which was executed by the owner in favor of the respondent. The latter was also indemnified by the appellant upon condition that the principal should fail to "pay in full the claims of all persons performing labor upon or furnishing materials to be used in such work." It is the appellant's contention that said second deed of trust and note thereby secured constituted payment for the materials and services furnished and that the finding of the trial court that said amount was due, owing, and unpaid was erroneous. It appeared that in pursuance of its contract and the bond in suit the respondent had set up a credit designated "trust deed account" on its books, to which charges aggregating the amount of its demand were made as materials were delivered to the owner's premises. After the commencement of work upon the structure the owner became insolvent, the first deed of trust was foreclosed, and the property was sold at a price which left a deficiency, rendering the respondent's security valueless and said "trust deed account" of no significance. The owner, who also was principal in said bond, failed to pay for the same. It was alleged by the appellant's answer that the indemnity bond in question was intended only for the holder of the first deed of trust as sole obligee. On the contrary, it expressly recited that the original obligee had made the first loan upon condition that the principal indemnify it "against any and all loss arising by reason of the failure of the principal to fully complete said apartment house," and "*pay in full the claims of all persons performing labor upon or furnishing materials* to be used in such work." The agreed sources of payment having become fruitless, the principal failed to fulfill its obligations, and that of the surety became binding and enforceable. It then resulted that the finding of fact that the indebtedness to the respondent had not been paid but was still due and owing was proper, unless the acceptance of said note and deed of trust concluded the respondent's rights to recourse for the value of its services and materials. The principal's promissory note to the respondent, no longer secured, promised that "should default be made in payment of any installment of principal or interest when due, the whole sum of principal and interest shall, at the option of the holder of this note, become immediately due." Said owner was also required "to furnish a lien and completion bond to cover this building," neither of which

was thus furnished. It is the general rule that nothing is to be considered as payment in fact but that which is in truth such unless something else is expressly agreed to be received in its place; and that if a note so given be not paid action may be had upon the original debt. Westberg v. Whittiken, 101 Cal. App. 204, 281 P. 509.

The judgment is affirmed.

We concur: STEPHENS, J.; ARCHBALD, Justice pro tem.

132 Cal.App. 42

JACOBSMEYER v. SUPERIOR COURT IN AND FOR SAN DIEGO COUNTY et al.

Civ. 1411.

District Court of Appeal, Fourth District, California.

May 16, 1933.

1. Executors and administrators ⇐315(4).

Probate Code did not lose jurisdiction because it first denied and later granted motion of contestant to set aside order of distribution and discharging executrix, where motion granted was first one to that end presented to court after due notice (Probate Court, § 381).

2. Wills ⇐355.

Facts necessary to enable court to set aside judgment in probate proceeding may be presented otherwise than by affidavit (Probate Code, § 381).

3. Wills ⇐355.

Where showing of merits is necessary to set aside judgment in probate proceedings, such showing may appear from verified pleading (Probate Code, § 381).

4. Wills ⇐355.

Where petition contesting probate of will was filed within time permitted by statute, court was justified in reopening judgment in view of showing made by contestant (Probate Code, § 381).

Contestant alleged that she was resident of Missouri, and did not know of probate of purported will distributing entire estate to petitioner for probate of will until after petitioner was discharged as executrix, and that petitioner secured discharge only 36 days after purported will was admitted to probate. Records showed that closing of estate was rushed through immediately after probate of will, with result that petitioner's final accounts as special administratrix and executrix were filed on same day.

5. Appeal and error ⇐935(1).

Where order setting aside distribution decree and discharging executrix recited that it was made after receiving documentary evidence, and such evidence did not appear in record, it was presumed that evidence supported order (Probate Code, § 381).

6. Executors and administrators ⇐315(4). Wills ⇐355.

Order admitting purported will to probate and decreeing distribution was not final where contest of will was filed within time allowed by statute (Probate Code, § 381).

Application for certiorari by Mary Jacobsmeyer opposed by Corrine Wall, to review an order of the Superior Court of San Diego County, C. N. Andrews, Judge of Department 4 thereof setting aside decree of distribution and discharging executrix.

Order affirmed.

Allan F. Daily, Edward Gallaudet, and Louis B. Minter, all of Los Angeles, for petitioner.

Alberta Belford, of Los Angeles, and H. L. Harrawood, of Redlands, for respondents.

BARNARD, Presiding Justice.

Petitioner seeks by writ of review to annul an order made by the respondent court and judge purporting to vacate and set aside a decree of distribution and an order discharging the executrix.

On May 31, 1930, this petitioner filed a petition for probate of the alleged last will of Frank Flanke, deceased, which will, dated April 18, 1930, purported to give to this petitioner all of the property owned by said deceased and named her as executrix thereof. A contest and opposition to the probate of this will was filed by one Wilfred T. Wall, alleging that the testator was of unsound mind on the date of the execution of the will, and that said will was not properly executed. Shortly thereafter, this petitioner asked for special letters of administration, her petition alleging that there would be an unusual delay in probating the will, but not referring to the opposition and contest of the will which had been filed. On July 11, 1930, an order was entered appointing the petitioner special administratrix with power to collect and preserve the property of the estate, and ordering that special letters be issued to her in conformity with the order. On August 15, 1930, an order was entered reciting that petitioner was appointed special administratrix with limited powers on July 11, 1930; that it appeared that a contest had been filed prior to making such order; that it appeared that

under such circumstances the order of July 11 should have given the special administratrix general powers, and ordering that petitioner be appointed special administratrix with general powers; that the bond theretofore furnished by her be reapproved; and that the order be made and entered nunc pro tunc as of July 11, 1930.

Special letters of administration with general powers were issued, and attached thereto is an oath purporting to have been taken by petitioner, as special administratrix with general powers, on July 11, 1930. A few months later petitioner published a notice to creditors for the required time. On September 4, 1931, an order was entered dismissing the contest to the will above referred to. On September 18, 1931, the will was admitted to probate, and this petitioner was appointed executrix thereof, and on that same day she filed her final account as special administratrix and also her final account as executrix of the will, with a petition for distribution. It does not appear that this final account of the special administratrix was ever set for hearing, that the same was ever settled, or that an order was ever made approving and allowing said account. However, on October 2, 1931, her final account as executrix was approved and all of the remaining property was ordered distributed to this petitioner. On October 24, 1931, a decree was entered discharging the petitioner as special administratrix and as executrix.

On January 22, 1932, one Corrine Wall filed a contest to the probate of the will admitted to probate on September 18, 1931, praying that the same be revoked, and alleging that the maker of said will was of unsound mind at the time of its execution; that the execution thereof had been procured by the fraud, duress, and undue influence of this petitioner; that on January 16, 1930, the deceased executed a last will naming Corrine Wall as sole devisee and legatee; that the said Corrine Wall had had no knowledge of the existence of the last-named will sufficient to enable her to contest the first will filed; and that she had now filed a petition asking for the probate of the will of January 16, 1930. A citation was issued requiring the petitioner herein to appear and plead to the contest referred to within thirty days after service, in accordance with section 381 of the Probate Code. This petitioner filed a demurrer to said contest on the ground that she was no longer the executrix of the estate named. Corrine Wall then gave notice of a motion to set aside and vacate the order discharging the petitioner as executrix and to vacate the decree of distribution entered; this being accompanied by the affidavit of her attorney. This motion and the demurrer to the contest coming on for hearing together, the court overruled the demurrer and allowed ten days within which to answer the contest, ordered the application of Corrine Wall for relief denied, and on the same day entered an order reciting that the plaintiff had filed a notice of motion, supported by affidavit, to vacate the order of decree of distribution and order of final discharge of the executrix, that good cause for shortening the time existed, and ordering the time shortened and fixing a time for hearing. At the time so fixed, an order was made vacating and setting aside the decree of distribution and the order discharging the executrix.

The main questions here presented relate to the authority of the court to make the order last referred to. It is contended that no jurisdiction to make such an order existed, because the same motion had previously been denied and because the showing of merits was not sufficient.

[1] As to the first contention that the court had lost jurisdiction by previously denying the same motion, while it would seem that the court first denied the motion because proper notice had not been given, the record is silent as to when the notice of motion and affidavit were served and filed. However, the order shortening time and fixing the hearing recites that notice of motion, supported by affidavit, had been filed, and that good cause existed for shortening the time, while the order here complained of recites that it is made upon motion of Corrine Wall, that due notice had been given, and that it is made upon affidavits filed, upon all the records and files of the case, and upon "testimony, oral and documentary, having been received." So far as shown by the record before us, the motion granted was the first one to that end presented to the court, after due notice, and no jurisdiction had been lost.

[2-5] The main contention is that the court was without authority to act upon the motion because the affidavit filed was not sufficient. The affidavit referred to was made by the attorney for Corrine Wall, and recites that Corrine Wall is not a resident of the state of California; that she resides in St. Louis, Mo.; that she had not had sufficient knowledge of the facts to enable her to contest the probate of the will; that since that time she has come into knowledge of such facts; that before she acquired such knowledge the petitioner herein, on October 24, 1931, and only thirty-six days after the purported will was admitted to probate, obtained an order distributing the entire estate to said petitioner and a further order discharging her as executrix; and that these orders were obtained through lack of information, mistake, inadvertence, surprise, and excusable neglect on the part of the said Corrine Wall. It is objected that the matters thus set forth were but conclusions of the affiant, were hearsay, and were not facts which could have been known to the affiant. No reason

appears why some of the matters alleged may not have been personally known to this affiant. In any event, while the facts necessary to enable a court to set aside a judgment in a proceeding of this nature are usually presented by affidavit, this is not always essential, and the requisite facts may otherwise appear (People v. O'Connell, 23 Cal. 281; Security Loan & Trust Co. v. Estudillo, 134 Cal. 166, 66 P. 257). Even in cases where a showing of merits is necessary, such showing may appear from a verified pleading. Hagenkamp v. Equitable L. Assur. Soc., 29 Cal. App. 713, 156 P. 520. In this case it appears that the court also had before it a verified contest filed by Corrine Wall together with a petition for the probate of the purported will of January 16, 1930, and, if the facts there alleged were true, the will admitted to probate on September 18, 1931, was not the last will of the deceased. This contest was filed within the time permitted by the statute, and the facts alleged were sufficient to justify the court in so reopening the matter as to give the contestant a hearing. The court also had before it all of the records and files in this estate, from which it appeared that the closing of the estate had been rushed through immediately after the admission of the will to probate, to the extent that the final account of the special administratrix and the final account of the executrix were filed on the same day the will was admitted to probate; that the final account as special administratrix was never set for hearing, acted upon or approved; that fourteen days after the will was admitted to probate all of the property was distributed to the executrix; and that she was discharged within thirty-six days of her appointment. In addition, the order complained of recites that it was made after both oral and documentary evidence had been received. None of this evidence appears in the record before us, and it is to be presumed that it supports the order made.

[6] It may be also observed that, the contest of a will involved here having been filed within the time allowed by the statute, the order admitting the other will to probate was not conclusive, and the decree of distribution had not become final. Even if it were necessary to set aside the order discharging the executrix in order to enable a citation to issue in strict compliance with section 381 of the Probate Code and in order to permit the contest to be heard, the general situation disclosed by the whole record is such that very little showing of merits, aside from the record, was required. No abuse of discretion appears.

For the reasons given, the order under review is affirmed.

We concur: MARKS, J.; JENNINGS, J.

132 Cal.App. 178

RINER v. VERNON et ux.

Civ. 4870.

District Court of Appeal, Third District, California.

May 22, 1933.

Hearing Denied by Supreme Court July 20, 1933.

1. Landlord and tenant ⇐120(2).

One rightfully in possession is entitled to notice to vacate, though only tenant at will (Civ. Code, § 789).

2. Landlord and tenant ⇐18(3).

Finding that barber given possession of shop rent free for specified period, in return for making repairs, had no lease *held* unwarranted.

3. Landlord and tenant ⇐112½.

Evidence that tenant before going to jail gave landlord key to barber shop *held* insufficient to support finding of abandonment or surrender, which would preclude recovery for wrongful eviction.

There was no evidence that the tenant voluntarily abandoned the barber shop, but evidence merely showed that as he was being taken to jail he gave key to landlord so that latter could look after the place while the tenant was gone. The tenant left all his belongings in the barber shop and gave no one permission to move them, and he demanded possession of the place when he heard that landlord had rented it to another barber.

Appeal from Superior Court, Lake County; Benjamin C. Jones, Judge.

Action by George H. Riner against W. A. Vernon and wife. Judgment for defendants, and plaintiff appeals.

Reversed with directions.

Lovett K. Fraser, of Lakeport, for appellant.

H. G. Crawford, of Lakeport, for respondents.

Mr. Justice PLUMMER delivered the opinion of the court.

Action by plaintiff on account of alleged wrongful eviction from a barber shop, by the defendants. The defendants had judgment, and the plaintiff appeals.

The record shows that the plaintiff, George H. Riner, was at one time running a barber shop in the Clear Lake Highlands, Lake county, about four miles from Lower Lake. The defendant Mildred Vernon owned a vacant barber shop in Lower Lake. This property had been deeded to her by her husband, W. A. Vernon. It appears that the defendant W. A. Vernon and the plaintiff had a conver-

sation in relation to the plaintiff renting the barber shop in question. The barber shop required repairs and fixing up. The negotiations between the defendant W. A. Vernon and the plaintiff, George H. Riner, resulted in the barber shop being offered to the plaintiff free of rent until on or about the 1st day of May of the following year. This appears to have been in consideration of the fact that the plaintiff, who undertook the repair and fixing up of the barber shop, would have to expend considerable money. On or about August 21, 1930, the plaintiff, after spending some $200 in fixing up the barber shop, took possession thereof and conducted the business as a barber therein until on or about the 5th day of December, 1930. The record shows that Mildred Vernon knew that the plaintiff had taken possession of the barber shop. The record also shows that both defendants understood that the plaintiff was to have the use of the barber shop until the 1st day of May, 1931, without the payment of any rent. That thereafter, and on or about the 5th day of December, 1930, the plaintiff was arrested and taken to jail at Lakeport, and stayed there until about the 20th of December, 1930, when he was released. While the plaintiff was in jail at Lakeport, the defendants rented the barber shop to another party at $15 per month. The record shows that during the time the plaintiff was conducting business in the barber shop his earnings amounted to about $35 per week. Upon the plaintiff's return from Lakeport he demanded possession of the premises, which was refused. This action followed.

There is some testimony in the record that the plaintiff was to have possession of the premises after the 1st day of May, 1931, at the rental of $10 per month. The undisputed testimony, however, is that all parties understood that the plaintiff was to have possession of the premises until the 1st day of May, without the payment of any rent. In some portions of the testimony it is referred to as "during the winter months."

The court found, among other things, that the defendants did not wrongfully evict the plaintiff from the premises, and did not place another tenant in possession of the premises, against the will and without the consent of the plaintiff; also found that the plaintiff was not compelled to vacate said premises, and further found that plaintiff intended to, and did, on or about the 13th day of December, 1930, voluntarily surrender the possession of the said barber shop and premises, as well as the key thereto, to the said defendants; that such voluntary surrender terminated any tenancy which he may have held. This finding is challenged by the appellant as not being supported by the testimony, and appears to us to be well taken.

As we have stated, the defendant W. A. Vernon told the plaintiff he could have the property for the winter months free of rent. The record shows that the defendant Mildred Vernon knew that the plaintiff was in possession of the property; that he was to have the property until May 1, 1931, free of rent, and stated that she did not intend to take any action to dispossess the plaintiff prior to that date, although she was not satisfied with having the plaintiff occupy the premises. Her consent, however, that he should remain until the 1st of May, in possession of the leased premises, is sufficiently shown by the record.

[1] The plaintiff being rightfully in possession of the premises for the time mentioned, even though it be considered as a tenancy at will, was entitled to notice to vacate, as provided by section 789, Civil Code, which admittedly was not given.

Just preceding the arrest of the plaintiff it appears that the sheriff who made the arrest told the defendant W. A. Vernon to ask for the key and the following thereupon took place between the plaintiff and the defendant W. A. Vernon:

"Q. At the time Mr. Riner passed the key over to you, did he say anything to you? A. No.

"Q. About the key or possession of the premises? A. The only thing he said was 'I'll be back tomorrow,' or 'I'll be back in a couple of days. Somebody is going my bail.' Outside of that nothing was said."

As to this transaction the plaintiff testified as follows:

"Q. Now, what conversation did you have with Mr. Vernon at that time? A. Mr. Jones was standing out on the sidewalk; he told me to 'come on.' I met Mr. Vernon in the door when I was coming out. Mr. Vernon said, 'George, give me the key; I will look after everything while you are gone.' I said, 'I got some towels from the Napa Steam Laundry; please put them in a box for me and tell the man I will pay for them when I come back.' That was all that was said."

On or about the 12th day of December, 1930, while the plaintiff was at Lower Lake having his hearing on the charge presented against him, the testimony shows the following:

"Q. When did you first learn Mr. or Mrs. Vernon, or either of them, had put any one in possession of the barber shop? A. On the 12th day of December.

"Q. 12th day of December. What happened on that day? A. I was brought from here to Lower Lake on my hearing, on my case. While we were there, there was—Uncle Bill Hale told me; he says, 'I got your property here in the jail locked up,' and I says, 'What for?' and he says, 'Well, they got another barber down at the barber shop,' and I says, 'Who got him?' He said, 'I understand Mr.

Vernon did.' I says, 'That's funny, I didn't know anything about it.' At that time Mr. Vernon walked up in the front door of the courthouse, and we were just coming out.

"Q. And did you have a conversation with him then? A. I did.

"Q. What did you say and what did he say? A. I said, 'What's the big idea carrying my things out?' He said, 'I didn't do it.' I said, 'Who done it?' He says, 'Herb Jones did.' I said, 'I understand you got a barber in the barber shop.' He says, 'Yes, and he is going to stay there, too.' I said, 'All right, we are going to see about it.' I asked the sheriff for permission to go over. He said, 'Sure.' He drove us down. When we got down there, Mr. Vernon was inside the shop, and the barber. * * * So I walked up to the barber, and I said, 'Riner is my name.' He said, 'Wheeler is mine.' I said, 'I understand you are doing the barber work here.' He said, 'Yes,' I said, 'How did you get it?' He said, 'Through Mr. and Mrs. Vernon.' He says, 'I don't want you to get mad at me, Mr. Riner. I had nothing to do about this. If I had known, I wouldn't have come.' I said 'I am not mad at you, Shorty, at all.' And I turned around, and Mr. Vernon was sitting in the barber shop, and you (Lovett K. Fraser), spoke up and you said, 'Mr. Vernon, don't you know you can't put a man in another man's place of business without giving him notice?' And he says, 'It is not leased, he's got no lease.' Well, you spoke up and said, 'Why did you tell him he could come and stay until the 1st of May?' and Mr. Vernon said, 'Yes, providing he kept the place clean.' And the Shellane plant was running. I just put in a new tank of gas, and I asked for the key.

"Q. This barber was using your Shellane plant? A. Yes.

"Q. And your hot water tank? A. Yes.

"Q. And you asked for the key? A. I asked for the key. I says, 'Where is the key to this plant?' The barber spoke up, 'Yes, it is over in the drawer,' and I got it and I turned the hot water off and fire, and locked the Shellane plant up, and I turned and gave the key to the deputy sheriff in charge, and said, 'You keep the key.'"

A few days afterwards the following conversation took place in the presence of Carl Hale, Mr. Wheeler, Mr. Vernon, and plaintiff:

"Q. What conversation did you have with Mr. Vernon at that time? A. Mr. Vernon was standing in front of the garage door and the barber was standing next to him, and I walked up to the barber; I said 'Shorty, I will be ready to take possession of the shop Monday.' Mr. Vernon spoke up and said, 'No, you don't; you can't come back in here to do any work.'

"Q. Did you give anybody authority to take that personal property out of the barber shop? A. No, sir."

As to the key transaction, the defendant W. A. Vernon testified as follows:

"Q. You recall a conversation had at the barber shop premises at the time Mr. Riner turned the key over? A. Yes.

"Q. All I want was what happened in the barber shop in the presence of Mr. Riner. A. Well, I walked in with Mr. Jones.

"Q. Walked in where? A. In the barber shop; right behind Mr. Jones. What took me in there, he told me he was going to take Riner out. I told him that Riner was in there, and was conducting not a very good place; my wife didn't want him in there. And he said, 'Follow me in and ask for the key and possession of the property,' which I did. I asked him for the key, and Mr. Jones asked him to get his hat, and I said, 'Mr. Riner, please give me the key.'

"Q. Did Mr. Riner reply? A. He stuck his hand in his pocket and handed me the key. He said, 'Now, there are thirteen towels here that belong to the Napa Steam Laundry, which I wish you would give the Napa Steam Laundry,' which they paid him for, but he told me they would come and get them.

"Q. At the time Mr. Riner passed the key over to you, did he say anything to you? A. No.

"Q. About the key or possession of the premises? A. The only thing he said was, 'I will be back tomorrow,' or, 'will be back in a couple of days; somebody is going my bail.' Outside of that nothing was said."

There was other testimony to the effect that Mr. W. A. Vernon simply asked, as he stated, the plaintiff, Riner, for the key, and did not say anything about possession, and that after he asked for the key, Mr. Riner gave it to the defendant W. A. Vernon, and that at the time the key was delivered, Mr. Riner said he would be back in a couple of days.

[2, 3] As stated by the appellant, there is not a particle of evidence in the record that plaintiff voluntarily abandoned the place. He was arrested by the sheriff, and, as he was being taken to the jail, gave the key to W. A. Vernon so he could look after the place while the plaintiff was gone. Riner stated at the time he would be back "tomorrow or in a couple of days." The plaintiff left all his belongings in the barber shop and gave no one permission to move them. He demanded possession of the place as soon as he heard the Vernons had rented it to another barber. The evidence, without contradiction, shows that the plaintiff expended the sum of $200 in repairs and making the place suitable for conducting the barber business; that he placed in the shop a Shellane plant and other fixtures necessary to the conducting of the business; that he was earning approximate-

ly $35 a week; that no notice was ever given by the defendants to vacate the shop, and therefore, if only a tenancy at will, the plaintiff was wrongfully deprived of the possession of the barber shop.

We have omitted the testimony leading up to the renting of the shop; the fact that it was vacant prior to its being leased to the plaintiff; that it was in a condition of disrepair; and also, as to the title to the premises—because that testimony has no bearing upon the issue determinative of this case.

We have only set forth the undisputed testimony, which shows that the finding of the court as to the plaintiff having voluntarily surrendered possession of the premises has no support in the record. The finding of the court that the plaintiff did not have a lease on the premises is not supported by the evidence. The contention of the respondents that the plaintiff did not have a lease is based upon the fact that there was no written instrument of lease. There is no contradiction of the fact that the plaintiff was told he could have the premises until the 1st day of May, 1931, without payment of any rent. This was in consideration of two facts: First, that the plaintiff would necessarily have to expend a considerable sum of money in making the premises fit for use; and, second, that the plaintiff was a stranger and would have to build up a business.

As we have seen, there is nothing in the record indicating an intent to abandon the barber shop by the plaintiff, and the mere delivery of the key thereto by the plaintiff to W. A. Vernon is insufficient to support the finding of the court.

In the case of In re Mullings Clothing Co., John P. Mullings, appellant, 238 F. 58, 65, 151 C. C. A. 134, L. R. A. 1918A, 539, it is held that such fact is insufficient to support a finding of abandonment or surrender of leased premises, the language of the court being: "The mere acceptance of the keys is not in itself sufficient to show an acceptance of a surrender. Stern v. Thayer, 56 Minn. 93, 57 N. W. 329; Lucy v. Wilkins, 33 Minn. 441, 23 N. W. 861; Bowen v. Clarke, 22 Or. 566, 29 Am. St. Rep. 625, 30 P. 430."

To the same effect is the text in 35 C. J. 1092, § 279.

In Schwartz et al. v. McQuaid, 214 Ill. 357, 73 N. E. 582, 105 Am. St. Rep. 112, the effect of mere delivery of a key is considered, and it is there held that a delivery of a key is not sufficient to support a finding of abandonment or surrender of premises.

In the case of Zautz v. Sebrean, 59 Cal. App. 781, 211 P. 834, 836, the court having before it the question of accepting keys to premises and the taking of possession thereof without any further act, held that it did not constitute an acceptance of surrender or abandonment of the premises, the language of the court being as follows: "Their mere act, therefore, of accepting the keys and taking possession did not constitute a rescission on their part, but rather an assertion by them of a right given under the lease, and one which the lessees themselves acknowledged when they requested that defendants take possession." (Citing a number of authorities.) The opposite of the rule is likewise true, that where a lessee requests the lessor to take possession, as was the case, for a temporary purpose, no finding of abandonment can be based thereon.

The text in 16 Ruling Case Law, page 1155, § 675, is based upon facts precisely similar to those presented in the instant case. The text, supported by authorities cited in the footnotes, is as follows: "So the delivery to the landlord of the key to enable him to take care of the building and its contents while the tenant is confined in jail does not constitute a surrender so as to deprive the tenant of the right to sue for a trespass on the premises." The case cited in the footnotes was where the lessee had been arrested for violating the prohibition act and delivered the keys to the landlord with a request to look after the premises until he returned. Possession of the premises denied by the landlord; abandonment and surrender pleaded, with the result as we have just stated.

It follows from what has been said that the judgment of the trial court should be reversed, with directions to the trial court to proceed and determine what damages the plaintiff has suffered by reason of being deprived of the use of the premises in question from on or about the 21st day of December, 1930, until the 1st day of May, 1931.

And it is so ordered.

We concur: PULLEN, P. J.; R. L. THOMPSON, J.

132 Cal.App. 72

WALTERS v. DU FOUR et al.*

Civ. 4769.

District Court of Appeal, Third District, California.

May 18, 1933.

As Modified on Denial of Rehearing June 17, 1933.

Hearing Denied by Supreme Court July 17, 1933.

1. Automobiles ⇐6.

Amendment to automobile guest statute eliminating gross negligence as ground of liability to guest *held* not retroactive so as to defeat vested right of action (St. 1923, p. 517, § 141¾, as added by St. 1929, p. 1580, as amended by St. 1931, p. 1693).

St. 1931, p. 1693, eliminating gross negligence as ground of liability of driver of automobile to guest imposed by St. 1923, p. 517, § 141¾, as added by St. 1929, p. 1580, was not retroactive because amendment was not mere change in rule of procedure or a method of proving a fact, but resulted in the modification of a former common-law right of action for damages for personal injuries resulting from a tort, and because vested right of action could not be abrogated by subsequent amendment of statute.

2. Automobiles ⇐244(20).

In guest's action for injuries sustained when brake locked and automobile swerved from pavement off roadway, evidence *held* to support implied finding of driver's gross negligence (St. 1923, p. 517, § 141¾, as added by St. 1929, p. 1580).

Evidence disclosed that driver and three guests occupied front seat of roadster automobile at time of accident; that automobile was being driven in the nighttime at the rate of 40 or 45 miles an hour in that crowded condition; that braking apparatus of automobile was known to have recently frozen in similar manner; and that no investigation or repair of braking apparatus had been made.

3. Automobiles ⇐181(1).

"Gross negligence" within automobile guest statute is failure to exercise slight diligence (St. 1923, p. 517, § 141¾, as added by St. 1929, p. 1580).

[Ed. Note.—For other definitions of "Gross Negligence," see Words and Phrases.]

4. Automobiles ⇐245(24).

Where record discloses substantial evidence of gross negligence of automobile driver at time of injury to guest, gross negligence becomes question for jury (St. 1923, p. 517, § 141¾ as added by St. 1929, p. 1580).

5. Automobiles ⇐246(18).

Instruction on actual and constructive notice to driver of automobile of defective brake *held* not erroneous (Civ. Code, §§ 18, 19).

Instruction that every person who has actual notice of circumstances sufficient to put prudent man on inquiry as to particular fact has constructive notice of fact itself in all cases, in which by prosecuting such inquiry he might have learned such fact, was not erroneous as applied to plaintiff's claim that driver of automobile had previous knowledge of existence of a defective brake, evidenced by his admission that wheel had locked and caused the accident because he knew it had locked on prior occasions while he had been driving the car.

6. Automobiles ⇐246(44).

Instruction on actual and constructive notice to driver of automobile of defective brake *held* not improper under evidence.

7. Automobiles ⇐168(2).

Maximum statutory rate of speed does not constitute license to drive automobile at such speed under all circumstances (St. 1923, p. 553, § 113, as amended by St. 1927, p. 1436, § 30).

8. Automobiles ⇐246(20).

Instructions on statutory maximum speed of automobile, stating that condition of traffic or other circumstances might render maximum speed unlawful, *held* not erroneous (St. 1923, p. 553, § 113, as amended by St. 1927, p. 1436, § 30).

Instructions informed jury that maximum speed fixed by statute at 40 miles per hour did not constitute license to go at that speed at all times and places, and that condition of traffic or other circumstances might render unlawful the maximum rate of speed at which an automobile is ordinarily permitted to travel.

9. Trial ⇐296(7).

Plaintiff's instructions on maximum statutory speed of automobile *held* not erroneous as telling jury that mere violation of statute would constitute negligence per se, especially in view of another instruction (St. 1923, p. 553, § 113, as amended by St. 1927, p. 1436, § 30).

10. Negligence ⇐141(11).

Instruction to effect that negligence of automobile driver could not be lawfully imputed to guest, in absence of joint adventure, *held* proper under evidence.

11. Automobiles ⇐246(36).

Instruction on duty of guest to protest or leave machine when automobile was being driven at high rate of speed *held* properly refused as being incomplete.

12. Automobiles ⇐246(2).

Defendants' instruction on duty owing by driver of automobile to guest and under what circumstances driver would be liable to guest

*Hearing denied 23 P.2d 1020.

because of defective brake *held* properly refused as being misleading.

Instruction to effect that automobile driver was not liable to invited guest riding therein for injuries sustained because of a defective brake, although it was a secondhand machine, "provided the owner believed the car was reasonably safe and was not guilty of gross negligence in the matter," was misleading because instruction should have contained condition that owner would not be liable provided that, acting as a reasonably prudent person, he believed the car to be reasonably safe.

13. Trial ⇐260(1).

Requested instruction, though containing correct statement of law, *held* properly refused, where sufficiently covered by instruction given.

Appeal from Superior Court, Solano County; W. T. O'Donnell, Judge.

Action by Georgia Walters, a minor, by her guardian ad litem, Richard Walters, against Lawrence E. Du Four and others. From a judgment in favor of the plaintiff, the defendants appeal.

Affirmed.

Myrick & Deering & Scott, of San Francisco, and Russell F. O'Hara, of Vallejo, for appellants.

John J. McMahon, of San Francisco, and Thos. J. Horan, of Vallejo, for respondent.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

Judgment for $6,150 was rendered against the defendants pursuant to the verdict of a jury for serious personal injuries sustained by the plaintiff in an automobile casualty, as the result of alleged gross negligence. Flouris Du Four, the minor son of the defendants, Mr. and Mrs. Lawrence Du Four, was operating the car at the time of the accident.

The parties to this action live at Vallejo. The defendant Flouris De Four was a minor who held an automobile operator's license which was previously issued under the provisions of section 62 of the California Vehicle Act (St. 1923, p. 532), upon the application and with the signatures of his parents, Mr. and Mrs. Lawrence Du Four. The son had been attending the Junior College at Sacramento. For several months prior to the time of the accident, he was accustomed to drive his father's Hupmobile roadster automobile. On the evening of September 20, 1930, the defendant Flouris Du Four, accompanied by three companions who were all sitting in the front seat of this Hupmobile roadster, drove to Airport Chicken Inn, situated on the Napa highway a few miles from Vallejo, where they spent some time in dancing. After midnight, the same group started to return in this automobile to Vallejo. Flouris Du Four was driving the machine. The plaintiff was riding in the car as a guest of Flouris Du Four. All four of the occupants of the vehicle were then riding in the front seat. It was dark. They were traveling at a rate of speed of from 40 to 45 miles an hour. The right-hand wheels of the car had run into the gravel adjacent to the paved strip of the highway. In pulling the wheels of the machine back onto the asphalt, the bars attached to the rods connected with the toggle-joint or clevis which controls the brake were displaced. A metallic sound was heard in the vicinity of the right front wheel. The brake became frozen. The driver lost control of the car, and it swerved from the pavement to the right-hand side of the roadway and struck a telephone pole with great force. The plaintiff was thrown through the top of the machine and was seriously injured. She was taken to a hospital, where she lay unconscious for several days. A subsequent examination of the machine by a mechanic disclosed the defect in the apparatus controlling the brake as above related. In a suit for damages for gross negligence on the part of the driver of the automobile under the provisions of section 141¾ of the California Vehicle Act as it then existed (St. 1929, p. 1580), the plaintiff recovered a joint and several judgment pursuant to the verdict of a jury, against the driver of the machine and his parents. From this judgment the defendants have appealed.

It is contended the record discloses no evidence that Flouris Du Four was guilty of gross negligence; that the amendment of section 141¾, supra, prior to the time of the trial of this cause, but after the accident occurred, so as to relieve the driver or owner of a car from liability to a guest on account of gross negligence, is retroactive and precludes recovery of damages in this case. It is also asserted the court erred in giving to the jury and refusing certain instructions.

The statute above referred to which was in existence in 1930, when this accident occurred, and upon which the respondent relies, then read in part: "Nothing in this section contained shall be construed as relieving the owner or driver or person responsible for the operation of a vehicle from liability for injury to or death of such guest proximately resulting from the intoxication, wilful misconduct, or gross negligence of such owner, driver or person responsible for the operation of such vehicle."

The foregoing provision of law was amended before this cause was tried so as to take effect August 14, 1931 (Stats. 1931, p. 1693), by eliminating therefrom the language "or gross negligence."

[1] The amendment of this statute in 1931 did not become retroactive so as to destroy plaintiff's vested right of action for damages for personal injuries received as the result of defendants' gross negligence in the performance of wrongful acts which occurred in 1930. The plaintiff's right of action had already accrued when this statute was amended. This amendment is not a mere change in a rule of procedure or a method of proving a fact. It results in the modification of a former common-law right of action for damages for personal injuries resulting from a tort. In the case of Callet v. Alioto, 210 Cal. 65, 290 P. 438, 441, it was definitely held that the right of a guest to recover damages for personal injuries received as the result of the negligence of the driver of an automobile was a common-law right of action in California, as distinguished from a purely statutory right of action. The court said: "We are of the opinion that the better reasoned cases permitted a recovery at common law based on failure of the driver to use ordinary care. It therefore follows, under the rules of statutory construction referred to, supra, that since section 141¾ of the California Vehicle Act abrogates the common-law rule, in a case involving personal injuries, that statute does not in any way affect causes of action existing on August 14, 1929, the date the statute took effect."

The California Vehicle Act did not create a statutory liability for negligence under the circumstances stated in section 141¾, supra. It merely restricted or limited the common-law liability which already existed. It limited the liability of the driver of an automobile for injuries sustained by a guest to circumstances which amount to gross negligence. The common-law cause of action for personal injuries inflicted upon a guest of an owner or driver of an automobile still remained. The liability of an owner or driver of an automobile was first confined by the terms of the statute to injuries sustained as a result of gross negligence, willful misconduct, and drunkenness. By the amendment to section 141¾, supra, which occurred August 14, 1931, the liability for such injuries was abolished when they were received solely as a result of gross negligence, by eliminating from that section the term "gross negligence." All that now remains of the statute is an imposition of liability for such injuries which are sustained as a result of drunkenness or willful misconduct. But before this last amendment was enacted the plaintiff was injured as a result of what the jury in this case found to be gross negligence of the driver of the machine. The plaintiff's cause of action therefore vested before the final amendment of the statute occurred. That vested right of action was not abrogated by the subsequent amendment of the statute.

It has been repeatedly decided that the effect of the amendment of section 141¾, supra, is not retroactive, and does not destroy the vested right of action by a guest for damages for personal injuries received as a result of gross negligence of an owner or driver of an automobile which occurred prior to the enactment of the amended statute. Smellie v. Southern Pacific Co., 212 Cal. 540, 299 P. 529; Edwards v. Gullick, 213 Cal. 86, 1 P.(2d) 11; Callet v. Alioto, 210 Cal. 65, 290 P. 438; Perry v. McLaughlin, 212 Cal. 1, 297 P. 554; Petroff v. Nunes, 123 Cal. App. 614, 11 P.(2d) 648; Anderson v. Ott (Cal. App.) 15 P.(2d) 526; Manica v. Smith (Cal. App.) 18 P.(2d) 347; James v. Oakland Traction Co., 10 Cal. App. 785, 103 P. 1082; Krause v. Rarity, 210 Cal. 644, 293 P. 62, 77 A. L. R. 1327, 1338, note.

[2] We are of the opinion the record contains substantial evidence to support the implied finding of the jury that the driver of the automobile was guilty of gross negligence. The evidence is uncontradicted that four individuals were riding in the front seat of the roadster at the time of the accident. The machine was running in the nighttime at the rate of 40 or 45 miles an hour, in this crowded condition. It is claimed this crowded condition of the car interfered with the driver's free exercise of necessary control over the automobile, and prevented him from keeping it on the paved portion of the highway while it was running at a high rate of speed, that the wheels of the car were thus permitted to run into the gravel adjacent to the paved portion of the highway, and that the steering and braking apparatus were defective so that the unusual strain of pulling the car back onto the pavement resulted in freezing the brake, and thus caused the accident. It is next asserted the braking apparatus of this machine was known to the defendant Flouris Du Four to have recently frozen in a similar manner, and that, in spite of the warning of this dangerous condition of the mechanism, no investigation or repair of the machinery was made, and that this failure to do so furnishes evidence of gross negligence on his part.

It is true the defendant Flouris Du Four denied at the trial that the brakes of his machine had ever previously frozen. For the purpose of impeaching him upon that subject, he was asked if he had not so stated to the plaintiff while she was confined in the hospital as a result of her injuries. He denied that he had ever made such a statement to her. In rebuttal, the plaintiff was called and testified in that regard as follows: "Q. Miss Walters, I will ask you if, at the Vallejo General Hospital, * * * November 1st, 1930, * * * the defendant Flouris Du Four stated to you that the wheel had locked and caused the accident in which you were injured, and that he knew that because it had locked on prior occasions while he had been driving the car? A. Yes sir."

On cross-examination she further testified in that regard: "Q. You say that Mr. Du Four stated in your presence, that the front wheel had locked on several occasions; did he say when? A. Yes sir. * * * He told me it had been locked in Sacramento before."

The evidence is uncontradicted that no previous investigation or repairs of the defective brakes were made.

The statute makes it unlawful to operate an automobile which contains dangerously defective mechanical apparatus.

It was a question for the jury to determine under the circumstances of this case whether the operating of a crowded car at night at a rate of speed of from 40 to 45 miles an hour with brakes known to have been defective because they had previously locked, and without inspection or repair thereof, constituted gross negligence. We must assume the jury decided that these facts existed and that they constituted evidence of gross negligence. On appeal this court is bound by that finding.

[3, 4] Gross negligence is defined by the California authorities as "lack of slight diligence." Malone v. Clemow, 111 Cal. App. 13, 295 P. 70; Kastel v. Stieber, 215 Cal. 37, 46, 8 P.(2d) 474. It is apparent that no definite line can be drawn by means of a mere linguistic definition which will invariably distinguish between ordinary and gross negligence. Some discretion necessarily rests with the jury in determining whether the circumstances of a particular case constitute gross negligence. By contrast, the authorities of this state have established the rule that it is gross negligence to fail to exercise slight diligence. In a final analysis of the definition of gross negligence, the determination of its existence must depend very largely upon the facts and circumstances of each particular case. Where substantial evidence of gross negligence is shown by the record, the question of its existence should be submitted to the jury under proper instructions. Merrill v. Pacific Transfer Co., 131 Cal. 582, 63 P. 915; Meighan v. Baker, 119 Cal. App. 582, 6 P.(2d) 1015; Malone v. Clemow, 111 Cal. App. 13, 295 P. 70; Krause v. Rarity, 210 Cal. 644, 293 P. 62, 77 A. L. R. 1327. A review of authorities on this subject from other jurisdictions is of slight value, since they are frequently predicated on statutory definitions different from our own.

[5] The giving of instruction No. 34 on the court's own motion is assigned as prejudicial error. This challenged instruction contains a definition of actual and constructive notice, which was given in almost the exact language of sections 18 and 19 of the Civil Code. It contains the following language which is complained of, to wit: "Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, has constructive notice of the fact itself in all cases in which by prosecuting such inquiry he might have learned such fact."

There is no doubt this instruction was intended to apply to plaintiff's claim that Flouris Du Four had previous knowledge of the existence of a defective brake, evidenced by his admission that "the wheel had locked and caused the accident, * * * and that he knew that because it had locked on prior occasions while he had been driving the car." In effect, this instruction merely directed the jury that, if they believed the operator of the machine had knowledge of the fact that the brakes of that car had previously locked, and they thought that knowledge was sufficient notice of the existence of a defective brake so as to place a prudent person on inquiry, then he would be deemed to have implied knowledge of the fact that the brake was dangerously defective. This appears to be a correct declaration of the law. It also has direct application to plaintiff's theory of the negligent operation of the machine with imputed knowledge of a defective brake.

[6] The appellants contend that this instruction has no application to the evidence of the case, and is therefore prejudicial, because the examination of the machine by a mechanic immediately after the accident occurred demonstrated the fact to be that the defective apparatus which caused the accident consisted of a bent toggle or clevis which prevented a proper application of the brake-band, and that this is not the same defect of which Flouris Du Four admitted he had previous knowledge when he said he knew the accident occurred from the locking of the wheel "because it had locked on prior occasions." This criticism appears to be captious. The toggle or clevis, which was found to be defective, is an inseparable part of the braking apparatus of an automobile. It is connected with the brake rod, and operates upon the device that spreads the brake band within the brake drum which is attached to the wheel. It is merely one of the parts of machinery constituting the mechanical braking apparatus. It does not appear exactly what causes the freezing of a brake. Unquestionably different defects might create that result. The examination of defendants' mechanical expert indicates that the defect of a bent toggle or clevis which he discovered was assigned by him as the cause of freezing the brake.

The entire apparatus constituting the braking system of this machine was produced in court, and the result of the defect was demonstrated to the jury. Since the record on appeal does not affirmatively show that the defect in the brake which was discovered after the accident had occurred was not different from the one which was admitted by Flouris Du Four to have previously caused the wheel to lock, we must assume the physical demonstration of the braking apparatus before the jury satisfactorily proved that the

defect was the same. At least both were defects which interfered with a proper use of the brakes. Evidently the jury understood the defendants' mechanical expert to testify that the bent and defective clevis did cause the locking of the brake or wheel. He said: "With that clevis in that position, it only operates on one side in this pin. * * * Every time you applied the brake it gave it that motion. In turn that would keep spreading this wider and wider until it came to a point where it slipped completely over that. When it got over that it dropped this here, this was sprung out of shape, and they were tangled up in there. * * * It would not take very much distance to create enough friction between that brake lining and brake drum to have that seize. * * *

"The Court: Q. You mean to grip?

"Another Juror: Q. Lock?

"Another Juror: Q. Freeze? A. And this particular brake, when they do lock, they lock badly, because of the self-energizing brake."

Again, this witness testified that the defect in the apparatus connected with the brake might automatically cause the locking of the brake or wheel. He said: "This being out of position and allowing this lining to come in contact with this brake drum and creating friction applied this brake by itself, he did not have to use his pedal at all. That is why he got all the braking application on one wheel."

This evidence is consistent with plaintiff's theory that the defective brake automatically caused the locking of the right wheel to a sufficient extent so as to cause a sudden diverting of the course of the machine to the right, resulting in the accident which occurred.

The challenged instruction is proper. It was neither erroneous nor prejudicial.

[7, 8] The giving of instructions numbered 35, 36, and 37, respecting the rate of speed with which an automobile may be lawfully driven, is assigned as erroneous. These instructions correctly informed the jury that "the maximum speed at 40 miles an hour is not a license to go at that speed at all times and places," and that the condition of traffic or other circumstances might render unlawful the maximum rate of speed at which an automobile is ordinarily permitted to travel. The last of these instructions then advised the jury that it was their sole province to determine from all the facts and circumstances surrounding the accident whether Flouris Du Four was driving in the prudent manner required by law. These instructions are in accordance with the provisions of section 113 of the California Vehicle Act (as amended by St. 1927, p. 1436, § 30). The maximum rate of speed which is fixed by statute is not a license to run at that rate of speed under all circumstances. It constitutes a limitation of speed beyond which one may not lawfully drive a car. Armstrong v. Day, 103 Cal. App. 465, 284 P. 1083; Soda v. Marriott, 118 Cal. App. 635, 5 P.(2d) 675, 678; Reaugh v. Cudahy Packing Co., 189 Cal. 335, 208 P. 125; Griffith v. Oak Ridge Oil Co., 190 Cal. 389, 212 P. 913. In the case of Soda v. Marriott, supra, wherein a judgment was reversed for the giving of erroneous instructions, with respect to an instruction which informed the jury that "it was lawful for Mrs. Marriott * * * to drive her automobile at the time and place mentioned in the complaint herein at a rate of speed not in excess of 35 miles per hour," the court said:

"This instruction is an invasion of the province of the jury, and disregards the mandate of section 113 of the California Vehicle Act, which requires the operator of a vehicle upon a public highway to 'drive the same at a careful and prudent speed not greater than is reasonable and proper, having due regard to the traffic. * * *' Subject to the twenty-mile zone restriction, the jury had the exclusive right to determine the rate of speed which would be lawful under the particular circumstances of the case."

In the present case it was dark; the roadster was crowded with four people riding in the front seat, and the driver had been warned of a dangerously defective brake by having had it freeze on previous occasions. It was proper to inform the jury they had a right to consider all these circumstances in determining whether it was prudent and lawful to drive the machine at the rate of 40 miles an hour. These instructions were neither erroneous nor prejudicial.

[9] It is strenuously insisted that the giving of plaintiff's instruction No. 38 is reversible error, for the reason that it asserts that the mere violation of section 113 of the California Vehicle Act with respect to driving an automobile faster than the maximum statutory rate of speed which is authorized constitutes negligence per se, and that upon the contrary this rule of evidence with respect to what rate of speed constitutes negligence per se, was changed by the amendment of that section in 1931 (Stats. 1931, p. 2120, § 34), and that at the time of the trial of this cause in 1932 the section provided that a mere violation of the speed limitation "shall not be deemed to have been negligent by reason thereof as a matter of law but in all such actions the burden shall be upon the opposing party to establish that the operation of such vehicle at such speed constituted negligence."

We are of the opinion the appellants are mistaken in assuming this challenged instruction No. 38 informs the jury that the mere violation of the statute with relation to the rate of speed of an automobile constitutes negligence per se. The instruction reads: "I further instruct you that if you find from the

evidence in this case that while in the operation of his automobile the defendant Flouris Du Four was guilty of a violation of one or more statutes of the State of California, read to you in these instructions regulating the operation of motor vehicles upon the highways of this state, and that said violation of said one or more statutes was by him committed in a grossly negligent manner, or that in the violation thereof, if any such violation occurred, the defendant failed to exercise slight care, and that said violation of said one or more statutes proximately caused said accident, and was a proximate contributing cause of the same at the time and place in issue herein, and that there was no negligence on the part of plaintiff contributing proximately to the accident, then I instruct you your verdict must be in favor of plaintiff."

Clearly this instruction correctly informs the jury that, if they find that the driver of the machine violated the speed limitation of the statute by acts "committed in a grossly negligent manner," or by conduct which indicated that he "failed to exercise slight care" in the performance thereof, and that such acts became the proximate cause of the accident, and the plaintiff was free from contributory negligence, then she was entitled to a verdict in her favor. It will be observed the jury are instructed they must find the statute was not only violated, but that it was violated by acts committed in a grossly negligent manner. The acts which might be deemed to constitute gross negligence were not specified or even suggested. The same construction of the language is true with respect to the limitation of their power to find the verdict for plaintiff, unless the jury first found that the statute was violated by acts which indicated a lack of slight care on the part of the driver of the machine. Since the California statutes have defined gross negligence as the performance of an act without the exercise of slight care, the last-mentioned sentence is merely another way of saying the jury must find the statute was violated by acts which amounted to gross negligence before they were warranted in finding a verdict for the plaintiff. Nowhere in this challenged instruction or elsewhere were the jury charged that the mere violation of the statute limiting the speed of an automobile on the public highway constituted negligence per se. If the language of the above instruction left any doubt respecting the requirement that the plaintiff must affirmatively prove the acts constituting gross negligence on the part of the driver of the machine, which refutes the assumption that negligence might be presumed as a matter of law from the mere violation of the speed law, then the giving of instruction No. 46 necessarily removes any such doubt. That instruction reads: "I instruct you that the burden of proof always rests upon the plaintiff to show the gross negligence of the defendants and to show such gross negligence by a preponderance of the evidence. Such burden never shifts to the defendants to show that they were not negligent."

This last instruction left no possibility for the jury to misunderstand the rule that the burden is upon the plaintiff to prove her charge of gross negligence by a preponderance of the evidence, and that gross negligence may not be implied from the mere violation of the statute limiting the speed of an automobile on the public highway. The giving of this challenged instruction was therefore not erroneous.

[10] The giving of instruction No. 42 did not constitute error. It is a correct declaration of the law, and applies to a reasonable theory of the case which is presented by the pleadings that plaintiff was not riding as a guest of the operator of the machine, but, upon the contrary, that the occupants of the car were all engaged in a joint adventure. Under such circumstances the plaintiff would have had joint control over the operation of the car, and the negligence of the driver might be imputed to plaintiff so as to defeat her claim for damages. The facts of this case do not warrant this assumption of a joint adventure. This instruction was nevertheless proper. It reads: "If you believe from the evidence that the plaintiff was riding in the automobile as a guest of the operator thereof, and if you further believe from the evidence that she had neither the control over the running of the same, nor the right to control the driver or operation of the said automobile, then I instruct you that the negligence, if any, of the driver of the automobile in which plaintiff was riding cannot be imputed to plaintiff in this case."

The answer of the defendants which was filed in this case denied that the plaintiff was riding as a guest of Flouris Du Four at the time of the accident. It was therefore proper for the court to instruct the jury that, if they found her to be riding as a guest, with no control or right to control the operation of the machine, then the negligence of the driver thereof could not be lawfully imputed to her. This instruction was not erroneous.

[11] Instruction No. 69 was properly refused. It omits a necessary element to warrant the assumption that the acts of the driver of the machine were so dangerous or negligent as to require the plaintiff to protest against them in order to purge herself of contributory negligence. It reads in part: "If you should find that the defendant, the driver of the automobile in which plaintiff was riding, was driving it at a high rate of speed, * * *" then it was the duty of the plaintiff to protest, or leave the machine, and, upon failure to do so, she is not entitled to recover damages for injuries received as a result thereof.

In the case of Dodds v. Gifford, 16 P.(2d) 279, 281, this court held this identical instruction to be fatally defective. The court there said: "It is apparent that a high rate of speed is not necessarily unlawful or dangerous. The question as to whether the machine was running at a dangerous rate of speed, or at such a high rate of speed as to require the plaintiff to protest, was a problem for the determination of the jury. The instruction omits this necessary element. It is fatally defective."

[12, 13] We are of the opinion the refusal to give to the jury instruction No. 72 was not prejudicial error, for the reason that it contains one fatal defect in its recitation of supposed facts, and because the substance of this charge was sufficiently covered by instruction No. 55, which was given. The challenged instruction reads: "You are instructed that with respect to the condition of an automobile and its brakes the rule is that one invited to ride therein by the owner or driver accepts the machine of her host as she finds it, subject only to the limitation that the driver or host must not deliberately set a trap or be guilty of gross negligence or wilful misconduct contributing to the injury of the guest. So under this rule an automobile owner is not liable to an invited guest riding therein for injuries sustained by the latter because of a defective brake, although it was a secondhand machine, provided the owner believed the car was reasonably safe and was not guilty of gross negligence in the matter."

This instruction is misleading. It is drawn upon the theory that the doctrine of caveat emptor applies to a guest who voluntarily accepts a ride in an automobile and is injured as a result of a defective brake without knowledge of the defect or negligence on the part of the owner or driver thereof. This is a correct declaration of the law with respect to guests under such circumstances. This instruction, however, omits an essential element. It declares the owner is not liable to a guest for injuries received because of a defective brake, provided only the owner believes the car is reasonably safe. In the present case there is substantial evidence that the driver of the car had knowledge of the existence of a defective brake from the previous locking of the wheel. It is apparent that, if such previous locking of the wheel would have warned a reasonably cautious person that the brake was dangerously defective, then the owner or driver of the machine could not escape liability by asserting that he nevertheless believed that it was reasonably safe. The instruction should have contained the following condition: That the owner would not be liable, provided that, acting as a reasonably prudent person, he believed the car to be reasonably safe. The proud possessor of a defective old rattletrap of a machine might foolishly believe that it was reasonably safe. But he may purge himself of negligence and avoid liability only provided he conducts himself as a reasonable person is required to act under like circumstances. This omission may be cured by the use of the last sentence, to wit, "and was not guilty of gross negligence." We are, however, of the opinion the previous sentence renders the instruction misleading.

Even though this instruction be technically deemed to be a correct statement of the law, we are of the opinion it was sufficiently covered by the giving of No. 55 of the court's charge. This instruction reads: "If you find that the sole proximate cause of the accident resulting in injury to plaintiff was the fact, if it be a fact, that one of the brakes of the automobile which was being driven by the defendant herein, became out of order and that as a result thereof he lost control of the automobile and he skidded into a post, then your verdict must be in favor of the defendant, unless you find that the condition of the brakes and skidding of the automobile, or either of them, was due to the gross negligence or willful misconduct of the defendant."

There was no prejudicial error in refusing to give this instruction.

The jury was very fully and fairly instructed. There appears to have been no miscarriage of justice.

The judgment is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

MINER et ux. v. DABNEY–JOHNSON OIL CORPORATION et al.*

Civ. 7712.

District Court of Appeal, Second District, Division 2, California.

May 12, 1933.

Hearing Granted by Supreme Court July 10, 1933.

1. Negligence ⇨141(7).

"Imminent danger" instruction *held* erroneous in omitting qualification that person in such danger must have been free from fault or negligence to excuse his acts in emergency.

The instruction was that person in imminent danger is not required to exercise intelligence and judgment otherwise expected of him, and hence is not negligent in choosing wrong or unsafe way, if he has not time to stop, investigate, and determine which of two ways open to him is right or safe way.

*For subsequent opinion see 28 P.2d 23.

[Ed. Note.—For other definitions of "Imminent Danger," see Words and Phrases.]

2. Trial ⇐296(4, 5).

Error in "imminent danger" instruction, omitting qualification that person in such danger must have been free from fault or negligence, *held* not cured by instruction to such effect.

The instruction, claimed to have cured the error, was that one suddenly confronted with imminent danger, without negligence on his part, is not required to exercise degree of care and skill required in commission of act after careful deliberation, but is required to act only as reasonably prudent man would under similar circumstances.

3. Trial ⇐296(1).

Error in instruction, containing materially incorrect statement of essential legal principle, is not ordinarily cured by correct declaration of such principle in another instruction.

4. Appeal and error ⇐1064(1).

Giving of instructions, contradictory in essential elements, may warrant reversal of judgment.

5. Negligence ⇐141(7).

"Imminent danger" instruction is improper, unless one suddenly confronted with peril had choice of alternative courses to avoid impending catastrophe.

6. Automobiles ⇐246(58).

"Imminent danger" instruction was improper, where driver of automobile, emerging from fog short distance behind double-parked truck, took only course open by swerving to left and starting to put foot on brake, but struck corner of truck.

7. Trial ⇐253(4).

Instruction that plaintiff must have failed to do what ordinarily prudent person would have done under same or similar circumstances to hold him contributorily negligent *held* erroneous as not mentioning commissive negligence.

8. Appeal and error ⇐1066.

Error in failing to mention commissive negligence in instruction on contributory negligence *held* harmless to defendant, where plaintiff's negligence, if any, consisted only in failing to throw out clutch or apply brakes of automobile.

9. Automobiles ⇐246(1).

Instruction that truck driver and his employer were jointly liable for injuries to occupants of automobile colliding with truck double parked in street, if both were guilty of negligence proximately contributing to injuries, *held* erroneous.

10. Negligence ⇐141(8).

Instruction to find for plaintiffs, if defendant's negligence was proximate cause of accident, unless plaintiffs were also guilty of negligence constituting "a" proximate cause of accident, *held* not erroneous.

11. Appeal and error ⇐1170(1).

Judgment will not be affirmed on ground that error did not cause miscarriage of justice, where appellate court cannot determine whether verdict might not otherwise have been given for appellants (Const. art. 6, § 4½).

Appeal from Superior Court, Los Angeles County; Percy Hight, Judge.

Action by A. G. Miner and wife against the Dabney-Johnson Oil Corporation and another. Judgment for plaintiffs, and defendants appeal.

Reversed.

Swaffield & Swaffield, Lawrence Hall, Kenneth Sperry, and Joseph E. Madden, all of Long Beach, for appellants.

Russell H. Pray, of Long Beach (Wahlfred Jacobson, of Long Beach, of counsel), for respondents.

WORKS, Presiding Justice.

This is an action for the recovery of damages for personal injuries suffered by both plaintiffs. They had judgment, and defendants appeal.

Appellant corporation owned an automobile truck of which appellant Black was the driver. On a certain evening, after nightfall, Black, having proceeded southerly along American avenue, in Long Beach, stopped the truck in front of his employer's office on the westerly or right side of the thoroughfare, and then alighted from the vehicle and went toward the company's office. He did not park the truck at the curb, but, to use a colloquial expression, parked it "double"; that is, he left it standing at the side of an automobile already parked at the curb. The truck therefore stood on that part of the avenue commonly used by drivers of cars proceeding along it toward the south. Just before Black reached the door leading into the office of the company, he heard a crash in the street, turned about, and saw that an automobile, coming from the north, had collided with the rear end of the truck. The car had been driven by Miner, his wife sat on the front seat of the vehicle with him, and their two children occupied a rear seat.

The Miners had come from Los Angeles and were on their way to some point in Long Beach. The evening was characterized by the presence of one of those phenomena known to Southern Californians as "high fogs," but, as is sometimes the case, "wisps"

of the fog at places touched the ground and, to the extent of their size and density, caused a reduction of visibility to the drivers of cars which passed through them. To adopt the language of Miner, speaking as a witness: "It was not a clear night; it was hazy, a high fog; it was a spotty fog; every once in a while, all the way down from Compton * * * I would run through spots of fog." Just before Miner collided with the truck, he came upon one of these "spots." As he entered it, his foot was resting on the accelerator of his car, but not hard enough to keep the power on. At that moment he was traveling at the rate of approximately twenty-five miles the hour. The spot of fog extended along the street a distance of from fifteen to twenty feet in the direction in which the car was traveling. As he got through the spot, Miner saw the truck before him, at a distance also of but from fifteen to twenty feet. He said on the stand: "When I came out of the fog bank the * * * truck was almost directly in front of me, just a little bit to the right hand side, just a trifle; in other words, the center of my car would be about a foot to the left of the center of the truck." He had already testified that, upon seeing the truck as he emerged from the fog, "I swerved to the left as much as I could and started to put my foot on the brake, but I got the corner of the truck before I could do anything else." At the moment of the collision, the Miner car was traveling at the rate of about twenty miles the hour. The negligence of appellants is conceded, of course, but it is contended that Miner was guilty of contributory negligence in driving through the fog at the rate of between twenty and twenty-five miles the hour.

[1] The appeal, which presents the question whether the trial court erred in giving certain instructions to the jury, shows a case of difficulty. The first assailed instruction read: "You are instructed that when a person is in imminent danger he is not called upon to exercise that intelligence and judgment he would be expected to exercise were he not in such danger, so if a party in imminent danger has two ways open to him, but has not the time to stop and investigate and determine which is the right or safe way and which is the wrong or unsafe way, his choosing of the latter is not, under the circumstances, negligence on his part." We think this instruction was erroneous, because it omitted the qualification that the "person" referred to at its beginning must have been free from fault or negligence himself. Under the authorities, such a limitation is necessary in stating the law in "imminent danger" instructions. It is said in one case: "The imminent peril must arise from a sudden emergency, but where that emergency is created by the automobilist, or where he brought about the perilous situation, through his own negligence, he cannot avoid liability upon the ground that his acts were done in the stress of emergency. 42 C. J. 891; Rush v. Lagomarsino, 196 Cal. 308, 237 P. 1066. One cannot shield himself behind an emergency created by his own negligence. The rule can be invoked only by those who are without fault. The vice of these instructions is that they are not predicated upon the further premise that the driver of the car was free from negligence when he first saw the plaintiff." Vedder v. Bireley, 92 Cal. App. 52, 267 P. 724, 728. A late opinion on the subject contains the following: "The foregoing instruction omitted the necessary qualification that the doctrine of sudden peril is available only to a person who is confronted with such peril without negligence on his own part. Where there is evidence tending to show that such person's sudden peril resulted from his own negligence, it is error to give such an instruction without proper qualification. Brooks v. City of Monterey, 106 Cal. App. 649, 290 P. 540; Vedder v. Bireley, 92 Cal. App. 52, 60, 267 P. 724. The main issue in the case was whether plaintiff's injuries resulted from the negligence of the plaintiff or the negligence of the defendant, and the giving of the foregoing instructions constituted prejudicial error requiring a reversal of the judgment." Gootar v. Levin, 109 Cal. App. 703, 293 P. 706, 707. There are other California cases to the same general effect.

In reply to the point made by appellants, respondents invoke the well-known rule that all of a set of instructions must be construed together, and that what is omitted from one instruction may be supplied by matter contained in others. But it could never have occurred to the jury that there was any omission in this instruction, and as a matter of law there was none. The instruction was complete. It told the jury that "a person," irrespective of the possibility of fault or negligence on his part, was entitled to the benefit of the statement concerning those "in imminent danger." The jury undoubtedly understood the judge to mean—as in truth he in effect said—that a person came under the rule stated whether he was himself at fault or whether he was not. Respondents say: "It will be noted that appellants do not claim that the instruction complained of contains any misstatements of law. In so far as it goes it is admittedly perfectly accurate." These expressions show that respondents misapprehend the position of appellants. The instruction, in its fullness, was nothing better than a misstatement of the law. As a concatenation of words it was "perfectly accurate," but as an announcement of the law it was wholly, and throughout, erroneous. The absence of a statement of the requisite limitation as to fault or negligence discolored the entire fabric.

[2-4] Respondents say that, if the instruc-

tion was error, the error was cured by another instruction which was given, thus: "You are instructed that one who, without negligence upon his part, is suddenly confronted with imminent danger or seeming imminent danger, is not required to exercise that degree of care and skill which is required in the commission of an act after careful deliberation; he is required to act only as a reasonably prudent man would act, under similar circumstances." This instruction did not cure the ills of the other. The two together must have confused the jury. In one of them it was said, as we have already observed, that a person, whether he was negligent himself or whether he was not, was entitled to the benefit of the rule stated. The other informed the jury that "one who, without negligence upon his part," etc., could profit by it. It was well said in a recent case, which applies here: "It is true that some of the incorrect principles announced in the foregoing challenged instructions were elsewhere correctly stated to the jury in other instructions which were given. It is also true that the instructions which were given must be construed as a whole, in determining whether they contain reversible error. If a single instruction omits an essential element of the cause, but is a correct declaration of the law so far as it goes, and the omitted element is correctly given in another instruction, the omission will ordinarily be cured thereby. If, however, an essential principle of law is stated to the jury materially incorrect, this prejudicial error will not ordinarily be cured by a correct declaration of the same principle in another instruction. The giving of instructions which are contradictory in essential elements may warrant the reversal of a judgment, for the reason that it is impossible to determine which charge controlled the determination of the jury." Soda v. Marriott, 118 Cal. App. 635, 5 P.(2d) 675, 678.

[5, 6] There is a particular reason why neither the assailed instruction nor the one claimed by respondents to have cured the error inherent in it should have been given to the jury. This was no proper case for the giving of an "imminent danger" instruction. A charge of that nature is never proper, unless one claimed to have been negligent, being suddenly confronted with peril, sees before him a choice of alternative courses either or any of which he may follow in an endeavor to avoid an impending catastrophe. An illustration of this truism is found in Olsen v. J. J. Jacobs Motor Company, 99 Cal. App. 423, 278 P. 1051, 1055. There the court said: "Two courses were open to the plaintiff: He might have set the brakes with all the force possible, or he might attempt, by speeding up his own machine, to get out of the way. Either course was hazardous. * * *" The court then declared that these circumstances made it proper to give an "imminent peril" instruction in the cause. The situation here, however, was very different. Miner and his family were confronted with an imminent danger at the instant when the family car emerged from the fog spot. But, be it observed, Miner met the situation by taking the only course that was open to him: "I swerved to the left as much as I could and started to put my foot on the brake, but I got the corner of the truck before I could do anything else." He made no mistake over which the jury should have been asked to throw the mantle of charity through the persuasive influence of either of the instructions given. Both were erroneous.

[7, 8] The trial judge gave this instruction: "You are instructed that in order to hold the plaintiffs guilty of contributory negligence you must find from the evidence in the case that the plaintiff, A. G. Miner, failed to do that which a person of ordinary prudence and caution would have done under the same or similar circumstances." As a general proposition of law, applicable in most cases, this instruction was erroneous, for the reason that it referred only to omissive negligence and contained no mention of negligence of the commissive variety. We think, however, that it did no harm in the present case. Miner rested his foot on his accelerator, but without sufficient pressure to keep his power above that amount which is exerted by a gasoline motor after it is started and while the foot is not upon the accelerator. Miner did not testify how long or for what distance this state of affairs continued, but it existed at the time he entered the fog belt. Then, to quote his testimony, and naturally his testimony was the sole evidence upon these questions: "As I went into that fog I took my foot off my throttle." As he entered the fog, he failed either to "throw out" his clutch or to apply his brakes. This was the sum of his offending, if he did offend. If he was guilty of contributory negligence, his sin was one of omission and not of commission. The jury could have seen nothing else in the evidence. Miner's conduct after his car emerged from the fog has been characterized above.

[9] The jury was thus instructed: "You are instructed that if you find that the defendants were negligent, as alleged in plaintiffs' complaint, and that their negligence proximately contributed to any injuries sustained by plaintiffs, then you are not to compare their negligence or determine which was more negligent or which contributed most to the injury, since both would be then jointly and severally liable and the plaintiffs may recover against either or both of them, provided, of course, they were free from contributory negligence; and in these circumstances, if you so find, it will be your duty in this case to render your verdict in favor of the plaintiffs and against the defendants." That part of this charge which assumed to

treat appellants as joint tort-feasors had no proper place in the instruction, as it is too plain for argument that appellants did not belong in that classification. Black was negligent in leaving the truck standing in the street, and his employer was guilty of the same negligence; Black having acted at the time within the scope of his employment. Appellants also condemn the portion of the court's charge now before us as a "formula instruction," lacking in some of the elements which such an instruction should contain, but we think it unnecessary to decide whether it was an instruction of that character. Surely, it was erroneous for the reason above stated, and should not be given again.

[10] After stating, as part of an instruction to the jury, provisions of an ordinance of Long Beach, the court proceeded: "You are further instructed that the failure to use reasonable care to comply with said provision of law would be in itself negligence as a matter of law, and, therefore, if you find from a preponderance of all of the evidence that the defendant, L. K. Black, failed to use reasonable care to have said vehicle stand on American avenue in such a way as not to obstruct the free use thereof, and that such failure was a proximate cause of the accident in question, then your verdict must be in favor of the plaintiffs, unless you should further find from a preponderance of all of the evidence, and under the instructions of the court, that the plaintiffs were also guilty of negligence which was a proximate cause of the accident in question." The last few words of this instruction, that is, "were also guilty of negligence which was a proximate cause of the accident in question," are the basis of a point made by appellants. It is contended, in effect, that instead of this language the court should have employed some such expression as, "were also guilty of negligence which proximately contributed to the accident in question." Instructions similar to the one given, in the respect just referred to, have been before the courts several times [Squier v. Davis Standard Bread Co., 181 Cal. 533, 185 P. 391; Straten v. Spencer, 52 Cal. App. 98, 197 P. 540; Katz v. T. I. Butler Co., 81 Cal. App. 747, 254 P. 679; Harvey v. Aceves, 115 Cal. App. 333, 1 P.(2d) 1043], although the question principally considered in the cases has been whether the article "the" before the term "proximate cause," when that term is applied to contributory negligence, can properly be employed in an instruction. We are referred to no case which decides specifically the question presented by appellants, but we think the positive and frequent declarations in the cases cited that it is proper to refer to the claimed contributory negligence of a plaintiff as a proximate cause must be considered as closing to appellants the claim they now make. And this view is based upon reason. To refer, as was done in the instruction, to a possible proximate cause as springing from the negligence of both respondents and appellants is not materially different from saying that the negligence of each may have been a proximate contributing cause of the accident.

[11] Respondents invoke the provisions of section 4½ of article 6 of the Constitution as a means whereby to prevent a reversal of the judgment, but without avail. It is impossible for us to say whether or not the errors of the trial court have resulted in a miscarriage of justice, and in those circumstances, under many cases, the constitutional provision extends no saving grace. If the jury had rendered verdict in favor of appellants instead of for respondents, the pronouncement would have had ample support in the evidence. Indeed, appellants argue strenuously that the verdict against them is without support. We think, however, that the case presents a substantial conflict of evidence, and we do not mean to say that it preponderates the one way or the other. We do say that it cannot be determined whether, but for the confusing errors of the trial court, the verdict might not have been given in favor of appellants.

Judgment reversed.

We concur: CRAIG, J.; PARKER, Justice pro tem.

132 Cal.App. 64

Ex parte MARTIN.

Cr. 1742.

District Court of Appeal, First District, Division 1, California.

May 18, 1933.

1. Habeas corpus ⇐22(1).

After affirmance of conviction, court could not consider grounds for habeas corpus which were or should have been urged during trial, on motion for new trial in arrest of judgment, or on appeal from judgment.

2. Habeas corpus ⇐27.

Function of habeas corpus is to inquire into jurisdiction of court, from whence process is issued under which accused is held.

3. Habeas corpus ⇐30(1).

Habeas corpus cannot be used to consider alleged errors, where conviction has been had and commitment thereon is in due form.

4. Criminal law ⇐1182.

Affirmance of judgment of conviction operates as final adjudication against accused of all questions assignments raised or which could have been raised.

5. Habeas corpus ⇐30(3).

Petitioner *held* not entitled to habeas corpus because form of judgment set out in commitment failed to show whether prisoner was present when court pronounced sentence.

Application by Milford B. Martin for a writ of habeas corpus prayed to be directed to the Warden of San Quentin prison to secure the release of petitioner from custody.

Writ denied.

Milford B. Martin, in pro. per.

PER CURIAM.

Petitioner is imprisoned in the state prison at San Quentin under a judgment of sentence imposed by the superior court in and for Los Angeles county for the crimes of bribing a witness and conspiracy to bribe a witness. The judgment of conviction was affirmed on appeal (People v. Martin, 114 Cal. App. 392, 300 P. 130), and petitioner now seeks to be discharged on habeas corpus.

[1] The application for the writ is filed by petitioner in propria persona. It contains some 560 closely typed and printed pages, and is devoted chiefly to torrents of vituperation directed against those who were in any way identified with his prosecution and conviction, and against insurance companies generally. Incidentally, some 40 specific grounds are urged for the issuance of the writ. An examination of those grounds discloses, however, that all but one relate to matters which were or should have been urged during the trial of the action, on motion for new trial, in arrest of judgment, or on appeal from the judgment of conviction; and which after affirmance of said judgment cannot be inquired into on habeas corpus. For instance, some of them are based upon accusations of fraud, conspiracy, corruption, and impure motives on the part of the district attorney's office, the witnesses for the prosecution, a former attorney for the defense, and certain insurance companies; others in their nature are an attack upon the integrity of the trial judge, the jury, and the court reporters; a number involve alleged errors of law which it is claimed were committed during the trial of the action; and several pertain to the weight of testimony and the credibility of certain witnesses, alleged misconduct of the district attorney, and the legal sufficiency of the evidence to support the verdict of the jury.

[2-5] As held in the cases hereinafter cited, the function of a writ of habeas corpus is to inquire into the jurisdiction of the court from whence the process is issued under which the accused is being held. In re Vitalie, 117 Cal. App. 553, 4 P.(2d) 171. It cannot be made the vehicle for the consideration of alleged errors where a conviction has been had and the commitment thereon is in due form; nor to subserve the office of a motion in arrest of judgment, In re Stambaugh, 117 Cal. App. 659, 4 P.(2d) 270; nor can it be used as a means of considering the question of the insufficiency of the evidence, In re Horr, 177 Cal. 721, 171 P. 801; In re Williams, 183 Cal. 11, 190 P. 163; In re Gutierrez, 46 Cal. App. 94, 188 P. 1004; In re Jacobs, 175 Cal. 661, 166 P. 801; In re Kaster, 52 Cal. App. 454, 198 P. 1029; nor for the purpose of reviewing errors alleged to have been committed in the course of the trial, Ex parte Lehmkuhl, 72 Cal. 53, 13 P. 148; Ex parte Noble, 96 Cal. 362, 31 P. 224. Furthermore, the affirmance on appeal of a judgment of conviction operates as a final adjudication against the appellant of all questions raised by the assignments of error or which could have been so raised. In re Cohen, 107 Cal. App. 288, 290 P. 512; France v. Superior Court, 201 Cal. 122, 255 P. 815, 52 A. L. R. 869. In the present case, as appears from the reported decision in California Appellate Reports, supra, petitioner was at all times represented by counsel; upon the affirmance of the judgment of conviction, he petitioned the District Court of Appeal for a rehearing, and his petition was denied; he then petitioned the Supreme Court for a transfer of the cause to that court, and his petition was denied. Therefore, under the rules of the cases above cited, such judgment of affirmance precludes this court from considering any of the points now sought to be raised on habeas corpus, except the one embodied in the forty-second specification (see page A–9 of the petition), wherein petitioner contends that the form of judgment set out in the commitment is void, in that it fails to show whether petitioner was present in court at the time judgment of sentence was pronounced; and that same point was held to be without merit in the recent cases of People v. Sherman (Cal. App.) 15 P.(2d) 881, and In re Larabee (Cal. App.) 21 P.(2d) 132.

It follows, therefore, that, since no legal ground has been shown for the issuance of the writ, the application therefor should be, and it is accordingly denied.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

MILBANK v. STANDARD MOTOR CONST. CO.

Civ. 7600.

District Court of Appeal, Second District, Division 1, California.

May 18, 1933.

Hearing Denied by Supreme Court July 17, 1933.

1. Corporations ⇐668(15).

To sustain judgment against foreign corporation based on service of summons on managing or business agent within state, corporation must be doing business within state (Code Civ. Proc. § 411).

2. Corporations ⇐642(4½).

Foreign corporation is "doing business" within state within statute governing service of summons, if transacting some substantial part of its ordinary business by agents and officers elected for that purpose (Code Civ. Proc. § 411).

Phrase "doing business" is equivalent to the words "transacting business" and has reference to a continuation in some form of business, but ordinarily does not apply where corporation does only a single act of business within the state. There must be the carrying on of business to such an extent by the corporation as to manifest its presence in the state, even though the transactions are entirely interstate in character.

[Ed. Note.—For other definitions of "Doing Business," see Words and Phrases.]

3. Corporations ⇐673.

Evidence *held* to establish that foreign corporation, manufacturing engines, was "doing business" within state, authorizing service of summons on managing or business agent within state (Code Civ. Proc. § 411).

Evidence disclosed that foreign corporation sent representative to aid and assist customers within state with maintenance and service of engines theretofore delivered; that representative was authorized to employ mechanics whenever necessary to do the work; and that the continuous endeavor to service the engines of the customers in order to correct their mechanical defects and increase their efficiency was a substantial and important branch of its ordinary business.

4. Corporations ⇐668(5).

Representative of foreign corporation, manufacturing engines, sent to state to service engines sold and to correct mechanical defects and increase their efficiency *held* "managing or business agent" within statute relating to service of summons on foreign corporations (Code Civ. Proc. § 411).

[Ed. Note.—For other definitions of "Business Agent" and "Managing Agent," see Words and Phrases.]

5. Corporations ⇐668(5).

Where agent of corporation is business or managing agent within statute relating to service of summons upon foreign corporations, implication of authority will be made notwithstanding denial of authority by corporate officers (Code Civ. Proc. § 411).

Appeal from Superior Court, Los Angeles County; Marshall F. McComb, Judge.

Action by Lee B. Milbank against the Standard Motor Construction Company. From a judgment in favor of the plaintiff, the defendant appeals.

Affirmed.

Pacht, Pelton & Warne, of Los Angeles, for appellant.

Andrews & Andrews, of Los Angeles (E. H. Blanche, of Los Angeles, of counsel), for respondent.

HENDERSON, Justice pro tem.

[1] This is an appeal by defendant, a New Jersey corporation, from a personal judgment rendered against it after default and subsequent to the denial of its motion made by special appearance to quash service of summons. The affidavit of service attached thereto recited that personal service had been made upon the defendant corporation "by serving Henry W. Runyon, Jr., its California business agent * * *." The motion of the defendant challenged the sufficiency of the service of the summons under section 411, Code of Civil Procedure, which then read: "The summons must be served by delivering a copy thereof as follows: * * * If suit is against a foreign corporation * * * doing business and having a managing or business agent, cashier or secretary within this state: to such agent, cashier or secretary." Under this provision, to sustain the judgment it is requisite that the defendant corporation was doing business within the state and that Runyon was its managing or business agent at the time of the service. In considering the motion the court had before it the complaint, summons, notice of motion, and the affidavits and counteraffidavits of the respective parties, which, although somewhat conflicting, showed the following facts: The appellant, Standard Motor Construction Company, a corporation, manufactured engines in New Jersey and was engaged in selling some of them to purchasers in this state. In February, 1929, plaintiff's agent entered into correspondence with defendant which resulted in a contract of purchase and sale for a Diesel engine. Unable to meet plaintiff's request for a May de-

livery, the company sent him an engine of similar type, which it had on exhibition in this state at a boat show. The engine, after being installed in plaintiff's boat, developed mechanical defects. The plaintiff made complaint thereof and shortly thereafter was notified by the president of the corporation that he was sending Runyon, a graduate engineer, as their representative "to aid and assist the customers in California with the maintenance and service of engines theretofore delivered in California." He was authorized to employ mechanics whenever necessary to do this work. Subsequent to his arrival, by an advertisement in the "Pacific Motor Boat" the public were urged to see their Pacific Coast representatives, who would tell "why you should have a Standard Diesel." Runyon's name and address were given in this advertisement. Runyon was not an officer or stockholder of the defendant corporation and was not authorized by the by-laws or rules and regulations or records of the company to sign and execute contracts. Pursuant to the instructions of the president of his company, in addition to his servicing engines he had frequent conferences with plaintiff Milbank for the purpose of an adjustment of his company's difference with him respecting the engine's defects, and he promised to replace it with one of a later type. Being unable to settle the dispute with defendant to his satisfaction the plaintiff brought this action for breach of contract. Runyon, who received a regular salary, was still actively engaged in the business of his company on April 18, 1930, when the summons was served upon him.

[2] The defendant first contends that the judgment is void because it is not so far engaged in doing business in this state as to be subject to the jurisdiction of its courts. The authorities, both state and federal, have found difficulty in laying down an all-embracing rule as to what constitutes "doing business," and many instances of irreconcilable conflict have arisen. It has been held by numerous cases, however, that in order for a foreign corporation to be doing business within the state it must transact here some substantial part of its ordinary business by its agents and officers selected for that purpose. Davenport v. Superior Court, 183 Cal. 506, 191 P. 911; Walton N. Moore Dry Goods Co. v. Commercial Industrial Company (D. C.) 276 F. 590, 594; Knapp v. Bullock Tractor Co. (D. C.) 242 F. 543. The phrase "doing of business" is equivalent to the words "transacting business" and has reference to a continuation in some form of business, but ordinarily does not apply where a corporation does only a single act of business within the state. General Conference of Free Baptists v. Berkey, 156 Cal. 466, 105 P. 411. There must be the carrying on of business to such an extent by the corporation as to manifest its presence in the state even though the transactions are entirely interstate in character. International Harvester Co. v. Kentucky, 234 U. S. 579, 34 S. Ct. 944, 58 L. Ed. 1479, 1483.

[3] Directing our attention to the activities of defendant in this state, we are of the opinion that they were sufficient in character to constitute "doing business" for the purpose of the service of summons. The continuous endeavor to service the engines of customers in order to correct their mechanical defects and increase their efficiency was a substantial and important branch of its ordinary business. It is apparent that the maintenance of such a service does not logically fall within the category of a merely casual or incidental activity of defendant. Cone v. New Britain Machine Company (C. C. A.) 20 F.(2d) 593, 595; Beach v. Kerr Turbine Co. (D. C.) 243 F. 706.

[4] The defendant further maintains that the service of process was not made on a "managing" or "business agent." In the construction of this phrase there has also been a pronounced conflict in the authorities both state and federal. But the meaning of the term in this state is no longer susceptible to subtle distinctions, if we are to follow the recent construction of the expression as used in said section 411, Code of Civil Procedure, in Roehl v. Texas Company, 107 Cal. App. 691, 704, 291 P. 255, 260, as follows: "We hold the true rule to be * * * that 'every object of the service is obtained when the agent served is of sufficient character and rank to make it reasonably certain that the defendant will be apprised of the service made.' * * * Whether in any given case the agent in question is a 'managing agent' within what we have decided the meaning of that expression to be must depend on the particular facts involved. It is impracticable to lay down a more concrete test of general validity." Considering the testimony in relation to the rule just announced, we are of the opinion that the court was justified in the finding that Runyon was the "managing" or "business agent" of the defendant corporation, and that the same should not be disturbed.

It is finally urged that Runyon lacked the specific authorization from the defendant corporation required by section 411 of the Code of Civil Procedure as construed in Jameson v. Simonds Saw Co., 2 Cal. App. 582, 84 P. 289, 292, where it was said that the status of "managing" or "business agent" could not be created "by construction or implication, contrary to the intention of the parties."

[5] But we are of the opinion that this language could never have been intended to extend to a situation similar to the one presented by the instant case. Such a rule would permit a foreign corporation to avoid

the jurisdiction of the courts of this state by the mere denial of its agent's authority. The true rule is found in the case of Connecticut Mutual Life Insurance Company v. Spratley, 172 U. S. 602, 19 S. Ct. 308, 313, 43 L. Ed. 569, 573, which reads as follows: "In such case it is not material that the officers of the corporation deny that the agent was expressly given such power, or assert that it was withheld from him. The question turns upon the character of the agent,—whether he is such that the law will imply the power and impute the authority to him; and, if he be that kind of an agent, the implication will be made, notwithstanding a denial of authority on the part of the other officers of the corporation."

It follows that the judgment should be, and it hereby is, affirmed.

We concur: CONREY, P. J.; HOUSER, J.

132 Cal.App. 173

PEOPLE v. KNEWBOW.

Cr. 2311.

District Court of Appeal, Second District, Division 1, California.

May 22, 1933.

Hearing Denied by Supreme Court June 19, 1933.

1. Criminal law ⇐1159(2).

Appellate court cannot reverse conviction because of assumed fact that, judged by the cold record, evidence either apparently preponderated in favor of accused or was sufficient to create reasonable doubt as to his guilt, where evidence against him, if believed, was sufficient to sustain conviction.

2. Witnesses ⇐344(1).

In prosecution for grand theft by means of misrepresentation to money lender that accused owned realty offered as security, exclusion of evidence relating to transaction and tending to impeach complaining witness *held* error.

Excluded evidence related to fact that convention of the parties to the loan included agreement, not only that for performance by complaining witness of two hours' service per week to corporation, of which accused was president, complaining witness was to be compensated at rate of $600 per month, but that three different members of complaining witness' family were to be employed to cover up real consideration of loan and to permit lender to exact usurious interest; also that complaining witness had procured false set of minutes of corporation to be made for purpose of deceiving a designated person and thereby inducing him to become a guarantor on a promissory note evidencing the making of the loan and providing for its repayment to complaining witness.

3. Criminal law ⇐938(1), 1156(3).

Whether new trial shall be granted because of newly discovered evidence rests in sound discretion of trial court, whose judgment will not be disturbed, except for manifest abuse.

Appeal from Superior Court, Los Angeles County; William Tell Aggeler, Judge.

William Knewbow was convicted of grand theft, and he appeals.

Reversed.

Thomas W. Cochran, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

CONREY, Presiding Justice.

This appeal is from the judgment of the trial court sitting without a jury, which followed the conviction of defendant of the commission of the crime of grand theft, and from an order by which the motion of defendant for a new trial was denied.

It is unnecessary to make a detailed statement of the facts. The essential substance of the charge against defendant and the ultimate fact established by the evidence to the satisfaction of the trial court was that, by means of false pretenses made by defendant as to his ownership of a certain piece of real property, he procured a loan from the complaining witness of the sum of $50,000, and, as security for the repayment of which loan in part, he executed a deed of trust to the property, of which deed the complaining witness was the beneficiary.

At the outset it may be remarked that an observation made by the Supreme Court in the case of People v. Byrne, 160 Cal. 217, 225, 116 P. 521, 525, seems appropriate to the situation presented by the record herein, to wit: "While a mere reading of the record in this case necessarily leaves one in grave doubt on the question of the defendant's guilt, there is certainly enough in the evidence to sustain the conclusion of the jury and trial judge who saw and heard the various witnesses, and who were in a much better position to determine the truth than a court that does not possess such an advantage."

[1] Although as appears from the record of the proceedings had on the trial of the action, as between the evidence presented by the prosecution and that adduced on behalf of defendant, a very decided conflict existed, nevertheless, since considered by itself the evidence which tended to establish the guilt

of defendant was sufficient for that purpose, in accordance with the well-established rule which governs the powers of appellate tribunals, and in the absence of certain exceptions to such rule not here applicable, this court is unauthorized to disturb the judgment because of the assumed fact that, judged by the cold record, the evidence either apparently preponderated in favor of the innocence of defendant or at least likewise was sufficient to create a reasonable doubt as to his guilt.

In effect, and as expressed in various specifications of error, it is contended by appellant that he was prejudiced by the action of the trial court in its refusal:

(a) To admit evidence either offered by defendant directly, or by way of cross-examination of witnesses introduced by the prosecution, relative to the fact that the convention of the parties to the loan included an agreement not only that for the performance by the complaining witness of two hours' service per week to the corporation of which defendant was the president the complaining witness was to be compensated at the rate of $600 per month, and that employment was to be provided for each of three different members of the family of the complaining witness; all for the purpose of "covering up the real consideration for the loan, and to permit Leff (the lender) to exact usurious interest. * * *" And in the court's refusal:

(b) To admit evidence likewise sought to be introduced by defendant either directly or by way of cross-examination of prosecution witnesses regarding a false set of minutes of the said corporation, which assertedly were prepared at the suggestion of said complaining witness for the sole purpose of deceiving a designated person and thereby inducing him to become a guarantor on a promissory note which evidenced the making of said loan and provided for its repayment to said complaining witness.

[2] As hereinbefore has been indicated, the ultimate issue between the parties to the action was whether defendant had falsely represented to the lender of the money that defendant was the owner of a specified piece of real property which was offered as part security for the loan, and by such means had secured the loan from such lender. In the trial of the case, the decision concerning the truth of the charge depended very much upon the credibility of the complaining witness. In the face of some evidence tending to impeach that witness, the court appears to have believed and accepted his testimony. If the court had received and had believed the rejected evidence to which we have referred, the facts thus established would have given added weight to the impeachment. We are satisfied that the court erred in rejecting that evidence, all of which related to the circumstances of the very transaction whereby it was alleged that the defendant had committed the crime charged in the indictment. Upon full consideration of the record, it seems to us reasonable to conclude that, if this rejected evidence had been before the court for consideration in arriving at its decision of the cause, there would be an increasing probability that the defendant would not have been convicted. Taken in connection with the record in general, there is thus indicated a probable miscarriage of justice resulting from the rejection of said evidence.

"Newly-discovered evidence" was among the grounds upon which defendant relied for the granting of his motion for a new trial. An examination of the statements contained in the several affidavits presented by defendant in support of his motion discloses the fact that the effect of the testimony which might, or would be, given on a retrial of the action by the persons who made such affidavits, was but cumulative of the mass of evidence of like character which formerly had been received.

Even though it be assumed that due diligence had been exercised by defendant to produce at the trial the evidence which he claimed had been discovered after the trial of defendant had taken place, "the trial judge is still called upon, in the exercise of a wise discretion, to determine the weight to be given to the evidence produced upon the motion for a new trial, the truth of the matters shown thereby, and the materiality and probability of the effect of them if believed to be true." People v. Byrne, 160 Cal. 217, 226, 116 P. 521, 525.

As this court remarked in the case of People v. Ledbetter, 106 Cal. App. 109, 111, 288 P. 832, 833: "On a review of the authorities, the principle of law is outstanding that whether a new trial should be granted for the reason that since the trial of the action new evidence has been discovered, which is either corroborative of that introduced by the moving party, or, on the other hand, in the nature of impeachment of, or contradictory to, that produced by the other party, rests in the sound discretion of the trial court; and unless it manifestly appear that the discretion lodged in the trial court has been abused, the appellate court will not disturb the judgment."

[3] Since the determination of the question of whether "newly-discovered evidence" affords a sufficient ground for the granting of the order for a new trial rests within the discretion of the trial court, in accordance with the well-established rule governing such a situation it is only when it appears that the trial court was guilty of an abuse of discretion that an appellate tribunal is authorized to disturb the conclusion reached by the trial court. People v. Hewitt, 101 Cal. App. 306, 281 P. 666; People v. Oxnam, 170 Cal. 211, 149 P. 165; People v. Weber, 149 Cal.

325, 348, 86 P. 671; People v. Yeager, 194 Cal. 452, 489, 229 P. 40; People v. Walton, 97 Cal. App. 782, 783, 276 P. 426; People v. Ledbetter, 106 Cal. App. 109, 288 P. 832; People v. Staigers, 92 Cal. App. 628, 268 P. 923.

The ruling of the court in denying the motion for new trial might well be sustained, if said motion depended solely upon the affidavits showing newly discovered evidence; nevertheless, when the motion is also considered in relation to the erroneous rejection of evidence to which we have referred, we are satisfied that a new trial should have been granted.

For the foregoing reasons, the judgment and the order by which the motion for a new trial was denied are reversed.

We concur: YORK, J.; HOUSER, J.

131 Cal.App. 729

TIFFANY PRODUCTIONS OF CALIFORNIA, Inc., Limited, et al. v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

Civ. 8951.

District Court of Appeal, Second District, Division 1, California.

May 12, 1933.

Hearing Denied by Supreme Court July 10, 1933.

1. Attachment ⇐137.

Trial court, on defendant's motion, is authorized to increase amount of undertaking on attachment (Code Civ. Proc. § 539).

2. Judgment ⇐720.

Generally, phrase "res adjudicata" means that issuable fact once legally determined is conclusive as between parties in same action or subsequent proceeding.

[Ed. Note.—For other definitions of "Res Judicata," see Words and Phrases.]

3. Attachment ⇐137.

Refusal to grant, or granting of, permission to renew motion to increase undertaking on attachment is matter within trial court's discretion (Code Civ. Proc. §§ 182, 183, 539).

4. Motions ⇐43.

Generally, leave to renew motion should be predicated on assumption that moving party will show material additional facts occurring after date of former hearing, or not presented because of surprise or excusable neglect (Code Civ. Proc. §§ 182, 183).

5. Motions ⇐43.

Hearing of second motion and granting of order sought thereby constitute implied permission to renew motion (Code Civ. Proc. §§ 182, 183).

6. Attachment ⇐137.

Order denying motion to increase amount of undertaking on attachment *held* not res adjudicata so as to preclude subsequent renewal of motion based on change in circumstances (Code Civ. Proc. §§ 182, 183, 539, 963).

Original application by the Tiffany Productions of California, Inc., Limited, and another, for a writ of prohibition prayed to be directed to the Superior Court in and for Los Angeles County, and the Honorable Lester Wm. Roth, a Judge thereof, to restrain further action under an order granting a motion to increase amount of undertaking on attachment.

Writ of prohibition discharged.

See, also, 123 Cal. App. 50, 10 P.(2d) 798.

Sam Wolf and Harry J. Miller, both of Los Angeles, for petitioners.

Everett W. Mattoon, Co. Counsel, Beach Vasey, Deputy Co. Counsel, and Martin Gang, all of Los Angeles, for respondents.

HOUSER, Justice.

From the record herein it appears that at a time some months preceding the date of the application to this court for the issuance of a writ of prohibition, by means of which the respective rights of the parties regarding the issues here involved are proposed to be tested, the petitioners brought an action in the Superior Court against James Cruze Productions, Inc., and James Cruze; and as incidental to such action, caused a writ of attachment to issue by authority of which certain personal property belonging to defendants in that action was seized and held as security for the payment of any judgment which thereafter might be rendered in the action in favor of the plaintiff. As a statutory prerequisite to the issuance of the writ of attachment, by direction of the clerk of the court the plaintiff in the action was required to, and did, furnish an undertaking in the sum of $7,500. Thereafter, by motion presented to the Superior Court, the defendants sought to have the amount of that undertaking substantially increased. By order of the court that motion was denied. On a so-called "rehearing" of said matter, its former order by which an increase in the amount of the undertaking was denied in effect was "affirmed." About two months after said "order of affirmance" was made, based upon the additional fact that possible or probable increase in accrued damages to the defendants had resulted from the issuance of the writ of attachment, the defendants presented a third motion to increase the amount of the under-

taking; which motion was granted. On application by the plaintiff to this court for a writ of prohibition, an order was issued by which the respondent herein was temporarily restrained and prohibited from the enforcement of its order increasing the amount of said undertaking; and at the same time the respondent was directed to show cause on a date specified why an order should not be entered by which the said temporary order of this court in the matter should be made permanent.

[1] The first question presented by the petitioner, that is, whether following the act of furnishing an undertaking on the issuance of a writ of attachment in the amount demanded by the clerk of the court, as required by the provisions of section 539 of the Code of Civil Procedure, on motion of the defendant in the action the Superior Court is authorized to increase the amount of such undertaking, is settled in the affirmative by the ruling in the case of Francis v. Superior Court, 58 Cal. App. 618, 209 P. 80.

[2] Somewhat reduced in form, the second question propounded by the petitioner herein in substance is whether the ruling by the court on the first motion to increase the amount of the undertaking was res adjudicata. If it was, of course it should follow the ordinary rule obtainable with reference to judgments; that is to say, that the court thereafter had no authority by its order either to modify, or to reverse the former order made by it. In other words, if the first order in question ranked as a judgment, the court thereafter was unauthorized to disturb it in the manner or by the method adopted by the defendant for that purpose. And although disaffirming any intention to accurately define what is meant by the expression "res adjudicata," as a starting point for ensuing observations it may be assumed that included within the boundaries of a complete exposition of the significance which properly may be ascribed to the term is the general doctrine that in any action or proceeding an issuable fact once legally decided therein is thereafter beyond dispute as between or among the parties either in that or in any other action or proceeding in which the same parties or their respective privies may be litigants. But the simple pronouncement of such a legal principle, although possibly helpful in attempting to arrive at a correct conclusion of the question here involved, in the face of judicial decisions which may appear to be not entirely harmonious one with the other, does not furnish a clear and infallible guide. An examination of the authorities reveals the situation that many of the different orders which ordinarily are incidental to the administration of an estate in probate are regarded as final and conclusive (15 Cal. Jur. 117 et seq.), and consequently do not admit of a renewal of a motion for the granting of an order theretofore refused. Illustrations of such rulings may be found in an application for family allowance, or to set aside a homestead (Estate of Harrington, 147 Cal. 124, 81 P. 546, 109 Am. St. Rep. 118); order of sale (Estate of Bazzuro, 161 Cal. 71, 118 P. 434); an order of partial distribution of an estate (12 Cal. Jur. 156); the discharge of an administratrix (Nason v. Superior Court, 39 Cal. App. 448, 179 P. 454; Crane v. Superior Court, 42 Cal. App. 285, 183 P. 606). And the rule of "res adjudicata" has been made applicable to various other motions and orders in civil proceedings. For example, to the denial of a motion to issue execution (Wheeler v. Eldred, 137 Cal. 37, 69 P. 619); to the denial of a motion by an insolvent debtor to a right to the proceeds of a crop on land set apart as a homestead (Sunkler v. McKenzie, 127 Cal. 554, 59 P. 982, 78 Am. St. Rep. 86); to the change of place of trial (Karst v. Seller, 45 Cal. App. 623, 188 P. 298; but see Johnston v. Brown, 115 Cal. 694, 47 P. 686); to the vacation of an order of execution and to quash execution (Creditors' Adjustment Co. v. Newman, 185 Cal. 509, 197 P. 334). See, also, Lake v. Bonynge, 161 Cal. 120, 118 P. 535, 539. In the case last cited the following appears as a quotation from Freeman on Judgments:

"The tendency of the recent adjudications is to inquire whether an issue or question has been in fact presented for decision and necessarily decided, and, if so, to treat it as res adjudicata, though the decision is the determination of a motion or summary proceeding, and not of an independent action. This is especially true when the decision did not involve a mere question of the proper form or time of proceeding, but was the determination of a substantial matter of right, upon which the parties interested had a right to be heard upon issues of law or fact, or both, and these issues, or some of them were necessarily decided by the court as the basis of the order which it finally entered granting or denying the relief sought."

And in Karst v. Seller, 45 Cal. App. 623, 627, 188 P. 298, 300, which, as hereinbefore indicated, related to a motion for change of place of trial, it was said:

"The action of the court on the questions involved in the order for change of place of trial has all the characteristics of a final judgment. Issues of facts are presented and tried on their merits, and an appeal lies from the order. We find no California decisions on this point, but the general rule in other jurisdictions seems to be that if a motion involves a substantial right, and a full hearing is afforded thereon, and the order made on such motion is appealable, such order is a final adjudication of all matters involved in the motion. Ann. Cas. 1914D, 975 [note]; Hoge v. Norton, 22 Kan. 265; Truesdale v. Farmers' Loan, etc., Co., 67 Minn. 454, 64 Am.

St. Rep. 430, 70 N. W. 568; Bennett's Adm'r v. Russell's Ex'x., 39 Mo. 152, 90 Am. Dec. 457; Fitterling v. Welch, 76 Minn. 441, 79 N. W. 500; Rogers v. McCord-Collins Co., 19 Okl. 115, 91 P. 864; Smith v. Zalinski, 94 N. Y. 524."

On the other hand, notwithstanding the inclusive character of such declaration of a legal principle, the rule has been repeatedly announced in the most positive manner, not only by the courts of this state but as well generally throughout the United States, that in its "strict sense" the doctrine of res adjudicata has no application to decisions either on "interlocutory motions or motions in the course of practice." 42 Cor. Jur. 558; 19 R. C. L. 676; 18 Cal. Jur. 667; 15 Cal. Jur. 112; Estate of Harrington, 147 Cal. 124, 81 P. 546, 109 Am. St. Rep. 118; Gay v. Gay, 146 Cal. 237, 79 P. 885; Johnston v. Brown, 115 Cal. 694, 47 P. 686; Bowers v. Cherokee Bob, 46 Cal. 279; Ford v. Doyle, 44 Cal. 635; Johnson v. Nelson, 43 Cal. App. 113, 184 P. 501; Lawson v. Lawson, 15 Cal. App. 496, 115 P. 461, 464.

[3] And as an additional indication that a ruling, at least on an ordinary motion, is not to be considered as conclusive as between or among the parties to the action or proceeding either of the facts therein at issue or of the law applicable thereto, sections 182 and 183 of the Code of Civil Procedure include provisions to the effect that if a motion be "refused with liberty to renew the same," no valid objection on the ground of "res adjudicata" may be sustained. Moreover, by many different decisions emanating from the courts of this state, it has been directly held that the refusal to grant, or the granting of, permission to renew a motion is a matter of discretion with the trial court. Gay v. Gay, 146 Cal. 237, 79 P. 885; Ventura County v. Clay, 119 Cal. 213, 51 P. 189; Johnston v. Brown, 115 Cal. 694, 47 P. 686; Kenney v. Kelleher, 63 Cal. 442; Bowers v. Cherokee Bob, 46 Cal. 279; Ford v. Doyle, 44 Cal. 637; Johnson v. Nelson, 43 Cal. App. 113, 184 P. 501; Lawson v. Lawson, 15 Cal. App. 496, 115 P. 461, 464; 18 Cal. Jur. 660.

[4] But in recognition of the authorities generally, and admitting the broad power on the part of the trial court to entertain successive motions with regard to the decision either of a disputed matter of fact, or matter of law dependent upon the fact thus established, the further conditional principle has been declared that ordinarily leave to renew a motion should be predicated upon the assumption that at the hearing thereof the moving party can and will produce material and relevant evidence additional to that which he presented on the hearing of the former motion and that the facts which gave rise to such additional evidence either occurred after the date of such former hearing, or that they were not presented at that time "by reason of the surprise or excusable neglect of the moving party." Ford v. Doyle, 44 Cal. 635; Creditors' Adjustment Co. v. Newman, 185 Cal. 509, 197 P. 334; Wheeler v. Eldred, 137 Cal. 37, 69 P. 619. See, also, Lawson v. Lawson, 15 Cal. App. 496, 115 P. 461, 464.

However, as indicating a modification of such latter principle, it has been ruled that because the granting of leave to renew a motion "is within the legal discretion of the court," where it appears that the order was made "upon the same facts more fully stated," ordinarily the Supreme Court "ought not to interfere." Kenney v. Kelleher, 63 Cal. 444.

A reference to some of the authorities by which it has been held that as to certain motions and ensuing orders the doctrine of res adjudicata is inapplicable may be helpful: To vacate a default judgment (Kenney v. Kelleher, 63 Cal. 442); to vacate sheriff's return on execution and to order new sale (Johnson v. Nelson, 43 Cal. App. 113, 184 P. 501); to change place of trial of action (Johnston v. Brown, 115 Cal. 694, 47 P. 686; but see Karst v. Seller, 45 Cal. App. 623, 188 P. 298); to dismiss action (Ventura County v. Clay, 119 Cal. 213, 51 P. 189; Andersen v. Superior Court, 187 Cal. 95, 200 P. 963; Pacific States Corp. v. Grant, 87 Cal. App. 108, 261 P. 1100); in effect to be placed in possession of property (Bowers v. Cherokee Bob, 46 Cal. 279); to issue an alias writ, or to require sheriff to execute writ (Ford v. Doyle, 44 Cal. 635); to vacate order of execution of judgment on ground that the summons never was served (Cooper v. Miller, 165 Cal. 31, 130 P. 1048; see, also, Boggs v. Clark, 37 Cal. 236); for alimony (Gay v. Gay, 146 Cal. 237, 79 P. 885).

In the case of Andersen v. Superior Court, 187 Cal. 95, 102, 200 P. 963, 966, it is said: "Section 182 [Code Civ. Proc.] does not apply to the renewal of a motion refused for informality of the moving papers or proceedings, or in cases where leave to renew is given, and, in any event, does not go to the jurisdiction of the court to entertain a second motion. * * *"

[5, 6] Concretely, the point urged by the petitioner is that the respondent court having once ruled adversely on the motion to increase the amount of the undertaking, at least in the absence of additional facts, or inadvertence, or mistake of fact, the said court thereafter was without jurisdiction either to vacate its former order, or to make a new order by which the amount of the undertaking would be increased.

On the part of respondent no claim is made that the ruling on either the first motion, or on the "rehearing" thereof, was made either by reason of any inadvertence, or because of any mistake of fact. However, it is suggested that an additional material fact appeared

on the hearing of the last motion which was not presented on the hearing of either of the preceding motions, in that, notwithstanding the fact that the affidavits presented in support of each of the several motions to increase the amount of the undertaking contained the allegation that the total damages which would be sustained by the defendant by reason of the alleged wrongful attachment was the sum of $60,000, the allegation contained both in the first motion and in the so-called "rehearing" thereof was that the damages which then had accrued amounted to the sum of $17,000; whereas, in the affidavits which supported the last motion the accrued damages were stated as, and fixed at, the sum of $40,000. It will thus be noted that the ultimate damage which the defendant claimed would result from the alleged wrongful attachment remained consistently stationary throughout the several motions, to wit, at the sum of $60,000; but that a considerable difference existed between the amount of damages which had accrued at the time the first order was made, and the amount which had accrued at the time when the last motion was presented.

With reference to the amount of the undertaking, the requirement of the controlling statute (section 539, Code Civ. Proc.) is that it shall be "in the sum of not less than two hundred dollars and not exceeding the amount claimed by the plaintiff, * * * to the effect that if the defendant recovers judgment, the plaintiff will pay all costs that may be awarded to the defendant and all damages which he may sustain by reason of the attachment. * * *" Aside from the item of "costs," it is clear that the entire concern of the defendant in the matter of damages is the total amount of damages "which he may sustain by reason of the attachment." Although the amount of damages which a defendant may suffer from day to day, or from month to month, during the progress of the action is not made the statutory basis for a determination of the amount of the required undertaking, it is, of course, plain that the total amount of damage may be made up from several different items, as to each of which, from various and sundry causes, the amount may vary by an increase or by a decrease thereof. In the first instance, upon the application by the plaintiff for the writ, the clerk of the court is interested in casually ascertaining, not necessarily what the details or the items of the total damage which may result to the defendant may be, but rather has his attention centered on or attracted to the question of what damages in the aggregate may be sustained by the defendant from the wrongful issuance and the execution of the writ. And to some extent, the same situation applies to the court on the hearing of the motion to increase the amount of the undertaking. Although the ultimate fact for determination is what probable total damages will the defendant sustain should it finally be determined that the writ of attachment was wrongfully issued and executed, on the presentation of a question of whether the undertaking should be increased, it is evident that the various items of either accrued or of anticipated damage may be material in reaching a proper conclusion. If new or additional items of damage appear to have resulted, they may have a distinct bearing upon the total amount to be suffered by the defendant; and if it appear that as to any formerly enumerated or considered items the damage has so materially increased as substantially to affect the gross amount of damage, such fact also should have a part in enabling the court to reach a just conclusion. At the outset, on the original application to the clerk the allegation with reference to anticipated damage may be more or less conjectural in its nature; but as time progresses and the facts with reference to the various items of anticipated damage become established, either as dependent and inevitable, or as vague, unreliable, or contingent, the more certainly and accurately the ultimate damage to the defendant may be computed. And so it becomes evident that a positive statement under oath of an increased amount in an item or items of either an accrued damage to, or of one thereafter to be suffered by, the defendant becomes an allegation of a material additional fact which may justify a renewal of the motion to increase the amount of the undertaking on the attachment, and which fact properly may be considered by the court in arriving at a conclusion.

Although by the language employed in sections 182 and 183 of the Code of Procedure it may be understood that preceding the renewal of a motion theretofore refused "liberty to renew the same" must first be obtained from the court, it has been held that the hearing of the second motion and the granting of the order sought thereby constitute an implied permission to renew the motion. 42 Cor. Jur. 525, and authorities there cited; Kenney v. Kelleher, 63 Cal. 442; Bowers v. Cherokee Bob, 46 Cal. 279.

Reverting to the order under consideration, it becomes clear that it may not be used "as the basis of the order which is finally entered granting or denying the relief sought." The undertaking on a writ of attachment is merely a requirement precedent to the issuance of the writ. Even the writ itself does not serve as a "basis" for any judgment which may be rendered in favor of the plaintiff in the action. The writ is entirely incidental to the action; it may, or it may not, be issued. In no way does its issuance tend to a determination of the issues in the action, nor does it assist in a conclusion with reference thereto. Nor is the order here in question appealable. (Section 963, Code Civ. Proc.)

The conclusion of this court is that the lower court had jurisdiction in the premises. It follows that the writ of prohibition issued out of this court should be discharged. It is so ordered.

We concur: CONREY, P. J.; YORK, J.

132 Cal.App. 124

HOWARD v. HOWARD.

Civ. 1229.

District Court of Appeal, Fourth District, California.

May 19, 1933.

Hearing Denied by Supreme Court July 17, 1933.

1. Automobiles ⇐181(1).

"Willful misconduct," within automobile guest statute, is something apart from negligence, even "gross negligence," and involves distinct positive element, rather than merely negative element of negligence or carelessness (St. 1923, p. 517, § 141¾, as added by St. 1929, p. 1580, as amended by St. 1931, p. 1693).

Term "gross negligence" has been defined as the want of slight diligence, as an entire failure to exercise care, or the exercise of so slight a degree of care as to justify the belief that there was an indifference to the things and welfare of others, and as that want of care which would raise presumption of the conscious indifference to consequences. "Gross negligence" is merely such a lack of care as may be presumed to indicate a passive and indifferent attitude toward results, while "willful misconduct" involves a more positive intent actually to harm another or to do an act with a positive, active, and absolute disregard of its consequences.

[Ed. Note.—For other definitions of "Gross Negligence" and "Willful Misconduct," see Words and Phrases.]

2. Automobiles ⇐181(1).

Word "willful," used in phrase "willful misconduct" within automobile guest statute, implies intent, but intention relates to misconduct and not merely to fact that some act was intentionally done (St. 1923, p. 517, § 141¾, as added by St. 1929, p. 1580, as amended by St. 1931, p. 1693).

[Ed. Note.—For other definitions of "Willful; Willfully," see Words and Phrases.]

3. Automobiles ⇐181(1).

"Willful misconduct," within automobile guest statute, does not mean sort of misconduct involved in any negligence or intent to do act which constitutes negligence (St. 1923, p. 517, § 141¾, as added by St. 1929, p. 1580, as amended by St. 1931, p. 1693).

4. Automobiles ⇐181(1).

"Willful misconduct," within automobile guest statute, implies at least intentional doing of something either with knowledge that serious injury is probable result, or intentional doing of act with wanton and reckless disregard of possible result (St. 1923, p. 517, § 141¾, as added by St. 1929, p. 1580, as amended by St. 1931, p. 1693).

Under foregoing rule, intentional doing of act with a wanton and reckless disregard of its possible consequences implies the doing of such an act either with the intent that harm shall result therefrom, or in the attitude of mind of not caring if it does result in injury.

5. Automobiles ⇐181(1).

Recklessness of automobile driver in sense of being careless is only negligence, and does not constitute "willful misconduct" within automobile guest statute (St. 1923, p. 517, § 141¾, as added by St. 1929, p. 1580, as amended by St. 1931, p. 1693).

6. Automobiles ⇐244(20).

In action for death of guest in automobile, evidence *held* insufficient to support finding that driver was guilty of willful misconduct based on driving fast on wet pavement approaching slight curve (St. 1923, p. 517, § 141¾, as added by St. 1929, p. 1580, as amended by St. 1931, p. 1693).

7. Automobiles ⇐181(1).

No recovery may be had for injuries to, or death of, guest in automobile, where act of driver of automobile complained of constitutes, in truth and in fact, ordinary or gross negligence and nothing more (St. 1923, p. 517, § 141¾, as added by St. 1929, p. 1580, as amended by St. 1931, p. 1693).

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Action by Alice Howard against Homer C. Howard. From a judgment in favor of the plaintiff, the defendant appeals.

Judgment reversed.

Christian Hoeppner and Wakefield & Hansen, all of Fresno, for appellant.

J. A. Chase, of Visalia, for respondent.

BARNARD, Presiding Justice.

This is an appeal from a judgment in favor of the plaintiff based upon a fourth amended complaint charging willful misconduct on the part of the defendant. Plaintiff, who lived in Visalia with her two sons, Homer C. Howard and Sammie Howard, had gone to Santa Cruz on November 10, 1931.

On the evening of that day, the two boys started from Visalia to join their mother at Santa Cruz, it being conceded that Sammie was riding as the guest of his brother in his automobile. It was raining or sprinkling and the pavement was wet. As they reached the outskirts of Visalia, near a point where a paved highway joins the city pavement, Homer, who was driving, saw an automobile approaching which appeared to be in the center of the paved highway. He kept on the highway, thinking the other car would get over, and when he finally saw that car was not getting over, he turned to the right, whereupon his car began to skid, left the pavement, and turned over, causing injuries to his bother Sammie, from which he later died.

This action, brought by the mother against the surviving son, was tried by the court without a jury. The court found that the deceased was riding as the guest of his brother on pavement which was wet from rain then falling, and then found as follows:

"That defendant having full knowledge of the wet and slippery condition of said pavement, that in order to follow the pavement westerly on said street, he was required to change the direction of said automobile, and that in making such a change of direction, the wheels of said automobile would slip, skid or slide sideways and thereby cause him to lose control of said automobile, wilfully continued to increase and accelerate the speed of said automobile to a high rate of speed, and in changing the direction of said automobile while traveling at such high rate of speed, at or near a curve in said West Main street, the said automobile skidded sideways and defendant by reason thereof lost control of said automobile, and thereupon said automobile upset and turned completely over."

"That the manner in which defendant operated said automobile at the time of and immediately prior to its upsetting, under conditions then existing, constituted wilful misconduct of defendant, and such wilful misconduct of defendant was the proximate cause of the injuries to and death of said Sammie Hamilton Howard."

Appellant is charged with willful misconduct in that he drove too fast over a wet pavement, especially in view of the fact that near the point of the accident there was a slight curve in the road. The only evidence as to this curve is that "it is three degrees and fifty-seven minutes, the angle of declination being so small—." The only other evidence material here may be thus summarized: The appellant testified that he was twenty-one years old; that he had been driving a car for six years and this particular car for one year; that this car would run about sixty-five miles an hour and was in good condition; that he was thoroughly familiar with the street where the accident occurred but had never paid much attention to the curve; that the pavement was wet on this occasion; that he had previously driven this car on pavements when it was raining and that it had never slipped sideways; that when they were near an oak tree which stands near the western edge of Visalia, his brother told him he was driving too fast for such a wet pavement and that "I told him that I was in a hurry and that we could not lose any time"; that Sammie said nothing more about his driving; that the accident occurred some four or five blocks beyond the tree; that his car did not skid until he turned to get out of the way of an approaching car; that he did not turn until it was necessary to get out of the way of this car; that he did not know how fast he was going at the time his car started to skid; that he thought he was traveling between thirty and thirty-five miles per hour at that time but did not know exactly; and that when he passed the oak tree he was traveling approximately twenty-five miles an hour. When asked if he increased his speed after passing the tree, he replied, "Apparently I did." He also testified that they left their home in Visalia at 25 minutes to 7 o'clock, that they wanted to reach Santa Cruz before a dance closed, and that they "had planned" to reach Fresno at 7 o'clock. It does not appear when they planned this, but apparently not after they left at 6:35, as this would have required making more than one hundred miles per hour which he knew he could not do. Another witness testified as to a conversation he had with the appellant shortly after the accident, as follows:

"A. I asked him how he came to have the accident and he said the mother was in Santa Cruz and they were going up there and he said he was in a hurry and when they got out to the edge of town he was stepping on it and shoved it to the floor board. He said he shoved the accelerator to the floor board and he said he was going too fast.

"Q. Was there any further conversation there at that time? A. Well he said that the highway was slick and he run off the highway, and it got out of his control and that there was all there was. And sliding and skidding and turned over."

[1] The main question presented is whether this evidence will support a judgment based upon willful misconduct on the part of the appellant. The only direct evidence of speed is that appellant was running thirty or thirty-five miles an hour. While there is evidence that he pushed the accelerator to the floor board, there is no evidence as to how long it was kept there or when this was done. While an inference may be drawn that the appellant was driving too fast under the circumstances, the question is whether such an inference is sufficient, under the facts

of this case, to establish that willful misconduct which recent developments in our law have made essential to a recovery in such a case as this. To meet certain well-known evils that had arisen, the Legislature in 1929 eliminated ordinary negligence as a basis for recovery in guest cases. This not proving sufficient to accomplish the end desired, gross negligence also was eliminated in 1931, and before the incident involved here, making it necessary aside from intoxication, to prove willful misconduct in order to recover on account of injuries received by a guest. It seems to us that the intent of the Legislature, as expressed in these enactments, requires that willful misconduct be interpreted as something quite different from negligence, even gross negligence, and that it involves distinct positive elements rather than the merely negative elements of negligence or carelessness.

In Krause v. Rarity, 210 Cal. 644, 293 P. 62, 66, 77 A. L. R. 1327, it is said: "The term 'gross negligence' has been defined as 'the want of slight diligence,' as 'an entire failure to exercise care, or the exercise of so slight a degree of care as to justify the belief that there was an indifference to the things and welfare of others,' and as 'that want of care which would raise a presumption of the conscious indifference to consequences.'"

In Helme v. Great Western Milling Co., 43 Cal. App. 416, 185 P. 510, 512, the court said: "'Willful misconduct' means something different from and more than negligence, however gross. The term 'serious and willful misconduct' is described by the Supreme Judicial Court of Massachusetts as being something 'much more than mere negligence, or even gross or culpable negligence,' and as involving 'conduct of a quasi criminal nature, the intentional doing of something either with the knowledge that it is likely to result in serious injury or with a wanton and reckless disregard of its probable consequences.' In re Burns, 218 Mass. 8, Ann. Cas. 1916A, 787, 105 N. E. 601. The mere failure to perform a statutory duty is not, alone, willful misconduct. It amounts only to simple negligence. To constitute 'willful misconduct' there must be actual knowledge, or that which in the law is esteemed to be the equivalent of actual knowledge, of the peril to be apprehended from the failure to act, coupled with a conscious failure to act to the end of averting injury."

[2-4] While the line between gross negligence and willful misconduct may not always be easy to draw, a distinction appears from the definition given in that gross negligence is merely such a lack of care as may be presumed to indicate a passive and indifferent attitude towards results, while willful misconduct involves a more positive intent actually to harm another or to do an act with a positive, active, and absolute disregard of its consequences. It seems clear that in excluding all forms of negligence as a basis for recovery in a guest case, the Legislature must have intended that to permit a recovery in such a case the thing done by a defendant must amount to misconduct as distinguished from negligence, and that this misconduct must be willful. While the word "willful" implies an intent, the intention referred to relates to the misconduct and not merely to the fact that some act was intentionally done. In ordinary negligence, and presumably more so in gross negligence, the element of intent to do the act is present and any negligence might be termed misconduct. But willful misconduct as used in this statute means neither the sort of misconduct involved in any negligence nor the mere intent to do the act which constitutes negligence. Willful misconduct implies at least the intentional doing of something either with a knowledge that serious injury is a *probable* (as distinguished from a possible) result, or the intentional doing of an act with a wanton and reckless disregard of its possible result.

[5, 6] Applying these rules to the case before us, and conceding that this driver must have known that driving on a wet road might possibly result in injury, it seems clear that the evidence does not justify the belief that he increased his speed with the knowledge or belief or expectation that any serious injury was probable. He had driven a car for six years and this particular car for one year, had driven it in the rain without its skidding, and without doubt he believed he could do this again. If he may be said to have disregarded the possible consequences of his act, such disregard was due to carelessness rather than to wantonness and recklessness, and was undoubtedly based upon his belief that no injury was probable. While he may be said to have been reckless in the sense of being careless, that is only negligence and is not within the statute. But the intentional doing of an act with a wanton and reckless disregard of its possible consequences implies the doing of such an act either with the intent that harm shall result therefrom or in the attitude of mind of not caring if it does result in injury. No such intent and no such attitude of mind on the part of this appellant here appears. There is nothing in the evidence to show or even indicate that the appellant in driving as he did, even though the pavement was wet, either had actual knowledge or in law is chargeable with actual knowledge that his course of action constituted a real present peril, and that knowing such peril existed he consciously and intentionally failed to act to avoid the peril and avert an injury. The only conclusion possible from reading the evidence before us is that while the appellant was in a hurry and desired to proceed

as rapidly as he could, he was not even indifferent to results but, on the contrary, had a fixed desire to arrive at his destination in time to attend a dance before it closed. It clearly appears that, although he proved to be mistaken, he thought he could safely drive as he did even though the pavement was wet; that while he intended to drive rather rapidly he neither intended the result that happened nor was indifferent to the same; and that he was far from being in such a frame of mind that he did not care whether or not he injured any one. While this driver may have been negligent in a greater or less degree, in our opinion, no willful misconduct within the meaning of this statute is disclosed by this evidence.

[7] We think it was the intention of the Legislature in its successive enactments, as set forth in section 141¾ of the California Vehicle Act (as amended by St. 1931, p. 1693), to prevent a recovery on account of injuries received by a guest in just such cases as this, where the acts complained of constitute, in truth and in fact, ordinary or gross negligence and nothing more.

For the reasons given the judgment is reversed.

We concur: JENNINGS, J.; ANDREWS, Justice pro tem.

131 Cal.App. 757

NELSON v. CALIFORNIA CONST. CO.

Civ. 808.

District Court of Appeal, Fourth District, California.

May 12, 1933.

1. Automobiles ⇐206.

Driver of automobile has right to assume driver of approaching vehicle will move to right.

2. Automobiles ⇐209.

Truck owner could not successfully contend that driver of passing vehicle was negligent in proceeding through narrow space, where lack of space was due to manner of driving truck.

3. Automobiles ⇐244(12).

Evidence sustained finding that collision between automobiles passing and following truck, when wheel of passing car slipped into trench, was due to truck driver's negligence in running to left of center of highway.

4. Appeal and error ⇐1011(1).

Trial court's determination of fact questions on conflicting evidence is final.

Appeal from Superior Court, Tulare County; Frank Lamberson, Judge.

Action by W. C. Nelson against the California Construction Company. Judgment for plaintiff, and defendant appeals.

Affirmed.

Ray W. Hays, of Fresno, for appellant.

Farnsworth, Burke & Maddox, of Visalia, for respondent.

CAMPBELL, Justice pro tem.

In this action respondent sought judgment for personal injuries and property damages alleged to have resulted from the negligence of defendant. The case was tried before the court without a jury. Judgment was rendered for respondent. The facts are briefly summarized as follows: Respondent and his family were proceeding southerly on the Golden State highway between the towns of Tipton and Pixley, in Tulare county, Cal. He reached a place on the highway where it was in process of being widened and resurfaced. There was a header-board on the east side of the pavement, flush with the old paved part of the highway. On the west side of the highway there was a trench about four to six inches deep and four feet wide, and a header-board placed on the westerly edge of this trench. On this particular morning the surface of the highway was damp. A white line marked the center of the highway. Appellant's driver, at the time of the collision, was driving an empty water tank-truck northerly on the highway. He was being followed by a Studebaker automobile. At the point where the collision occurred the right rear wheel of respondent's car slipped into the trench and caused it to veer sharply to the left, striking the Studebaker automobile and causing the damage. Appellant contends that there are certain disputed questions of fact, to wit: (1) The width of the paved portion of the highway; (2) the speed of Nelson's car; and (3) the position of appellant's car on the highway with relation to the center line thereof.

The evidence shows that the highway was approximately sixteen feet six inches wide at the place of the accident, and various witnesses fixed the speed of respondent's car from twenty-five to forty miles an hour. All the witnesses, save appellant's driver, are agreed that appellant's truck was being driven about a foot or a foot and a half to the left-hand side of the center of the highway. By the findings, all of the so-called disputed facts were resolved against appellant by the trial court, either directly or impliedly.

Appellant contends that the trial court erred in finding negligence on the part of the appellant's driver. Various witnesses testified as to the width of the truck, and estimates

were placed from five and a half to eight feet in width. The evidence shows that appellant's truck held steadily to its course with the left wheels from a foot to a foot and a half to the left of the center line of the pavement. In attempting to pass the truck, the right rear wheel of respondent's automobile dropped over the west edge of the pavement. The car went out of control and ran diagonally across the pavement and collided with the automobile which was following the truck, with disastrous results to respondent and his family. The evidence shows that there was no reason why appellant's truck should have been on the wrong side of the highway.

[1] As the two vehicles were approaching each other respondent had a right to assume that appellant's truck would abide by the law and move over to the right so that he could pass without interference. In the case of Hagenah v. Bidwell, 46 Cal. App. 556, 560, 189 P. 799, 801, the court says: "It is the duty of the driver of a vehicle who is suddenly confronted with danger, though arising from the fault of another, to seek to avoid a collision. Skene v. Graham, 114 Me. 229, 95 A. 950; Hartley v. Lasater, 96 Wash. 407, 165 P. 106. Whether he has taken the proper course depends upon all the circumstances of the case. Hartley v. Lasater, supra; Harrington v. Los Angeles Ry. Co., 140 Cal. 514, 521, 98 Am. St. Rep. 85, 63 L. R. A. 238, 74 P. 15; County of Alameda v. Tieslau [44 Cal. App. 332], 186 P. 398."

[2, 3] Respondent had three possible choices as the appellant's truck steadily approached on the left of the center of the pavement: (1) To go out in the ditch on the west side of the pavement and on his right-hand side. This might be an exceedingly dangerous thing to do. (2) He could have stopped. A question remains, however, as to whether he could stop in time after realizing that the truck was not going to swerve to its right. (3) He could do as he did, that is, attempt to pass the truck in the space that was open. While it was possible, mathematically, for respondent's automobile to pass, that course involved practical difficulties. By its findings, the trial court determined that the last course, and the one chosen by respondent, offered most hope for safety. The evidence shows that the lack of space for respondent's automobile to pass was caused entirely by reason of appellant's truck being driven to the left of the center of the pavement. Appellant cannot, therefore, successfully assert that it was error on the part of respondent to attempt to pass appellant's truck. To permit appellant to avail itself here of such defense, in a situation which it had thus created, would be to permit it to take advantage of its own wrong. Section 2927 of Thompson on Negligence states: "It is a principle of obvious justice that one person cannot impute negligence to the act of another, which act has been induced by the negligence or wrongful act or omission of the former."

[4] Appellant contends that the respondent was guilty of contributory negligence on the ground that he was driving at a highly dangerous and reckless speed. The evidence pointed out by appellant merely shows a conflict, and the trial court resolved that conflict in favor of respondent. The appellate court cannot set aside the trial court's determination of such conflict. The case at bar resolves itself into a question of fact and not a question of law, and the trial court having found against the appellant on the disputed facts, its decision will not be disturbed on appeal.

Appellant complains of certain rulings of the trial court on the admission of evidence, and assigns them as error. The errors, if any, were harmless and were in no way prejudicial to the appellant.

Judgment appealed from is affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

131 Cal.App. 787

Leland NELSON, by W. C. Nelson, his Guardian ad Litem, Plaintiff and Respondent, v. CALIFORNIA CONSTRUCTION COMPANY (a Corporation), Defendant and Appellant.

Civ. 805.

District Court of Appeal, Fourth District, California.

May 12, 1933.

Appeal from Superior Court, Tulare County; Frank Lamberson, Judge.

Ray W. Hays, of Fresno, for appellant.

Farnsworth, Burke & Maddox, of Visalia, for respondent.

CAMPBELL, Justice pro tem.

The facts and questions of law involved herein are identical with those in the case of Nelson v. California Construction Company, a corporation (Cal. App.) 22 P.(2d) 282, this day decided, and for the reasons there given the judgment here appealed from is affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

131 Cal.App. 788

Henrietta NELSON, by W. C. Nelson, her Guardian ad Litem, Plaintiff and Respondent, v. CALIFORNIA CONSTRUCTION COMPANY (a Corporation), Defendant and Appellant.

Civ. 806.

District Court of Appeal, Fourth District, California.

May 12, 1933.

Appeal from Superior Court, Tulare County; Frank Lamberson, Judge.

Ray W. Hays, of Fresno, for appellant.

Farnsworth, Burke & Maddox, of Visalia, for respondent.

CAMPBELL, Justice pro tem.

The facts and questions of law involved herein are identical with those in the case of Nelson v. California Construction Company, a corporation (Cal. App.) 22 P.(2d) 282, this day decided, and for the reasons there given the judgment here appealed from is affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

131 Cal.App. 788

Lillie S. NELSON, Plaintiff and Respondent, v. CALIFORNIA CONSTRUCTION COMPANY (a Corporation), Defendant and Appellant.

Civ. 807.

District Court of Appeal, Fourth District, California.

May 12, 1933.

Appeal from Superior Court, Tulare County; Frank Lamberson, Judge.

Ray W. Hays, of Fresno, for appellant.

Farnsworth, Burke & Maddox, of Visalia, for respondent.

CAMPBELL, Justice pro tem.

The facts and questions of law involved herein are identical with those in the case of Nelson v. California Construction Company, a corporation (Cal. App.) 22 P.(2d) 282, this day decided, and for the reasons there given the judgment here appealed from is affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

132 Cal.App. 89

PEOPLE v. NOONE.

Cr. 245.

District Court of Appeal, Fourth District, California.

May 18, 1933.

Hearing Denied by Supreme Court June 15, 1933.

1. Criminal law ⇐982.

By making application for probation, defendant waives pronouncement of judgment.

2. Criminal law ⇐1023(12).

Where no final judgment of conviction was rendered, order granting probation and imposing conditions in connection therewith was not "order made after judgment," and appeal therefrom would not lie (Pen. Code, § 1237).

[Ed. Note.—For other definitions of "Order (In Practice)," see Words and Phrases.]

3. Criminal law ⇐334.

People had burden of showing missing witness was dead or out of state, or that with due diligence he could not be located within state, before people could introduce his testimony given at defendant's preliminary examination (Pen. Code, § 686, subd. 3).

4. Criminal law ⇐541.

Defendant could insist on strict compliance with statutory provision respecting allowing deposition of witness taken on preliminary examination to be read (Pen. Code, § 686, subd. 3).

5. Criminal law ⇐543(2).

Question whether state used due diligence to find witness whose testimony on preliminary examination was sought to be introduced is addressed to trial court's discretion (Pen. Code, § 686, subd. 3).

6. Criminal law ⇐1158(4).

Trial court's determination of whether state used due diligence to find witness whose testimony on preliminary examination was sought to be introduced will not be disturbed on appeal, unless abuse of discretion clearly appears (Pen. Code, § 686, subd. 3).

7. Criminal law ⇐543(2).

In determining whether state used due diligence to find witness whose testimony on preliminary examination was sought to be introduced, each case must be determined on its own facts (Pen. Code, § 686, subd. 3).

8. Criminal law ⇐1144(12).

Presumption on appeal is that trial court's discretion in determining whether state used due diligence in finding witness whose testimony on preliminary examination is sought to be introduced has been properly exercised (Pen. Code, § 686, subd. 3).

9. Criminal law ⇐736(1), 1158(4).

Whether sufficient showing has been made to warrant reception in evidence of tes-

timony of absent witness given at defendant's preliminary examination is primarily question for trial court, and its solution will not be disturbed if there is substantial evidence supporting conclusion (Pen. Code, § 686, subd. 3).

10. Criminal law ⇐543(2).

Where witness, Marine Corps private, was placed in confinement at marine base, but was subsequently dishonorably discharged before trial without state's knowledge, there was no such obvious lack of diligence by state in failing sooner to have subpœna served as showed abuse of discretion in permitting deposition of witness given at defendant's preliminary examination to be read (Pen. Code, § 686).

11. Criminal law ⇐543(2).

Record did not show lack of due diligence of state in endeavoring to locate witness so as to show abuse of court's discretion in admitting transcript of witness' testimony at defendant's preliminary examination (Pen. Code, § 686).

Record disclosed that deputy sheriff, after learning that witness had been dishonorably discharged from Marine Corps, and had left forwarding address in South Carolina, had searched city and county directories, registration lists, and telephone directories of all towns and villages in county, that during court recess he again went to marine base, and interviewed officers, who made inquiry of men in company, and found that only three men of company knew witness.

12. Criminal law ⇐543(2).

Evidence that absent witness had departed from state and had left forwarding address in another state justified court's holding that state was not required before introducing his testimony given on preliminary examination to show that subpœnas had been sent to counties in California other than county of trial.

13. Criminal law ⇐1170½(1).

Permitting witness to refresh recollection by examining written statements read by accomplice in presence of defendant at police station, if error, *held* harmless, where another witness testified regarding what accomplice stated in defendant's presence (Code Civ. Proc. § 2047).

14. Criminal law ⇐829(10).

Refusing proper instructions respecting corroborative evidence of accomplice *held* not error requiring new trial, where other instructions fully advised jury regarding applicable legal principles.

Appeal from Superior Court, San Diego County; L. N. Turrentine, Judge.

John J. Noone was convicted of violating Penal Code, § 288a, and, from an order fixing terms of probation and from an order denying motion for a new trial, defendant appeals.

Affirmed.

E. L. Johnson, of San Diego, and Thomas P. Mackey, of New York City, for appellant.

U. S. Webb, Atty. Gen., and John L. Flynn, Deputy Atty. Gen., for the People.

CAMPBELL, Justice pro tem.

The defendant was charged by an information filed by the district attorney of San Diego county with having committed the offense denounced by section 288a of the Penal Code. Upon being arraigned, he entered a plea of not guilty, and was tried before a jury, which returned a verdict of conviction. He thereupon presented a motion for new trial, and at the same time made application for probation. His motion for new trial was denied, and the application for probation was granted upon conditions that were stated in the order of probation. From the order fixing the terms of probation and from the order of the court denying his motion for new trial the defendant prosecutes this appeal.

[1, 2] It may be observed at the outset that the defendant's appeal from the order granting his application for probation and imposing certain conditions in connection therewith is without merit. By making application for probation, he waived pronouncement of judgment. People v. De Voe, 123 Cal. App. 233, 11 P.(2d) 26. Section 1237 of the Penal Code permits an appeal by a defendant "from a final judgment of conviction; * * * from any order made after judgment, affecting the substantial rights of the party." Since it appears that no "final judgment of conviction" was rendered, the order granting probation and imposing conditions in connection therewith was not an order made after judgment, and an appeal from it does not lie. People v. Patello, 125 Cal. App. 480, 13 P.(2d) 1068. His appeal from the court's order denying his motion for a new trial is, however, entitled to consideration, since section 1237 of the Penal Code specifically permits an appeal from such an order. In connection with the appeal therefrom, it is contended that the court erred in refusing a new trial because the evidence submitted was insufficient to support the verdict and for the further reason that certain evidence was improperly admitted.

It appears from the record that the defendant and one William Buice, a private in the United States Marine Corps, were arrested on October 23, 1932, at a hotel in San Diego, Cal., by two naval intelligence officers, Benjamin Whitehead and J. E. Hansen. They

were taken to the local police station, where Buice made a written statement accusing defendant of the charge in the information. The defendant was arraigned in the superior court of San Diego county, and entered a plea of not guilty. On motion of the district attorney, the case was set for trial on November 10, 1932. The case appeared on the calendar on November 3d, 9th, 17th, 18th, and 25th, and was finally reached for trial on November 29, 1932. The prosecution did not produce the witness Buice at the trial. The transcript of Buice's testimony taken at the preliminary examination was admitted in evidence over the objection of the defendant. The court ruled that the people had shown due diligence in attempting to locate Buice within the county of San Diego after an adjournment of the trial from November 30 to December 5, 1932, was granted, to allow the prosecution further opportunity to make a search for the missing witness.

Section 686 of the Penal Code provides in part:

"* * * 3. To produce witnesses on his behalf and to be confronted with the witnesses against him, in the presence of the court, except that where the charge has been preliminarily examined before a committing magistrate and the testimony taken down by question and answer in the presence of the defendant, who has, either in person or by counsel, cross-examined or had an opportunity to cross-examine the witness; or where the testimony of a witness on the part of the people, who is unable to give security for his appearance, has been taken conditionally in the like manner in the presence of the defendant, who has, either in person or by counsel, cross-examined or had an opportunity to cross-examine the witness, the deposition of such witness may be read, upon its being satisfactorily shown to the court that he is dead or insane, or cannot with due diligence be found within the state; and except also that in the case of offenses hereafter committed the testimony on behalf of the people or the defendant of a witness deceased, insane, out of jurisdiction, or who cannot, with due diligence, be found within the state, given on a former trial of the action in the presence of the defendant who has, either in person or by counsel, cross-examined or had an opportunity to cross-examine the witness, may be admitted."

A deputy sheriff testified that on November 28, 1932, one day before the trial commenced, he received a subpœna for William Buice; that he went to the marine base to serve the subpœna, and found that Buice had been dishonorably discharged from the United States Marine Corps on November 14, 1932, and had left a forwarding address of "Saxon, South Carolina"; that he searched the city and county directories, the registration lists, and the telephone directories of all the towns and villages in San Diego county, but could find no one listed by the name of the witness Buice; that during the court recess he again went to the marine base and interviewed the captain and sergeant of Buice's company, who in turn made inquiry of the men in the company; that only three men in the company knew Buice. The deputy sheriff learned that when Buice had been discharged he was led to the gate and told to leave the grounds.

Whitehead, one of the naval intelligence officers, testified that the first time he learned that Buice had been discharged from the Navy was on November 29th; that during the four days' court recess he drove around the streets of San Diego looking for Buice, but without finding him.

An assistant district attorney testified that he had been assigned to the trial of this case on November 28, 1932, at which time he learned for the first time that Buice could not be located. He then sent a telegram to the sheriff at Saxon, S. C., inquiring as to Buice, and received no reply.

Hansen testified that he was a naval intelligence officer; that on October 25, 1932, the day after defendant's arrest, he went to the marine general and had Buice transferred from the S.S. Henderson to the marine base, as "he would be wanted to appear in court"; that Buice was kept as a prisoner at large at the marine base until November 14th, when he was dishonorably discharged; that he (Hansen) was in court on November 9th or 10th when this case was set for November 17th; that on November 28th, the day before the trial commenced, he went to the marine base and inquired of the warden of the brig as to Buice; that he then learned for the first time that Buice had been dishonorably discharged on November 14, 1932; that he had searched around San Diego county and failed to locate him, and found no one who knew of, or who had seen, Buice; that at the time of the arrest Buice was attached to the S. S. Henderson, and Hansen requested that Buice be transferred to the marine base to be used as a witness; that the Henderson had just arrived from the East Coast, and this was the first time that Buice had ever been in San Diego. This witness was not permitted to answer a question as to whether or not he had at any time prior to November 28th attempted to procure the presence of the witness Buice.

[3, 4] Under subdivision 3 of section 686 of the Penal Code, the burden rested upon the people to show that the missing witness was either dead or out of the state, or that with due diligence he could not be located within the state. The defendant had the right to insist upon a strict compliance with this statutory provision before such evidence as is here under attack could be used as evidence

against him at his trial. People v. Hayes, 72 Cal. App. 292, 237 P. 390, 395; People v. Lewandowski, 143 Cal. 574, 77 P. 467, 468; People v. Plyler, 126 Cal. 379, 58 P. 904. In People v. Lewandowski, supra, the Supreme Court, in discussing a similar situation, says: "The trial court should be fully satisfied by the evidence that the absent witness cannot with due diligence be found in the state, before allowing the deposition of such witness, taken on the preliminary examination to be read."

In People v. Hayes, supra, the appellate court says: "The right of the defendant in a criminal case to be confronted with the witnesses against him, while not guaranteed in this state by the Constitution, as it is in some of the Constitutions of the sister commonwealths, but secured only by statutory provision, is one of great value. 'The right * * * is deemed a most substantial one.'" People v. Plyler, supra; People v. Fish, 125 N. Y. 136, at page 150, 26 N. E. 319; State v. Wing, 66 Ohio St. 407, 64 N. E. 514.

[5-7] The question of "due diligence" contains three fundamental elements, to wit: (1) It is addressed to the discretion of the trial court; (2) the trial court's determination will not be disturbed on appeal unless it is clearly shown that there was an abuse of discretion; and (3) each case must be determined upon its own facts.

It must be conceded that the record shows that no attempt was made to subpœna the absent witness until the day before the trial of the case was commenced in the superior court. The failure of respondent to have procured the issuance of a subpœna at an earlier date, bearing in mind that the case was set for trial on November 10, 1932, a date on which the witness was admittedly confined as a prisoner at the marine base in the city of San Diego and could therefore have been served therewith, forms the basis for the principal claim of appellant that there was such failure of due diligence by respondent that the trial court abused its discretion in permitting the transcript of his testimony given at the preliminary examination to be read in evidence.

At first blush, the contention of appellant in this regard appears to be well taken. As above noted, the case was set for trial November 10, 1932. The record shows that on November 3, 1932, appellant was arraigned in the superior court, and that on motion of the district attorney the case was set for trial on November 10, 1932, and that, due to the fact that the department of the superior court to which the case had been assigned for trial was occupied in the trial of other cases, the trial of the instant case was continued from time to time until it was finally reached on November 29, 1932. The record also shows that one of the naval intelligence officers who had made the arrest of appellant and of the witness Buice was present in court when the case was first set for trial on November 10, 1932. The record further shows, however, that, after Buice was arrested on October 23, 1932, he was taken to the marine base and there placed in confinement, and that, unknown to the naval intelligence officers or to the civil officers who were charged with the prosecution of the case, he was dishonorably discharged from United States Marine Corps on November 14, 1932, and released from the marine base. The question which then arises is whether, under these circumstances, it may be said that respondent was so obviously negligent in failing to take the necessary steps to insure the presence of the witness at the trial of the action that it must be declared there was a failure to exercise due diligence.

We entertain the opinion that it is at least open to serious doubt that it should be so declared. The witness had been placed under arrest at the same time that appellant was taken into custody and had been placed in confinement. It was therefore entirely reasonable for the officers who were charged with the duty of conducting the prosecution to assume that the witness would be immediately available at any time within a reasonable period after his arrest and confinement when his presence in court should be required The record shows that the witness did appear and testify at the preliminary examination of appellant on October 27, 1932.

[8] As was well said in Heintz v. Cooper, 104 Cal. 668, 670, 38 P. 511, 512: "'Diligence' is a relative term, incapable of exact definition. What would amount to due diligence under one state of facts would fall absolutely short of it under another and different state of facts. It depends, therefore, so essentially upon the particular circumstances of each case, with all their distinct and varying phases and bearings, as they have appeared to the lower court at the trial and throughout the conduct of the cause, in determining whether diligence has been used in any particular instance, that this court should hesitate to disturb a ruling upon this ground where it has any substance whatever upon which to rest. The presumption is that the discretion has been properly exercised, and that presumption must be overcome by a clear want of facts before the order will be disturbed."

[9, 10] This language was quoted with the observation that it correctly stated the rule in People v. Hewitt, 78 Cal. App. 426, 435, 248 P. 1021, where one of the principal contentions relied upon by the appellant for reversal of the judgment of conviction was that the trial court had abused its discretion in permitting the transcript of the testimony of the absent complainant given at the preliminary examination before the magistrate to be read in evidence. That the problem of determining whether a sufficient showing has been made

to warrant the reception in evidence of the testimony of an absent witness given at the preliminary examination of the defendant in a criminal action before a committing magistrate is primarily one for the trial court, and that its solution of the problem will not be disturbed if there is any evidence of a substantial character to support its conclusion, is well established. People v. Lederer, 17 Cal. App. 369, 119 P. 949; People v. Wilson, 26 Cal. App. 336, 146 P. 1048; People v. Brown, 61 Cal. App. 748, 216 P. 58; People v. Padilla, 81 Cal. App. 528, 254 P. 585; People v. Fay, 82 Cal. App. 62, 255 P. 239. We entertain the opinion that upon the facts presented by the record herein we cannot say there was such an obvious lack of diligence on the part of respondent in having failed sooner to have procured the issuance and service of a subpœna upon the witness Buice that we must now declare that the trial court abused the very wide discretion vested in it in permitting the deposition of this witness given at the preliminary examination of appellant to be read in evidence at the trial.

[11] Nor can we say that there was such lack of due diligence in endeavoring to locate the witness after it was discovered that he had been discharged from United States Marine Corps and released from the marine base that we should declare that the trial court abused its discretion in permitting the transcript of the testimony to be read in evidence.

[12] The record contains some evidence tending to show that the absent witness had departed from the state of California on November 14, 1932, and that he had given a forwarding address which was stated to be "General Delivery, Saxon, South Carolina."

This, we think, amply justified the trial court in holding that the respondent was not required to show that subpœnas requiring the attendance of the witness had been issued and sent to sheriffs of counties in California other than the county of San Diego. In this connection, it should be borne in mind that the witness had arrived in San Diego for the first time only a few days prior to his arrest, and that upon being discharged from the marine corps he gave the above-mentioned forwarding address. It was shown that a telegram addressed to the sheriff at this town inquiring as to the whereabouts of the missing witness was sent by the district attorney of San Diego county on November 30, 1932, and that no response to the telegram was received. It was further shown that search of the directories of the city of San Diego and of the county of San Diego was made, and that effort to locate the missing witness was put forth by inquiry at the marine base in the city of San Diego and by observation of the downtown streets of said city for a number of days.

[13] Objection is made that the trial court permitted the witness Whitehead to refresh his recollection by examination of a written statement which the witness testified was read by the accomplice Buice in the presence of appellant at the police station in the city of San Diego early in the morning of October 24, 1932. The document from which the witness was permitted to refresh his recollection consisted of a statement made by the accomplice narrating what had taken place between appellant and the accomplice during the evening of October 23, 1932, prior to their arrest and reduced to writing. The document was offered in evidence by respondent, but objection to its admission by appellant was sustained. The witness Whitehead was then asked to state what the accomplice had said in the presence of appellant. The witness related from memory a portion of the contents of the written statement which he testified was read in appellant's presence and inquiry was made of him if the testimony he had given was the substance of the accomplice's statement made at the time. The witness thereupon replied: "He might have said more." The court then permitted the witness, over appellant's objection, to refresh his recollection by an examination of the document. The witness enlarged upon his previous testimony, and included a highly incriminatory statement which he testified was made by Buice, the accomplice, in appellant's presence.

The court was undoubtedly correct in sustaining appellant's objection to the admission of the document. It was pure hearsay, and contained certain statements highly incriminatory and exceedingly prejudicial to appellant. The only excuse for placing before the jury a statement of the character above described is not that the statement itself is admissible but that the reaction of the accused thereto may properly be shown. It is at least open to serious question whether under the circumstances presented by the record the court should have permitted the witness to refresh his recollection by an examination of a document which did not at all conform to the provisions of section 2047 of the Code of Civil Procedure. Furthermore, the statement of the witness in attempting to relate from memory what the accomplice had read in appellant's presence that "He might have said more," can hardly be said to have established a sufficient foundation for permitting him to refresh his recollection. Nevertheless, if it be conceded that the court erred in permitting the witness to examine the document, which was clearly inadmissible in evidence, for the purpose of refreshing his recollection, it does not follow that the order refusing a new trial should be reversed. Another witness for respondent testified fully as to what the accomplice had stated in appellant's presence without reference to the document and

without finding it necessary to refresh his recollection, and further testified that appellant remained silent in the face of the accusation. Under the circumstances, therefore, we cannot say that appellant was prejudiced by the court's ruling to which exception has been taken or that a miscarriage of justice has resulted therefrom.

Complaint is made that the record contains insufficient corroboration of the testimony of the accomplice. No useful purpose would be subserved by indulging in a prolonged analysis of the evidence relied upon by respondent as furnishing sufficiently corroboration of the accomplice's testimony. Suffice it to say that the circumstances which surrounded the arrest of appellant and the accomplice were such as to raise more than a mere suspicion of appellant's guilt and strongly tended to connect him with the commission of the offense.

[14] Appellant's final contention is that the court erred in refusing to give to the jury an instruction offered by him relative to the necessity of an accomplice's testimony being sufficiently corroborated. The proffered instruction is in the following language: "You are instructed that corroborative evidence of an accomplice is not sufficient if it merely casts a grave suspicion upon the defendant, and where the circumstances proven, taken separately and collectively, are consistent with the innocence of the defendants, there is no corroboration, and, in such case, it is your duty to find a verdict of not guilty."

This instruction embodies language taken from 12 Cyc. 456, which the Supreme Court, in People v. Robbins, 171 Cal. 466, 470, 154 P. 317, quoted with approval as correctly stating the rule with respect to the corroboration of an accomplice. Concededly it might properly have been given. However, it does not follow that error was committed in its rejection. The jury was instructed that more is required by way of corroboration than mere suspicion, and that, if there are two reasonable conclusions to be drawn from the evidence as a whole, one pointing to the guilt of appellant and one pointing to his innocence, it was the duty of the jury to accept that conclusion which pointed to his innocence. Examination of the instructions in their entirety produces the conviction that the jury was fully and fairly advised by the court as to the legal principles to be applied in its consideration of the facts. We conclude that the refusal of the court to give the proffered instruction was not an error of law which required the court to grant appellant's motion for a new trial.

The orders of the court from which appellant has prosecuted this appeal are therefore affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

218 Cal. 242

RUTHERFORD v. OROVILLE-WYANDOTTE IRR. DIST.

S. F. 14744.

Supreme Court of California.

May 31, 1933.

1. Waters and water courses ⇨257(1).

Outside landowner using water under contract with irrigation district *held* not liable for "stand-by" charge, imposed in addition to "use" charge, in lieu of assessment for extending works of district (St. 1897, p. 273, § 55, as amended by St. 1931, p. 246).

2. Waters and water courses ⇨257(1).

Amount chargeable against inside users of water for extending works of irrigation district cannot be considered in determining whether rates charged inside and outside users are equal (St. 1897, p. 273, § 55, as amended by St. 1931, p. 246).

In Bank.

Original application by J. E. Rutherford against the Oroville-Wyandotte Irrigation District, for mandamus.

Writ of mandamus made peremptory.

George F. Jones, of Oroville, and Douglas Brookman, of San Francisco, for petitioner.

Raymond A. Leonard, of Oroville, and Chickering & Gregory, of San Francisco, for respondent.

Wright & McKee, Leroy A. Wright, and C. M. Monroe, all of San Diego, amici curiæ for Santa Fé Irr. Dist.

CURTIS, Justice.

Petitioner instituted this mandamus proceeding on behalf of himself and others to compel respondent district to issue to petitioner a receipt in full for water delivered to his lands upon the payment theretofore of $6 per acre foot. The controversy between respondent and the group represented by petitioner is of long standing. Various phases of this controversy have been before this court on four different occasions in recent years. Henderson v. Oroville-Wyandotte Irrigation District, 207 Cal. 215, 277 P. 487; Dankert v. Oroville-Wyandotte Irrigation District, 211 Cal. 87, 293 P. 785; Henderson v. Oroville-Wyandotte Irrigation District, 213 Cal. 514, 2 P.(2d) 803; Rutherford v. Oroville-Wyandotte Irrigation District, 215 Cal. 124, 8 P.(2d) 836. The facts and history of the controversy have been fully set forth in these prior cases and no useful purpose would be fulfilled by restating them in full in this opinion. So far as necessary to this opinion these facts may be summarized briefly as follows:

In 1922 respondent district purchased two public utility water companies, the Palermo Land & Water Company and the South Feather Land & Water Company. For many years prior to 1922, these companies had furnished their customers, one of whom is petitioner herein, with water. Before the purchase of the two utilities could be consummated it was necessary to secure the consent of the railroad commission thereto. That commission, after a full hearing, gave its consent to the purchase upon certain enumerated conditions, which conditions were approved and in fact suggested by the respondent district. So far as pertinent here these conditions were that the lands of certain protesting parties formerly served by the utilities, including the lands of petitioner herein, should not be included within the boundaries of respondent district, but should receive a guaranteed flow of water from respondent, for which water such outside users, after 1928, should not be compelled to pay a rate in excess of that charged the inside users for the use of water. The exact words of the contract of purchase in this respect were as follows: "* * * Said (outside) water user shall pay the same charge for water on his land as is paid for water within the * * * District." Another and different rate was provided for the years 1922 to 1928. The parties abided by the terms of this agreement until 1928. Since that time respondent has attempted by one means or another to discriminate between the rates charged inside and outside users. In 1928, the directors of respondent district adopted a resolution fixing the rate to inside users at $5 per acre-foot and to outside users at $7.50 per acre-foot. In Henderson v. Oroville-Wyandotte Irrigation District, 213 Cal. 514, 2 P.(2d) 803, this court affirmed the decision of the trial court to the effect that the contracts between the outside users and respondent district were valid, and that under them the outside users were entitled to be charged for the use of water a rate no greater than was charged inside users for the use of water. It was also held in that case, that in considering whether the rates between the two classes of users were equal, it was not permissible to take into consideration the special land taxes or assessments paid by the inside users. It was held that the evidence clearly showed that the revenues derived from taxes and assessments levied by the district on inside users were largely used for the purpose of paying the interest on the bonded indebtedness of the district and other expenses incurred by respondent in extending its water system. These charges were specifically held not to be a charge for the use of the water, and for that reason, under the contracts of the parties, could not be considered in determining

whether the rates for the two classes of users were equal. It was further held that these charges were not properly or at all chargeable against outside users but could only be charged against inside users, and that the contracts between the parties were entered into with that in mind.

After the above decision had become final, the directors of respondent district adopted a resolution fixing the rate for inside users for the year 1931 at $6 per acre-foot, and $10 per acre-foot for outside users. In Rutherford v. Oroville-Wyandotte Irrigation District, 215 Cal. 124, 8 P.(2d) 836, it was held that this was in violation of the contract. This court reaffirmed the position that it had taken in the prior case, viz.: That the district, under its contracts, must furnish water to the outside users at the same rate charged inside users.

So far as pertinent to the present controversy, the prior decisions above referred to have clearly established the following three propositions:

(1) The contracts between the outside users and respondent district are valid, existing, enforceable obligations.

(2) By these contracts respondent district is prohibited from charging outside users for the use of water a rate in excess of that charged inside users for the use of water.

(3) The land taxes and assessments levied on the lands of inside users cannot be considered in determining whether the rates charged the two classes of users are the same. Such assessments are not a charge for the use of water but are in addition to such charge, and are chargeable only against inside users.

With these preliminary remarks we turn to the facts of the present controversy. It appears that after the decision in the Rutherford Case, supra, had become final, on April 7, 1932, the directors of respondent district, by resolution, purported to fix the rates for outside and inside users for the year 1932, as follows:

(1) A use charge for both outside and inside users of $6 per acre-foot for water delivered.

(2) For all lands both outside and inside the district entitled to water service a stand-by or carrying charge of $2 per acre whether water is actually used or not.

By the terms of the resolution, both the use charge and stand-by charge as to outside users were made payable in advance of service, but as to those users (inside users), where the water charges constitute a prior lien on the property, the charges were not made payable until October 31st.

In this attempt to impose a stand-by or carrying charge on lands both within and without the district, whether such lands actually use water or not, the district purported to act under the provisions of section 55 of the California Irrigation District Act as amended in 1931. Stats. 1931, p. 246. It provides: "For any of the purposes of this act, or of any act supplementary hereto, the board of directors of any irrigation district may, in lieu (either in whole or in part) of levying assessments as herein provided, fix and collect rates of tolls or charges for the use of water which may include a stand-by or carrying charge notwithstanding the water is not actually used, or any other public use of which the district is in charge, under such reasonable rules and regulations as the board may prescribe, which may provide, in the case of water for irrigation, that tolls or charges will be payable only in case of the delivery of water in excess of a specified quantity per unit of land."

Petitioner contends that it is in violation of his contract with respondent district to thus impose a stand-by charge on his lands whether water is used or not; that the contract, as interpreted by the prior decisions of this court, permits only a charge for the use of water; that the only lawful charge that can be imposed on petitioner is the "use" charge of $6 per acre; that, in any event, the resolution above mentioned discriminates against the outside users because it requires them to pay in advance while inside users are not required to pay until October 31st. Petitioner has tendered the acre-foot charge of $6 per acre for water furnished to him, and has demanded a receipt in full. Upon respondent district refusing to accept such payment and to issue a receipt in full, petitioner deposited the proper amount in a bank to respondent's order. The answer of respondent district denies that the imposition of the stand-by charge violates the contract between the parties, or violates the previous decisions of this court.

After the answer of respondent district had been filed, the petitioner asked for and received the permission of this court to amend his petition. These amendments clarify, to a considerable extent, the problems herein presented. It is therein alleged that since 1928 respondent district has outstanding bonds of the aggregate face value of $1,054,000; that the interest rate thereon is 6 per cent. per annum which amounts to an annual bond obligation of the district of $63,240; that respondent district comprises 24,200 acres, of which only 2,068 acres are receiving water; that heretofore the district has always assessed the land within its borders for land taxes at $100 per acre; that in 1928 and 1929 the directors of the district fixed a land tax or assessment on lands within the district of $2 for each $100 of assessed value or the equivalent of $2 per acre; that in 1930 and 1931 this land tax was fixed at $3 per acre; that after the petition herein

had been filed, on September 14, 1932, the directors of respondent district by resolution reduced this land tax from $3 per acre to 10 cents per acre for the year 1932; that the revenue to be derived from the land tax at 10 cents per acre will amount to but $2,420 per year, which is far below the bond interest obligations of respondent district. Petitioner further alleges that the imposition of this stand-by charge was designed by the respondent district for the purpose and has the effect of requiring petitioner and the other outside users, under the guise of a stand-by charge, to pay the interest on the bonded indebtedness of respondent district and to pay other expenses incurred by the district in extending its water system. It is contended that this is in violation of the contract between the parties as interpreted by this court in prior decisions. We agree with this contention.

The answer of respondent district to these amendments is most evasive. Respondent district denies that the imposition of the stand-by charge has the effect of requiring the outside users to pay expenses properly not chargeable to them. Respondent district expressly admits passing the resolution lowering the land tax on inside users from $3 per acre to 10 cents per acre and admits, by failing to deny, most of the other allegations of the amendments to the petition.

[1, 2] It is our opinion that respondent district in fixing its rates for 1932, under the guise of a stand-by charge, is attempting to saddle onto the outside users, items of expense not properly chargeable against them, and in direct violation of the prior decisions of this court. Almost the exact point here involved was decided adversely to respondent in Henderson v. Oroville-Wyandotte Irrigation District, 213 Cal. 514, 2 P.(2d) 803. In that case respondent sought to show that the decision of the trial court holding that a $7.50 per acre-foot charge for outside users was discriminatory when the inside users' rate was $5, was in fact wrong because inside users, in addition to the water charge, paid also a land tax assessment. This court in no uncertain language held that this land tax could not be considered in determining whether the rates for the two classes of users were equal. At page 532 of 213 Cal., 2 P.(2d) 803, 810, it was stated:

"In support of this final contention that the judgments of the trial court confiscate the property of the district, the latter refers to certain evidence given at the trial of these actions which shows, or at least tends to show, that the members of the district are paying more for their water than are the outside users. In fact it is contended that the members of the district for less than half of the water available and delivered since the acquisition of the two utilities by this district pay more than two-thirds of the actual cost of furnishing such water to the users. This cost of water to the members of the district, however, includes the revenues from taxes and assessments paid by the members of the district in addition to the acre foot rate charged all water users. The weak link in the district's argument is that the revenues raised by taxes and assessments are not wholly and perhaps not at all used for the purpose of furnishing and delivering water to the users thereof. On the other hand, it clearly appears from this evidence that these revenues are largely used for the purpose of paying the interest on its bonded indebtedness and other expenses incurred by the district in extending its water system. The district comprised 24,200 acres, only 2,068 of which were receiving water at the time the district acquired the properties of the two utilities. A portion, the record fails to show just how much, of these 2,068 acres within the district receiving water was under the irrigation system of the two utilities prior to the transfer. There were 2,757 acres outside the district receiving water from these two irrigation systems at the time of the transfer and after the transfer they continued to receive water from the district. As there were over 20,000 acres in the district without water at the time the district acquired the two utilities, it is apparent that in order to carry out its plans it would be necessary to expend very large sums of money in securing additional water rights, constructing canals, ditches, and laterals, and purchasing rights of way for the same. As to the advisability of making these extensions in the irrigation system of the district the outside users had no voice, and with these plans they were not seriously concerned. They would receive only slight and probably no benefit from the large expenditures of money necessary to perfect an irrigation system adequate to the needs of the whole district. It was this burden—this large expense which would be necessary if the district carried out its plans to supply all of the lands of the district with water—that the outside users sought to protect themselves against when it was proposed that the district acquire the properties of the Palermo and South Feather Companies. In the light of these facts, we think it may well be doubted whether the members of the district are actually paying more for their water service than those outside the district. At the time of the organization of the district it is apparent that there was considerable diversity of opinion among the landowners residing in the locality where the district was subsequently organized as to whether it was advisable to organize the district, and as to the advisability of having their lands included in the district. The result was, as we have already seen, that the plaintiffs and those whom they represent remained out of the district. Those who consented to become mem-

bers and have their lands included in the district, it may well be assumed, knew of the plans of the organizers of the district to include therein a large body of land without water with the object and purpose of acquiring additional water rights, which might be brought upon and used upon these heretofore nonirrigated lands. With this knowledge they became members of the district and thereafter the district began to carry out the plans of developing a water system sufficient in capacity to irrigate as far as possible all of the lands in the district. These members of the district are, of course, liable for the expense thus incurred. They stand in an entirely different position from the plaintiffs who decided to remain out of the district and to receive water from the district under the plan outlined above. That those in the district are compelled to meet higher charges for water they receive than the outside users is not surprising. In fact, it must have been contemplated by them that such would be the result if they became members of the district, and the district should put into execution the plan of extending its water system to all the irrigable lands in the district. The fact that the members of the district under these circumstances are required to pay higher charges for the water used than the outside users does not to any extent amount to a confiscation of the property of the district. The two classes of water users stand in entirely different positions regarding their respective rights to have water supplied to them by the district. There is in our opinion no merit in the contention of the district that the judgments herein confiscate the plants or property of the district."

Applying the above reasoning to the facts of this case, it necessarily follows that the amount chargeable against the inside users in extending the works of the district, cannot be considered in determining whether the rates charged the two classes of users are equal. Such expense is not properly a charge for the use of water and cannot, for that reason, be included in the charge made against outside users. Under the prior decisions of this court, inside users and outside users must be charged the same rate for the use of water. Expenses not connected with the use of water borne by the inside users cannot be used in determining whether the rates are equal. Such charges must be borne solely and entirely by the inside users who solely benefit therefrom, and are in addition to the charge to inside users for the use of water. We do not find it necessary to pass on the validity of section 55 of the Irrigation District Act, supra, purporting to permit irrigation districts to charge a stand-by charge. We are well aware of the many decisions permitting utilities to include such a charge in fixing their rates. Whether such a charge may be legally made by irrigation districts will be determined in a proper case. Assuming the validity of that statute as applied to inside users, the question remains whether such a charge may be imposed on outside users, when the charge is obviously to pay expenses already held to be not chargeable against outside users. Changing the name of the charge cannot affect the substantive rights of the parties. By the very terms of section 55 it is specifically provided that the stand-by charge may be imposed "in lieu (either in whole or in part) of levying assessments." The uncontradicted facts of this case necessarily indicate that the purpose of the two charges is identical. In addition the statute itself so provides. The expression "in lieu of" necessarily means "instead of," "in place of," or "in substitution for." Irwin v. McDowell, 4 Cal. Unrep. Cas. 329, 34 P. 708; National Sewing-Machine Co. v. Willcox & Gibbs Sewing-Machine Co. (C. C. A.) 74 F. 557; Lamb v. Milliken, 78 Colo. 564, 243 P. 624; S. E. Hendricks Co. v. Thomas Publishing Co. (C. C. A.) 242 F. 37; Southland Life Ins. Co. v. Hopkins (Tex. Civ. App.) 219 S. W. 254. Since it has already been held that the land tax or assessment is chargeable solely against inside users and cannot be considered in determining whether the rates are equal, it follows that any charge "in lieu" thereof, cannot be so considered. To permit such a subterfuge would be to close our eyes to the necessary effect of such a ruling, and would permit respondent district to do something indirectly which it has already been held it cannot do directly. The prior decisions of this court leave no room for interpretation. These cases have definitely settled the point that no portion of the expenses incurred by the district in expanding its water system can be charged against the outside users. The land assessment has already been held to be in that category. Changing the name of that charge, when the purpose and effect of such levy remains the same, in no way changes the result.

The writ heretofore issued is made peremptory.

We concur: WASTE, C. J.; SEAWELL, J.; IRA F. THOMPSON, J.; SHENK, J.; LANGDON, J.; PRESTON, J.

218 Cal. 221

ROGERS v. BOARD OF DIRECTORS OF CITY OF PASADENA et al.

L. A. 13966.

Supreme Court of California.

May 26, 1933.

1. Municipal corporations ⇐33(5).

Electors who signed petition for annexation of certain territory to city could not by thereafter withdrawing their names deprive board of directors of such city of jurisdiction (Gen. Laws 1931, Act 5159).

2. Municipal corporations ⇐34.

Extent and character of land proposed to be annexed by city must be decided by electors where uninhabited portions of such territory are not separable or independent from inhabited main portion (Gen. Laws 1931, Act 5159; St. 1889, p. 358).

3. Mandamus ⇐16(1).

That city board of directors were not justified in refusing to act on annexation petition did not entitle elector to mandamus, where all other electors had attempted to withdraw their signatures from petition so that election would be fruitless proceeding (Gen. Laws 1931, Act 5159).

In Bank.

Application by David E. Rogers, suing for benefit of all qualified electors residing in certain described territory for a writ of mandate to be addressed to the Board of Directors of the City of Pasadena to require the calling of a special election.

Alternative writ discharged, and peremptory writ denied.

Woodruff & Burr, of Los Angeles, for petitioner.

Harold P. Huls, City Atty., and John W. Holmes, Deputy City Atty., both of Pasadena, for respondents.

LANGDON, Justice.

This is a petition for a writ of mandate.

On June 7, 1932, a petition was filed with respondent board of directors of the city of Pasadena, under the Annexation Act of 1913 (Stats. 1913, p. 587, as amended, Deering's Gen. Laws 1931, Act 5159), signed by a sufficient number of qualified electors in a certain described territory, which proposed that the said territory be annexed to the city. On August 2, 1932, and on September 20, 1932, by two other instruments, all of the qualified electors who had signed the petition for annexation requested that their names be withdrawn and the petition be denied. Thereafter respondents refused to proceed to call an election and submit the question of annexation to the electors of the said territory, as required by the statute.

On August 22, 1932, a petition by the requisite number of qualified electors within said territory was presented to the board of supervisors of Los Angeles county, seeking incorporation of the territory and additional land as a city of the sixth class, under the provisions of the Municipal Incorporation Act of 1883, as amended (Deering's Gen. Laws 1931, Act 5233). The board refused to proceed to hear and act on the petition, claiming that it had no jurisdiction to do so while the above-mentioned annexation proceedings were pending.

Thereafter a sufficient number of the electors in said territory and additional land signed a petition proposing that it be annexed to the city of San Marino; but this petition is being withheld from filing by the signers, who do not intend to proceed with the same unless and until the previous annexation and incorporation proceedings are terminated adversely to the petitioners therein.

Petitioner is a qualified elector in the said territory, and alleges that he sues for the benefit of all of the qualified electors therein; that it is the duty of respondent board to call a special election upon proper notice, and submit the question of annexation to the electors; that demand has been made upon the board, and it has refused to act; and that petitioner has no adequate remedy at law.

[1] It is apparently conceded by respondent that the petition was not rendered insufficient by the withdrawals, inasmuch as this court has decided that signers of a petition of this general character may not, after filing, withdraw their names and thereby defeat the jurisdiction of the body with which the petition was filed. Uhl v. Collins (Cal. Sup.) 17 P.(2d) 99. Certain other objections to the granting of the petition are, however, made.

[2] The first contention of respondent is that the territory proposed to be annexed contains large separable parcels of uninhabited land, and that therefore the act of 1889 (Stats. 1889, p. 358) providing for annexation of uninhabited territory applies, and not that of 1913, which only covers the annexation of inhabited territory. An examination of the map which is included in the record fails to support the assertion that the unoccupied portions of the territory are separable and independent of the main inhabited portions. There are streets and roads in the whole tract, and the inhabitants are scattered throughout its area. While this court doubtless has power in a clear case to determine that a case falls outside the scope of the act of 1913 (see People v. City of Lemoore,

37 Cal. App. 79, 174 P. 93; Capuchino Land Co. v. Board of Trustees of City of San Bruno, 34 Cal. App. 239, 167 P. 178), this is not such a case. The extent and character of the land proposed to be annexed is a matter for the electors to decide. See People v. Town of Ontario, 148 Cal. 625, 84 P. 205; People v. City of Los Angeles, 154 Cal. 220, 97 P. 311.

[3] A more serious question is presented by respondent's contention that the granting of the writ would result in a futile act at a considerable expense to the community, and that therefore mandamus, a discretionary remedy, should be denied. It is pointed out that every qualified elector who signed the original petition has formally indicated his change of opinion by attempting to withdraw his signature; and that, so far as appears in the record, petitioner is the only person residing in the territory who desires that the question of annexation be put to a vote. It is further urged that, since other proceedings have been taken both to incorporate the area as a city of the sixth class and to annex it to the city of San Marino, which proceedings have been held in abeyance pending a termination of the first proceeding, proper and adequate relief will be afforded petitioner by a denial of this writ, for, in such event, either of the other objects may be attained. We think there is merit in this position. The fact that respondent was not justified in refusing to act upon the petition does not of itself entitle petitioner to the extraordinary remedy demanded. It does not satisfactorily appear that the granting of the writ will result in anything but an expensive and fruitless proceeding. We are disposed, therefore, to follow the views expressed by us in a case involving a somewhat similar situation, Fawkes v. City of Burbank, 188 Cal. 399, 205 P. 675. There the petitioner sought the writ to compel the trustees of the city to call a special consolidation election. A previous election had been held at which the proposition was decisively defeated, but the petitioner asserted that defects in the proceedings leading to that election rendered it void. This court assumed that such was the fact, but nevertheless held that the writ should be denied. Quoting from High on Extraordinary Legal Remedies, § 9, we said: "* * * Cases may therefore arise where the applicant for relief has an undoubted legal right, for which mandamus is the appropriate remedy, but where the court may, in the exercise of a wise discretion, still refuse the relief. * * *" Further on, the opinion continues: "If the writ of mandate is denied, and the public sentiment of the city is really in favor of the consolidation, it will require but little expense to secure another petition of one-fourth of the voters and file the same with the board of trustees, whereupon a correct resolution can be adopted and a correct notice of election given calling the required election. On the other hand, if the writ is issued, the necessary result will be the incurring of the very considerable expenditure necessary for the publication of the notice and for the holding of the proposed election. In the face of the very pronounced sentiment against consolidation, we do not think the court should proceed to the length of issuing the writ. If the public sentiment is against it, it is useless to hold an election; and if the persons agitating for consolidation are doing so merely for the purpose of agitation, the court should not lend its aid in their behalf. The simpler and better method for all concerned is to leave the matter to the qualified electors of the city, to call a new election or not as may be desired."

The alternative writ heretofore issued is discharged, and the peremptory writ is denied.

We concur: PRESTON, J.; I. F. THOMPSON, J.; CURTIS, J.; SHENK, J.; SEAWELL, J.

218 Cal. 225

ABBOTT, Superintendent of Schools, v. McNUTT et al.

S. F. 14871.

Supreme Court of California.

May 27, 1933.

1. Officers ⇐30.

Phrase "any other office or public employment" in constitutional provision respecting judges applies to any other "public" office or "public" employment as distinguished from a purely private office or private employment (Const. art. 6, § 18, as amended in 1930).

The only constitutional inhibition against the private employment of judicial officers has to do with the practice of law.

[Ed. Note.—For other definitions of "Office (Public or Private Employment)," see Words and Phrases.]

2. Constitutional law ⇐74.
Officers ⇐30.

Service by judges on "qualification board" to consider qualifications of applicants for office of county executive would contravene constitutional inhibition against holding other "office or public employment" (Const. art. 6, § 18, as amended in 1930; Const. art. 3, § 1; Pen. Code, §§ 758–769).

3. Constitutional law ⇐38.

What may reasonably be done under statute is test of its validity.

4. Officers ⇐30.

Emolument is not indispensable element of "office" within constitutional provision prohibiting judges from holding other "office or public employment" (Const. art. 6, § 18, as amended in 1930).

5. Constitutional law ⇐74.
Officers ⇐30.

County charter *held* unconstitutional in so far as it imposes extrajudicial duties on judges of superior court by making them members of "qualification board" to consider qualifications of applicants for office of county executive (Const. art. 6, § 18, as amended in 1930; art. 3, § 1).

6. Constitutional law ⇐74.

Judges precluded by constitutional provision from serving on qualification board cannot be required to appoint nominees to serve for them (Const. art. 6, § 18, as amended in 1930).

In Bank.

Application by Pansy Jewett Abbott, as Superintendent of Schools of San Mateo County, for a writ of mandate directed to Maxwell McNutt and another, as Judges of the Superior Court in and for San Mateo County, to require respondents to act as members of the "Qualification Board" for recommendation of candidates for office of "County Executive" pursuant to Charter of San Mateo County, art. 4, § 2.

Writ denied.

Edmund Scott, Dist. Atty., of Redwood City, San Mateo County, John W. Coleberd, of South San Francisco, Robert L. McWilliams, of San Francisco, Ernest A. Wilson, of San Mateo, and Arthur H. Redington, of San Francisco, for petitioner.

A. A. Heer and J. H. Sapiro, both of San Francisco, for respondents.

David Cosgrave, Louis Dematteis, and W. H. Morrissey, all of Redwood City, amici curiæ.

IRA F. THOMPSON, Justice.

Application for writ of mandamus.

At the general election held in November, 1932, the electors of San Mateo county ratified and adopted a county charter theretofore prepared and proposed by a board of freeholders. In January, 1933, the state Legislature, by concurrent resolution of the Senate and Assembly, approved said charter. Among other things, the charter provides for a chief executive officer, in effect a county manager, to be known as the county executive. This officer is to be appointed by the board of supervisors of the county. However, an initial or preliminary step to the selection of such officer is the consideration of qualifications of applicants for the office and a determination of the five candidates found to possess the highest qualifications therefor, if five there be, otherwise so many thereof, not less than two, as are found to possess the necessary qualifications. The duty of considering and determining the qualifications of applicants for the position of county executive is imposed upon and vested in a "qualification board" created by section 2 of article 4 of the charter. It is the constitutionality of this section of the charter that is here brought in question. The membership of the "qualification board" therein provided for is made to consist of the two judges of the superior court of San Mateo county, or their nominees in the event they, or either of them declines to serve, the county superintendent of schools, a fourth person to be selected by the aforementioned three persons, and a fifth person to be selected by the board of supervisors. The members of the "qualification board" so constituted are required to take the constitutional oath of office, serve without compensation, and are charged with the duty of soliciting and obtaining applications of candidates for appointment to the office of county executive and thereafter submitting to the board of supervisors, the appointing body, a list of persons "qualified" to fill the position. In the event the board of supervisors is unable to agree upon an appointment from the list so submitted, "the clerk of said board of supervisors shall notify the qualification board of such fact, and it shall thereupon be and become the duty of the qualification board to solicit and obtain, and to select and submit, to the board of supervisors, other candidates possessing the aforesaid qualifications. * * * The exercise of such power by said qualification board shall not be exhausted by a single reference, nor until an appointment shall in fact have been made by said board of supervisors." Section 3 of article 4 of the charter provides that upon an appointment being made to the office of county executive the "qualification board shall be automatically dissolved." In the event of a subsequent vacancy in the office of county executive, "a new qualification board" is to be selected in the manner above described.

The two respondent judges of the superior court, who, by virtue of their office as judge, are made members of this "qualification board" decline to act as members of said board until it is judicially determined that with propriety they may so act. Hence this mandamus proceeding instituted by the superintendent of schools of San Mateo county, also a member of said board, to test the validity of the above-cited charter provision, in

the light of certain provisions of our state Constitution.

Section 1, article 3, of the Constitution provides: "The powers of the government of the State of California shall be divided into three separate departments—the legislative, executive, and judicial; and no person charged with the exercise of powers properly belonging to one of these departments shall exercise any functions appertaining to either of the other, except as in this Constitution expressly directed or permitted."

As regards this particular provision the respondents in their points and authorities submitted in support of their general demurrer to the petition concede that if this "were the only provision of the Constitution upon the subject, it is not to be doubted that judicial officers of the state might be appointed or elected to other offices of inferior and subordinate governmental institutions or instrumentalities, such as cities or counties, provided, only, that in exercising the power of these other offices they do not exercise any function pertaining to the legislative or executive departments of the state." It was so held by this court in the cases of People v. Provines, 34 Cal. 521, and Staude v. Election Com'rs, 61 Cal. 313, 322, 323.

[1-4] Respondents contend, however, that the present proceeding turns solely upon the question of whether or not membership upon the "qualification board," above described, constitutes such an "office or public employment as judges of the superior court are made ineligible to by the provisions of section 18 of article 6 of the Constitution." That section reads: "The justices of the supreme court, and of the district courts of appeal and the judges of the superior courts and the municipal courts shall be ineligible to any other office or public employment than a judicial office or employment during the term for which they shall have been elected or appointed, and no justice or judge of a court of record shall practice law in or out of court during his continuance in office; provided, however, that a judge of the superior court or of a municipal court shall be eligible to election or appointment to a public office during the time for which he may be elected, and the acceptance of any other office shall be deemed to be a resignation from the office held by said judge."

The phrase "any other office or public employment" necessarily has application to any other public office or public employment, as distinguished from a purely private office or private employment. The only constitutional inhibition against the private employment of judicial officers has to do with the practice of the law. Research fails to disclose any case construing or applying that portion of the constitutional provision above quoted. However, the purpose and policy underlying such a provision is cogently stated by Justice Cardozo in Re Richardson, 247 N. Y. 401, 160 N. E. 655, 661, wherein the following appears: "The policy is to conserve the time of the judges for the performance of their work as judges, and to save them from the entanglements, at times the partisan suspicions, so often the result of other and conflicting duties." In other words, it is intended to exclude judicial officers from such extrajudicial activities as may tend to militate against the free, disinterested, and impartial exercise of their judicial functions.

In our opinion service upon the "qualification board" by the respondent judges would be in contravention of the purpose and policy underlying the constitutional inhibition. As already stated, the charter provision requires that the qualification board continue to solicit and select and submit to the board of supervisors lists of qualified candidates for the office of county executive until such time as the board of supervisors determines upon an appointee for that office. It is conceivable that this duty may so consume the time of the respondent judges as to seriously embarrass, if not in fact impede, the orderly and proper discharge of their judicial functions. What may reasonably be done under a statute, is the test of its validity.

Moreover, service upon said qualification board may tend to involve the respondent judges in those "entanglements" and subject them to those "partisan suspicions" of which the constitutional inhibition, in its wisdom, seeks to free them. To illustrate: If the respondent judges are permitted to serve upon the qualification board, it is not at all unlikely that at some time in the future they may be called upon, as judicial officers, to pass upon the propriety or validity of the official acts of the county executive whom they recommended and indorsed as qualified for appointment to that office. Or, in the event of misfeasance in office of the county executive, the respondents as superior court judges may, under sections 758–769 of the Penal Code, be required to preside at a trial having for its purpose the removal from office of an incumbent theretofore recommended by them as qualified for the position. Either or both of these situations pointedly indicate the impropriety of service by the respondent judges on the qualification board.

Having definitely in mind the public policy underlying the constitutional inhibition, we are satisfied that membership on the "qualification board" constitutes an "office or public employment" within the purpose and intent of section 18 of article 6 of the Constitution. A public office is ordinarily and generally defined to be the "right, authority, and duty created and conferred by law, the tenure of which is not transient, occasional, or incidental, by which for a given period an individual is invested with power to perform a public function for the benefit

of the public. * * * The most general characteristic of a public officer * * * is that a public duty is delegated and intrusted to him, as agent, the performance of which is an exercise of a part of the governmental functions of the particular political unit for which he, as agent, is acting." Coulter v. Pool, 187 Cal. 181, 186, 201 P. 120, 123. The foregoing is peculiarly applicable to the present case. The duties to be discharged by the qualification board are governmental in character and continuous in the sense that it is mandatory upon the members thereof to submit, after examination and consideration, lists of qualified candidates until such time as the board of supervisors in its discretion selects and appoints a county executive from those so indorsed. The duties of the qualification board are not, therefore, necessarily discharged by a single act. Then again, in the event of subsequent vacancies in the office of county executive a "new" board, consisting of the same judicial members so long as San Mateo county continues to have but two superior court judges, is formed and charged with the identical duties of its predecessor. Members of the qualification board are required by section 3 of article 4 to take the constitutional "oath of office." The fact that they serve without compensation is immaterial for an emolument is not an indispensable element of an office. State v. Kennon, 7 Ohio St. 547, 559; State v. Stanley, 66 N. C. 56, 60, 8 Am. Rep. 488.

[5] To assume, as petitioner would have us do, that the duties of the qualification board are purely transient and occasional in character and therefore not such as to bring membership on the board within the above general definition of an "office," does not suggest a different conclusion. In our opinion, service upon the qualification board, even though spasmodic and occasional, would constitute such other "public employment," within the meaning of the constitutional provision, as may reasonably tend to prove incompatible, for the reasons already assigned, with the due and proper discharge by the respondents of their judicial functions. In other words, the test of whether the character of the public duty is transient is incomplete, because it remains to be determined whether the discharge of such public duty will, or may reasonably tend to, interfere with the due administration of the law. No hard and fast rule can be set down. Each case must turn upon its own peculiar circumstances. As already indicated, we are of the opinion that the discharge of the public, governmental duties imposed upon the respondents by the charter provision here in question will, or may reasonably tend to, embarrass or impede the respondents in the exercise of their judicial duties. This being so, the charter provision runs counter to the purpose and intent underlying the constitutional inhibition and must therefore be declared invalid in so far as it purports to impose extrajudicial duties upon the judges of the superior court in and for the county of San Mateo.

The cases relied on by petitioner, while declaring that transient and occasional duties of an extrajudicial character may be conferred upon judicial officers without doing violence to a constitutional inhibition precluding such officers from holding any other public "office," concerned themselves generally with such transient extrajudicial duties as are compatible and consistent with the untrammeled exercise of the judicial function. Such a case is People v. Nichols, 52 N. Y. 478, 485, 11 Am. Rep. 734, wherein was questioned a statute designating a judge and two other persons as a body or board charged with the duty of passing upon the authenticity of certain relics and of determining whether they were desirable for a state museum. The exercise of such a special and transient extrajudicial function obviously could not interfere with the proper discharge of the judge's judicial duty. The same may be said of a statute authorizing a judicial officer to issue a call for military aid to suppress a riot. People v. Bard, 209 N. Y. 304, 103 N. E. 140, 141. Likewise, the performance of administrative duties as to matters incidental to the exercise of the judicial power or which have some reasonable connection with a judicial purpose has been sanctioned. In re Richardson, supra, 247 N. Y. 401, 160 N. E. 655, 660.

[6] If, as we have determined, the respondents are precluded by the constitutional provision from serving on the qualification board, it necessarily follows that they are under no mandate to appoint nominees to serve for them.

Under section 2b of article 3 of the charter, the board of supervisors is given general power of appointment of "all appointive county officers, boards and commissions, whose appointments * * * are not otherwise provided for by this charter." The conclusion announced herein in no way interferes with such general power of appointment.

The peremptory writ of mandate is denied.

We concur: CURTIS, J.; SHENK, J.; SEAWELL, J.; LANGDON, J.; PRESTON, J.

218 Cal. 202

In re MAILHEBUAU'S ESTATE.

MAILHEBUAU v. GIBSON et al.

S. F. 14516.

Supreme Court of California.

May 26, 1933.

1. Executors and administrators ⇐504(2).

Claimants, whose claim was rejected by executrix, but who recovered judgment, *held* entitled to object to allegedly preferential payments to other creditor shown in executrix' account, though at time of payments remittitur of appellate court affirming judgment of objecting claimants had not been filed (Probate Code, §§ 927, 953).

2. Executors and administrators ⇐281.

Executor making payments to general creditor without order of court does so at his peril, especially where it is doubtful whether claims will be paid in full.

3. Executors and administrators ⇐504(2).

One whose claim has been rejected and who is prosecuting action against estate on claim is "person interested in estate," entitled to file exceptions to executor's account and contest account (Probate Code, §§ 927, 953).

[Ed. Note.—For other definitions of "Interest," see Words and Phrases.]

4. Executors and administrators ⇐514.

That claimants' objections to payments to other creditor shown by executrix' fourth annual account were disallowed and no appeal taken *held* not to preclude claimants from objecting to similar payments made after allowance of fourth account and presented for approval by fifth account.

5. Executors and administrators ⇐513(11).

Order allowing account, which has become final, is conclusive upon all unpaid creditors.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

Proceeding in the matter of the estate of Camille Mailhebuau, deceased, wherein Eugenie Bouscal Mailhebuau, executrix of said decedent, filed her fifth annual account. From an order sustaining objections to such account, which were filed by Walter D. K. Gibson and others, as executors of the last will and testament of Adolph B. Spreckels, deceased, executrix appeals.

Affirmed.

J. J. Dunne, of San Francisco, for appellant.

Morrison, Hohfeld, Foerster, Shuman & Clark, of San Francisco (C. Coolidge Kreis, of San Francisco, of counsel), for respondents.

IRA F. THOMPSON, Justice.

The appellant is the executrix of the last will and testament of Camille Mailhebuau, deceased, and the respondents are the executors of the last will and testament of Adolph B. Spreckels, deceased. The contest herein revolves around two items in the fifth annual account of the appellant. On October 5, 1925, she approved the claim of the Henry Investment Company against the estate in the sum of $10,000, together with interest thereon at 6 per cent. per annum from February 27, 1924, which claim was founded upon an unsecured promissory note. On the same day the executrix and appellant rejected the claim presented by respondents as executors of the last will and testament of Adolph B. Spreckels. Respondents on December 5, 1925, filed an action based upon the rejected claim, which action resulted in a judgment in favor of respondents on June 1, 1927, in the sum of $18,850, together with costs amounting to $14. The District Court of Appeal affirmed the judgment on January 29, 1929. A petition for a hearing in this court was denied and the remittitur was filed on April 3, 1929. Prior to the filing of the fourth annual account the appellant had paid on account of the Henry Investment Company claim the interest in full to July 1, 1928, and $2,000 of the principal amount. An objection by respondents to an item of interest in the account first mentioned in the sum of $480 paid to the Henry Investment Company was disallowed by the probate court on December 31, 1929. However, upon the filing of the fifth annual account, the appellant reported $240 interest and $1,000 principal as having been paid on account of the Henry Investment Company's claim. Again the respondents filed objections and exceptions on the theory that the appellant was giving a preference to that claim. The court sustained the objections; refused to approve the payments aggregating $1,240; found that she had that sum available for the payment of debts of the estate; and ordered that she pay it to the respondents. This appeal is from the order just recited, and, while there is some discussion in appellant's brief concerning a portion of the order requiring her to give bond, we shall not discuss that question further than to point out that the notice of appeal specifically excepts that portion of the order.

[1-3] The first contention of appellant is to the effect that the estate of Spreckels was not a creditor at the time the payments were made to the Henry Investment Company, for which reason she says respondents had no right to object. The basis of this argument is that the judgment in favor of respondents did not become final until April 4, 1929.

There is evidence in the record that the sum of $1,000 was paid to that claimant in January, 1929, before the remittitur was filed, but that is not conclusive of the matter. It is undoubtedly the rule where payments are made to a general creditor by the executor, especially in those cases where, as found by the court here, it is doubtful whether the claims will be paid in full, without any order of the court, that they are made at the peril of the executor. In re Estate of Fernandez, 119 Cal. 579, 51 P. 851. Furthermore, a complete answer to the contention is furnished by the sections of the Probate Code. In section 927 thereof it is provided that any "person interested in the estate may appear and file written exceptions to the account, and contest the same." Section 953, so far as material here, reads: "If there is any claim not due, or any contingent or disputed claim against the estate, the amount thereof, or such part of the same as the holder would be entitled to if the claim were due, established, or absolute, must be paid into court, and there remain, to be paid over to the party when he becomes entitled thereto; or, if he fails to establish his claim, to be paid over or distributed as the circumstances of the estate require." It is patent, therefore, that one whose claim has been rejected and who is prosecuting an action upon it is a person interested in the estate. It has been so held. In re Estate of McDougald, 146 Cal. 191, 195, 79 P. 878; Sime v. Hunter, 50 Cal. App. 629, 195 P. 935.

[4, 5] While stated in different forms, the next attack upon the order is to the effect that respondents were precluded from raising the objection by reason of the disallowance of similar exceptions to the fourth annual account. Appellant says the matter is res adjudicata; that the law of the case has been established; and that respondents are attempting to attack the order made with respect to the former account, although they took no appeal therefrom. There is no merit in the argument. Certainly it is the law that an order allowing an account which has become final is conclusive upon all unpaid creditors (In re Estate of Fernandez, supra; In re Estate of Pratt, 119 Cal. 156, 51 P. 47), but that rule of law is not applicable in the instant case. The respondents here were objecting to payments made subsequent to the allowance of the fourth account and presented to the court for its approval by the fifth account. A somewhat similar question was involved and disposed of by this court in Re Estate of Bell, 142 Cal. 97, 101, 75 P. 679, 680, in this language: "The creditors are not complaining of the payments made in the past and charged and settled in the executor's account, since the validity of those payments by lapse of time and failure to appeal is no longer open to question, but they may be heard on appeal as to payments subsequently made, and now for the first time presented to the court in probate for its consideration."

Finally it is claimed that the order awarding $1,240 is not a pro rata distribution of the funds of the estate. This result is arrived at by including the San Francisco bank, a claimant in the sum of $28,000, which received interest, according to the fifth account, in the sum of $1,400.04, and which is not objecting to the order, and excluding payments formerly made to the Henry Investment Company. It is apparent from the discussion to this point that the court was quite within its right in bringing the two creditors more nearly to a pro rata basis so far as the partial payment of their claims is concerned,

Order affirmed.

We concur: LANGDON, J.; PRESTON, J.; CURTIS, J.; SHENK, J.; SEAWELL, J.

218 Cal. 196

CUNNYNGHAM v. MASON-McDUFFIE CO., Inc., et al.

S. F. 14764.

Supreme Court of California.

May 25, 1933.

Rehearing Denied June 23, 1933.

1. Homestead ⇐118(4), 119.

Instrument conveying or incumbering homestead need not be signed by husband and wife at same time and place or acknowledged before same notary (Civ. Code, § 1242).

In such case it is sufficient if prior to delivery both husband and wife sign and acknowledge a single instrument, joint in form, intending such instrument to be joint instrument of both, and thereafter one of the spouses delivers the instrument with the express or implied consent of the other.

2. Homestead ⇐119.

Certificate of acknowledgment relating to husband's execution of instrument incumbering homestead *held* not defective because notary signed form using word "they" instead of "he."

The use of the word "they" instead of the word "he" in such certificate was obviously a mere inadvertence or typographical error.

3. Acknowledgment ⇐29.

That notary in California attached form of California acknowledgment to trust deed, which form was used by Oregon notary in taking acknowledgment of California resident, did not invalidate acknowledgment (Civ. Code, § 1188).

In Bank.

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Action to cancel a deed of trust brought by Mary Elizabeth Cunnyngham, also known as Mary E. Cunnyngham, against Mason-McDuffie Company, and others. From an adverse judgment, plaintiff appeals.

Affirmed.

H. H. McPike, of San Francisco, for appellant.

Robinson, Price & Macdonald, of Oakland, J. S. Hutchinson, of San Francisco, and Harrison S. Robinson, Harry L. Price, and R. W. Macdonald, all of Oakland, for respondents.

SPENCE, Justice pro tem.

Plaintiff brought this action for the cancellation of a certain deed of trust executed by plaintiff and her husband to defendant Mason-McDuffie Co., Inc., as trustee for defendant Berkeley Guarantee Building & Loan Association. From a judgment in favor of defendants, plaintiff appeals.

Plaintiff and her husband acquired the property involved, and plaintiff declared a homestead thereon in 1928. They executed a deed of trust on said property in 1929 as security for a note in favor of the Oakland Bank in the sum of $3,000. In 1930, they apparently needed additional funds, and defendant Berkeley Guarantee Building & Loan Association agreed with plaintiff's husband to loan $3,750 on the property. A note in that sum and a deed of trust to secure the same were prepared by said defendant for execution by plaintiff and her husband. These instruments were dated June 11, 1930, and plaintiff and her husband were both named as the trustors in the deed of trust as follows: "Mary E. Cunnyngham, also known as Mary Elizabeth Cunnyngham, and J. R. Cunnyngham, also known as James R. Cunnyngham, her husband." On said June 11, 1930, the husband visited the office of defendants and signed the note and deed of trust and acknowledged his signature before Miss Douglas, a notary public, who was the escrow clerk of the defendants. Plaintiff was in Portland, Or., at the time and Miss Douglas and plaintiff's husband discussed the question of whether Miss Douglas or plaintiff's husband would send the note and deed of trust to plaintiff for the purpose of execution. It was finally determined that plaintiff's husband would do so. Miss Douglas thereupon attached to the deed of trust a California form of acknowledgment for the convenience of the Oregon notary and then handed the instruments to plaintiff's husband. The latter forwarded them to plaintiff, and, pursuant to his request, plaintiff signed them on June 12, 1930, acknowledged her signature before a notary public in Portland, and sent them by mail addressed to the building and loan association. In consummating the transaction defendants caused the existing incumbrance to be paid off and issued a check payable to plaintiff and her husband for the balance due after deducting the loan expense. Plaintiff's husband indorsed his own name and that of plaintiff upon said check and deposited it in their joint bank account. Contrary to the claims of plaintiff, the trial court found and concluded "that said deed of trust was jointly and concurrently executed and delivered by plaintiff and her said husband," and that said deed of trust was valid.

Appellant has filed three briefs in this court. In "Appellant's Opening Brief" we find the following headings: "Statement of the Case," "Delivery," "Admissions of Answer," "Findings of Fact," "Conclusion of Law," "Acknowledgment," "Certificate of Acknowledgment," and "Motion to Strike Out." In "Appellant's Reply Brief" there are no headings whatever. In "Appellant's Closing Argument" we find but one heading as follows: "One other word regarding delivery." There is not a single heading in any of these briefs showing "the nature of the question to be presented or the point to be made" as required by rule VIII of the Rules of the Supreme Court and District Courts of Appeal. This rule has been in effect for many years, and its requirements have been repeatedly called to the attention of the members of the bar. We mention but a few of the more recent cases in which it has been discussed. Currier v. Oakland Association (Cal. App.) 21 P.(2d) 462; Herlihy v. Ward (Cal. App.) 18 P.(2d) 992; Landa v. Steinberg (Cal. App.) 14 P.(2d) 532; Frank Graves Sash, Door & Mill Co. v. Keener (Cal. App.) 16 P.(2d) 195; Skipitarey v. Fitts (Cal. App.) 17 P.(2d) 159; Milano v. Bulleri, 125 Cal. App. 72, 13 P.(2d) 521; Kaltenberger v. Alexander Hotel Co., 124 Cal. App. 198, 12 P.(2d) 59. Failure to comply with the provisions of the rule places an undue burden upon the court and also upon opposing counsel, and, unless the rule is observed, it will become necessary for the courts to impose the penalties provided in all cases where the rule is violated. Section 4 of said rule VIII.

[1] Despite the failure to observe the rule, we have examined the briefs herein, and it appears that appellant's main contentions are based upon the manner in which said deed of trust was executed. Section 1242 of the Civil Code provides: "The homestead of a married person cannot be conveyed or encumbered unless the instrument by which it is conveyed or encumbered is executed and acknowledged by both husband and wife." There appears to be no doubt that the deed of trust in question was executed and acknowledged by both husband and wife as required by said section, but appellant places a strained construction upon certain language used by this court in Hart v. Church, 126 Cal. 471, 58 P. 910, 59 P. 296,

77 Am. St. Rep. 195, and then concludes that the deed of trust is invalid. The decision in that case is not in point. There the wife alone executed and acknowledged a mortgage on the homestead and it was immediately delivered and recorded. About five months later the husband signed and acknowledged a separate writing on the same instrument, which stated: "I, * * * join and concur in the foregoing mortgage. * * *" He then delivered it to the mortgagee who again recorded the instrument. The mortgage was held to be invalid. The court there reviewed the earlier decisions and summarized on page 477 of the opinion in 126 Cal., 58 P. 910, 912, 59 P. 296, by saying: "We have been at pains thus to quote from the decisions of this court to show that uniformly and without any conflict the statute and the Code, though not using the term 'jointly' or 'concurrently,' have been construed to mean that the homestead cannot be alienated or incumbered by separate instruments separately executed by the husband and wife, and that *it can only be so alienated or incumbered by the joint and concurrent execution of the instrument by the two.*" (Italics ours.) Stressing the italicized language, appellant contends that there was no "joint and concurrent execution" of the deed of trust by the husband and wife in the present case. In our opinion this contention is without merit. Mid-West Lumber Co. v. Wagner, 133 Kan. 405, 300 P. 1067; Ferguson v. Nuttleman, 110 Kan. 718, 205 P. 365; Bell v. Slasor, 8 Kan. App. 669, 57 P. 139; Harlow v. Larson, 204 Iowa, 328, 213 N. W. 417. The facts in Ferguson v. Nuttleman, supra, are somewhat similar. The court there said at page 366 of 205 P., 110 Kan. 718: "Did Fred Nuttleman and Rose Nuttleman concurrently consent to the mortgage? Fred Nuttleman continuously consented to it from the time he signed it until it was delivered. He by letter requested his wife to sign it, and she expressed her consent to it by signing it and returning it to him. There was thus the concurring consent of both. The mortgage was delivered by the husband under that joint or concurring consent."

There is nothing in section 1242 of the Civil Code nor in the decisions construing the same which requires that the instrument conveying or incumbering the homestead be signed by the husband and wife at the same time and place or that it be acknowledged by them before the same notary public. We believe it entirely sufficient if, prior to delivery, both husband and wife sign and acknowledge a single instrument, joint in form, intending such instrument to be the joint instrument of both, and thereafter one of the spouses delivers the instrument with the express or implied consent of the other. There was ample evidence in the present case to show that the deed of trust was so signed, acknowledged, and delivered, and said evidence supports the trial court's findings and conclusions above set forth.

[2, 3] Appellant appears to make the further contention that the certificate of acknowledgment relating to the execution by the husband was defective. This contention is based upon the fact that the notary taking the husband's acknowledgment signed a form reading: "* * * acknowledged to me that *they* executed the same." (Italics ours.) The use of the word "they" instead of the word "he" in said certificate was obviously a mere inadvertence or typographical error and appellant's objection is wholly without merit. McCardia v. Billings, 10 N. D. 373, 87 N. W. 1008, 88 Am. St. Rep. 729; Trerise v. Bottego, 32 Mont. 244, 79 P. 1057, 108 Am. St. Rep. 521; Hughes v. Wright & Vaughan, 100 Tex. 511, 101 S. W. 789, 11 L. R. A. (N. S.) 643, 123 Am. St. Rep. 827; Durst v. Daugherty, 81 Tex. 650, 17 S. W. 388. Appellant further takes the position that, as the notary in Berkeley, Cal., attached a form of California acknowledgment to the deed of trust, which form was used by the Oregon notary in taking appellant's acknowledgment, said acknowledgment was not therefore taken in compliance with section 1188 of the Civil Code. That section reads: "An officer taking the acknowledgment of an instrument must indorse thereon or attach thereto a certificate substantially in the forms hereinafter prescribed." The objection does not run to the form of the certificate, but merely embraces the claim that the wrong person used the paste jar. The statement of the nature of the objection demonstrates that it requires no comment. Discussion of appellant's further contentions regarding the findings and the motion to strike out would serve no useful purpose in view of our conclusions relating to the validity of said deed of trust.

The judgment is affirmed.

We concur: SHENK, J.; IRA F. THOMPSON, J.; SEAWELL, J.; CURTIS, J.; LANGDON, J.

132 Cal.App. 193

PEOPLE v. ACREE.

Cr. 2359.

District Court of Appeal, Second District, Division 2, California.

May 23, 1933.

Rehearing Denied June 7, 1933.

1. Embezzlement ⇐44(1).

Evidence *held* to sustain conviction for converting funds of employees put up as bonds which could be used only for liquidating accounts between employee and employer (St. 1929, p. 961, § 1).

2. Criminal law ⇐863(1).

Giving additional instructions upon jury's request after commencement of deliberations, regarding written contracts which accused relied on for acquittal, was not erroneous, where accused was charged with conversion of funds put up by employees as bonds, and accused claimed funds were invested (St. 1929, p. 961, § 1).

3. Embezzlement ⇐47.

In prosecution for converting funds put up by employees as bonds, whether such funds were put up as bonds or investment, as claimed by accused, *held* for jury (St. 1929, p. 961, § 1).

4. Criminal law ⇐409.

Witness may testify to admissions or to precise fact in dispute.

5. Embezzlement ⇐42.

In prosecution for converting funds put up by employees as bonds, evidence of another employee that accused said employee and others would all be satisfied in few days, as soon as other employees signed up, was admissible, as showing accused was party to offense or had aided in its commission (St. 1929, p. 961, § 1; Code Civ. Proc. §§ 1832, 1870).

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Albert E. Acree was convicted of violation of St. 1929, p. 961, § 1, which provided that money or property put up by an employee or applicant as cash bond shall be used in trust and forbids its use except for liquidating accounts between employee and employer, and he appeals.

Affirmed.

Harold D. Kraft, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

CRAIG, Justice.

An information filed by the district attorney of Los Angeles county charged the appellant and other persons not parties to this appeal in three counts with violations of section 1, chapter 559, p. 961, of the Statutes of 1929, which directs that moneys or property put up by an employee or applicant as a cash bond shall be held in trust and forbids its use other than for liquidating accounts between the employee and his employer. A verdict of guilty was returned by a jury upon each of said counts.

Applicants for positions as drivers for an automobile stage line appeared at the office of the defendant and one Nu Dyke, operating under the name of Associated Service Company, in response to newspaper advertisements of the defendants offering employment; they were advised as to the duties required, that the compensation was at least $28 per week, plus a bonus of 5 per cent., and that other employees were then making about $200 per month. As conditions to employment it was testified that each applicant was required to pay Nu Dyke the sum of $400, which he was informed would be held and used by his employers to indemnify them against loss or damage in operation of vehicles or in handling of moneys collected, and directed to sign an agreement entitled "waiver"; he was also told that such contract and employment were not based upon any representation of the Associated Service Company as brokers. It was agreed that a percentage of the revenue from transportation would be refunded each month until repayment of said $400 and that the employer would thereby relieve the employee from that condition of the employment. Each employee also executed a contract in writing to the company which specified that $400 be paid the employer as an investment, and that for said sum the applicant should receive a job as driver at $4 per day. One of the complaining witnesses who signed in blank a check for said amount testified: "Mr. Acree took the check up, and when the check came back it was written 'in cash' and Mr. Acree's name was on it." One of the three drivers received as compensation $20 for about six weeks' work, another $15 during a period of about one month, and the third an average of about $1 per week. The driver last mentioned was informed by Acree "the only chance of getting the money back was to keep quiet and let him hire more drivers and get the money in." One employee was repaid the sum of $20 when demanded, but no other refund was made.

The statute in question provides: "Any money or property put up by any employee or applicant for employment as a cash bond in any case must not be used for any purpose other than liquidating accounts between the

employer and his said employee or return to the said employee or applicant for employment, and shall be held in trust for this purpose and not mingled with the money or property of the employer who receives same, any provision of any contract between the employer and employee or applicant for employment to the contrary notwithstanding. Any employer or prospective employer, or agent or officer thereof, who misappropriates any such money or property, mingles it with his own or uses it for any other purpose than that set forth above, shall be guilty of theft and shall be punished, upon conviction thereof, in accordance with the provisions of sections 486, 487, 489 and 490 of the Penal Code."

It is contended by the appellant that the evidence was insufficient to establish his guilt either of embezzlement or of aiding and abetting in the commission of the offense defined by said section.

[1] The question arising from the contention of the people that a cash bond was required of each applicant for employment under a written instrument designedly misleading, and that such funds were unlawfully converted to the use of the appellant and his co-defendants, and that of the appellant that applicants invested the same in fact and were equally answerable for the obligations of their employer under the management and control of the latter, lay peculiarly within the province of the jury under instructions of the trial court. The jury were instructed as to the credibility of witnesses, the weight to be given their testimony and to said documents, and that they must believe beyond a reasonable doubt that the defendant feloniously misappropriated money which the applicants named had put up as a cash bond for return to them, before he could be found guilty of the offenses charged. Hence, resolving all intendments in favor of the verdict and judgment, it may not be determined in such a case that the sufficiency of evidence otherwise abundant fails upon appeal to sustain them because it was capable of different constructions by the jury.

[2] Strenuous argument is directed by the appellant to asserted error in the giving of additional instructions upon return of the jury after commencing deliberation. In response to their request as to "where the responsibility lies in deciding whether these contracts constitute a bond or not," the appellant's counsel objected upon the ground that the question had been amply covered, though admitting that no instruction had been asked or furnished. The court charged that the jury "take these contracts into account, and irrespective of what they say, those contracts with all of the evidence that has been before you, and it will then be for you to determine whether the money was placed as an investment or whether it was the intent that it should be put up as a security. The method used in so far as the writing of the contracts is concerned is a matter for you to determine as to whether that was used in the sense of what you might call an evasion of the law. * * * That is a matter of fact you must determine for yourselves, and on which the court cannot give you the slightest hint." Criticism is aimed principally toward a possible misinterpretation by the jury of such instruction regarding the use of the defendants' contracts. A juror inquired if it might be repeated as to "*that part* of your instructions in which the word 'evasion' was employed." To which the court replied that it was "not in any sense attempting to express an opinion in any manner as to what verdict or verdicts" should be returned, and had the instruction read by the reporter. Since it remained for the jury to decide questions of fact in issue, it cannot be said that they were not entitled to instruction as to their responsibility in relation to documentary evidence introduced by the defendants and upon which they relied during the entire trial for an acquittal. No other instruction was offered upon the subject, nor is it even intimated as to how any right of the appellant was prejudiced by that given.

[3] The constitutionality of the inhibition of use for any purpose other than as a bond or for return to the employee of money so deposited "any contract to the contrary notwithstanding" is not here involved. The issue is not so much what the parties might have agreed as what they did agree to do. The appellant insisted that the transaction constituted an investment as evidenced by said contracts, and it became a question for the jury whether moneys had been invested in accordance with the provisions of contracts which were valid if effective, or, as testified, were demanded and accepted as cash bonds contemporaneously with the exaction in each instance of a pretended and fictitious formal gesture. Upon such question as presented the verdicts are conclusive.

[4, 5] The people called as a witness upon this issue a mechanic from the defendant Nu Dyke's garage, who testified that the defendant Acree had told him of arrangements being made "so that they could get us boys all satisfied and he thought if we would give him a little bit more time, a few days, that they would have some more men signed up, we would get some of our money"; that "as these men put their money in they would pay us back." This evidence having been stricken out, counsel for the people invoke the provisions of section 1252 of the Penal Code, which requires consideration of rulings of a trial court when so requested by the Attorney-General. It is said that the purpose of such testimony was to show further that the em-

ployees' bond moneys were not held for return, but that they were converted to the defendants' use. It was the theory and contention of the prosecution that a public offense had been committed in that the defendants mingled such funds with their own and were unable to return them. A witness may testify to admissions or to the precise fact in dispute, and it would not have been incompetent evidence for consideration by the jury under proper instructions of the trial court, as tending to show that the appellant was a party to the transaction and had converted the moneys deposited by employees to his own use or had aided in the commission of the offense charged. Code Civ. Proc. §§ 1832, 1870.

The judgments are affirmed.

We concur: WORKS, P. J.; STEPHENS, J.

132 Cal.App. 105

CALIFORNIA STANDARD FINANCE CORPORATION v. CORNELIUS COLE, Limited, et al.

Civ. 9035.

District Court of Appeal, Second District, Division 1, California.

May 19, 1933.

As amended June 2, 1933.

Hearing Denied by Supreme Court July 17, 1933.

1. Appeal and error ⇐460(2).

On plaintiff's appeal from judgment rendered against him for costs only, execution on judgment is automatically stayed until appeal has been determined.

2. Appeal and error ⇐477.

District Court of Appeal could award plaintiff appealing from judgment against him for costs only writ of supersedeas pending determination of appeal, notwithstanding trial court refused to recall and quash writ of execution issued on judgment.

3. Appeal and error ⇐460(2).

Statute requiring undertaking, to stay execution of judgment directing payment of money, in double amount of judgment, is inapplicable to allowance for costs incurred by prevailing party on trial (Code Civ. Proc. § 942).

Petition by the California Standard Finance Corporation for a writ of supersedeas prayed to be directed to Cornelius Cole, Limited, and others, to stay further proceedings in a certain action.

Writ granted.

Ellis I. Hirschfeld and Samuel W. Blum, both of Los Angeles, for petitioner.

William E. Reiley, of Los Angeles, for respondent Doris Kenyon Sills.

HOUSER, Justice.

On examination of the application to this court for a writ of supersedeas, the material facts appear to be that in an action in the superior court, in which the petitioner herein was the plaintiff, one of the defendants therein was awarded a judgment against the plaintiff for costs only expended by the said defendant in the action, which amounted to the sum of $572.55; from which judgment the plaintiff appealed to this court. No undertaking on appeal was filed. Thereafter, at the instance of the said defendant, a writ of execution on said judgment for costs was issued by the clerk of the trial court, which writ was levied on property belonging to the plaintiff. A motion made by the plaintiff in said court to recall and to quash said execution was denied. Thereupon the plaintiff procured from this court its alternative and temporary writ of supersedeas to the effect that, until further order of this court, proceedings on the proposed execution of said judgment be stayed.

[1, 2] The precise point at issue is whether, on an appeal by a plaintiff in an action from a judgment rendered against him for costs only, execution on said judgment is automatically stayed until the appeal has been determined.

It is not contended by the respondent either that the appeal from the judgment is ineffective or that by the terms of any statute of this state the appellant is required to file any undertaking to cover costs expended by the respondent on the trial of the action; but, in connection with the question of jurisdiction of this court to order a stay of execution of the judgment, respondent urges the point that, since by implied order of the trial court a writ of execution on the judgment was issued, and which, on motion of the appellant, the trial court refused to recall or to quash, this court is thereby precluded from making any contrary order in the premises. The opposite of such a principle of law is announced in the case of Dulin v. Pacific Wood & C. Co., 98 Cal. 304, 306, 33 P. 123, 124, where it is said: "* * * If, after such appeal, the court below seeks to enforce its judgment, this court will grant a special order or writ restraining its action. The writ itself is directed to the court whose action is sought to be restrained, or to some one of its officers, and is limited to restraining

any action upon the judgment appealed from."

The syllabus in the case of McAneny v. Superior Court, 150 Cal. 6, 87 P. 1020, contains a declaration of the law as follows: "A stay of proceedings upon appeal from the alimony order operates as a supersedeas, and deprives the superior court of all power to enforce the order appealed from, either by execution or by proceedings for contempt, or through the appointment of a receiver."

In the case of Craig v. Stansbury, 37 Cal. App. 668, 174 P. 404, it was ruled that, pending a decision by the appellate court on appeal from a judgment of the trial court, the former court had inherent power, by a writ of supersedeas, to vacate an execution sale made after the appeal was perfected and a stay bond given; which is an indication in the instant matter that, if no stay bond is required, this court has the power to grant the writ for which the petitioner has prayed. See, also, Rose v. Mesmer, 131 Cal. 631, 63 P. 1010; Whitaker v. Title Insurance & T. Co., 179 Cal. 111, 175 P. 460; Southern Pacific Co. v. Superior Court, 167 Cal. 250, 252, 139 P. 69; Holcomb v. Juster, 39 Cal. App. 462, 179 P. 445. It must therefore be concluded that, notwithstanding the refusal by the trial court to recall and to quash the writ of execution of the judgment, this court is not thereby deprived of the right, pending a determination of the appeal, to make such order for the purpose of preserving the "status quo" of the parties to the appeal as it may be advised is meet and proper in the premises.

[3] Admittedly, the only statute in this state which in terms contains even an intimation that on an appeal of the nature of that here involved an undertaking is required to stay execution of the judgment is section 942 of the Code of Civil Procedure, which, as far as is here pertinent, provides that, "if the appeal be from a judgment or order directing the payment of money, it does not stay the execution of the judgment or order unless a written undertaking be executed on the part of the appellant," etc. But by numerous decisions by the appellate courts of this state it has been held that such provision has no reference to costs incurred by the prevailing party on the trial of the action. See Whitaker v. Title Insurance & T. Co., 179 Cal. 111, 114, 175 P. 460; McCallion v. Hibernia Savings & L. Soc., 98 Cal. 442, 33 P. 329; and authorities therein respectively cited. And in the case of People v. Jackson, 190 Cal. 257, 212 P. 4, in effect it is held that, where on appeal no bond is required by the statute, the perfecting of the appeal is sufficient to stay execution of the judgment. The same ruling is indicated in Young v. City Council, 74 Cal. App. 487, 490, 241 P. 415.

It follows that, pending a final determination of its appeal, the petitioner herein is entitled to have the temporary writ of supersedeas heretofore issued by this court made permanent. It is so ordered, and it is directed that said writ of execution and all proceedings thereunder be recalled and quashed.

We concur: CONREY, P. J.; YORK, J.

132 Cal.App. 248

EDGECOMB v. CALLAHAN.

Civ. 7551.

District Court of Appeal, Second District, Division 1, California.

May 24, 1933.

1. Brokers ⇐43(2).

Broker could not recover on quantum meruit for services in effecting sale of real estate, where contract for employment of broker was not in writing (Code Civ. Proc. § 1973, subd. 5).

2. Brokers ⇐43(2).

Letter authorizing broker to lease property, with direction that, at expiration of 25-year lease, lessee should become owner by deed put in trust when lease was signed, called for conditional sale within statute requiring written agency contract to recover broker's commission (Code Civ. Proc. § 1973, subd. 5).

3. Brokers ⇐60.

Owner's instructions to broker authorizing 25-year lease with contemplated transfer of title thereafter, and containing promise to pay commission when lease was signed, required signing of lease as condition to broker's recovery of commission.

The letter of authorization written by the owner of the property to the real estate broker stated that the owner could enter into lease for a net monthly rental for a period of 25 years, at end of which time the lessee was to become owner of the premises by deed put in trust when the lease was signed. The letter made further provision for authorizing earlier delivery of deed to assist in financing building and provided for amount of commission to be paid when lease was signed. In closing, the owner stated: "I believe this brings out the necessary high spots for your people to shoot at, as a preliminary outline." No provision was made in the letter for payment of taxes or as-

sessments or insurance or for conditions on which default might be declared, and it appeared from the language used and from nature of the transaction that the owner reserved right to negotiate further with prospective lessees or purchasers.

4. Brokers ⇐49(1).

Owner of premises and broker may enter into binding agreement that no commission shall be considered earned until happening of certain specified event.

5. Appeal and error ⇐1071(5).

If there are unobjectionable findings which amply support judgment, findings on other issues are immaterial.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by C. A. Edgecomb against H. S. Callahan. Judgment for defendant, and plaintiff appeals.

Affirmed.

Russell H. Pray, of Long Beach, for appellant.

Louis N. Whealton and Raymond J. Kirkpatrick, both of Long Beach, for respondent.

DESMOND, Justice pro tem.

Plaintiff claimed the sum of $8,750 was due him as commission earned in connection with a transaction involving certain real estate belonging to the defendant in the city of Long Beach. From a judgment in favor of defendant, this appeal is prosecuted.

The appellant, a regularly authorized real estate broker, on April 12, 1929, secured from respondent a letter reading as follows:

"April 12, 1929. Mr. C. A. Edgecomb, Long Beach, California. Dear Sir:

"After our conversation yesterday, in regard to the leasing of my West Ocean property, described as lots one to eight, inclusive, Park View Tract, Long Beach City, California.

"Should you find a party financially responsible; I will enter into a lease for my above described property, on the following terms; $2000. per month net for a period of twenty-five years.

"At the expiration of the twenty-five year lease, the lessee becomes owner of the above described property by deed, put in trust, when lease is signed.

"In the event the lessee desires to build before the expiration of his lease, and to assist him in financing if it should become necessary, I will deliver deed before expiration of this twenty-five year lease, for building purpose only and in deeding the property before expiration of the lease, does not change the terms of said lease, as to the amount of monthly payment or length of time to run. Lessor to be secured by bonds or property before turning over deed to property.

"The insurance to be prorated when the lease is signed, and I will refund all deposits now up on lease that have not expired.

"I will pay you a commission on the basis we talked about, that $8750. is to be the full amount paid when the lease is signed, payable $500 per month.

"I believe this brings out the necessary high spots for your people to shoot at, as a preliminary outline to work from.

~~"You may have ten days from date to negotiate this lease.~~

"Hoping you success, I remain Yours very truly,

"H. S. Callahan."

A copy of this letter was attached as Exhibit A to appellant's complaint.

On April 20, 1929, according to the evidence, the following instrument was signed by prospective lessees procured by appellant: "We, the undersigned, B. D. Marx and I. Chudnow, hereby accept the proffer and agreement for a lease made by H. S. Callahan to his agent, C. A. Edgecomb on the 12th day of April, 1929, and a copy of which is hereto attached.

"This is intended as a notice to H. S. Callahan of the acceptance of his said proposition for a twenty-five year lease on the premises described as: Lots One (1) to Eight (8) inclusive, Park View Tract, Long Beach, California, at a rental of Two Thousand Dollars ($2,000.00) per month for a period of twenty-five years, the undersigned acceptors and lessees to become the owner of the above described property at the expiration of said twenty-five year lease. Dated this 20 day of April, 1929. I Chudnow B. D. Marx."

Within the ten days originally mentioned in the letter of April 12, 1929, notice of the "acceptance" by Messrs. Chudnow and Marx was served on respondent by registered mail, by telegram, and by means of a paper left at his office.

No lease was ever executed between the parties, although it appeared that on April 29, 1929, appellant brought them together. At that conference, according to appellant's testimony, the respondent "said he would not go through with the deal, thought he had a better deal, he thought he had a better deal made, something to that effect." Respondent also "said he would not go through with any deal unless he was properly secured, if he had to turn that deed over before that lease expired." Shortly thereafter Messrs. Chudnow and Marx signed a release in favor of respondent "so that he could lease the second floor of his building"; the attorney for

respondent being instructed by him at that time to draft a lease of his premises between himself and Chudnow and Marx, which was done, but the lease was never signed by respondent or by the prospective lessees.

The appellant was the first and only witness called in this case, for, when he had proceeded to the point reached in the foregoing recital, the trial judge stated that he would entertain an objection to the introduction of any further evidence. This objection accordingly was made by respondent's counsel on the ground, as stated, that the letter of April 12, 1929, "shows that it was the intention that a lease be prepared and that the listing in and of itself was not an offer to make a lease." Counsel for appellant offered to show that Chudnow and Marx went to a bank prepared to sign the lease which had been prepared by respondent's attorneys, but that, upon arriving there, respondent declined to sign "because $10,000. not provided for in the lease, was not given to him." It appears from affidavits filed by Chudnow and Marx in support of a motion for a new trial (which seems never to have been formally made or determined) that, if they had been permitted to testify, they would have sworn that on April 29, 1929, when they conferred with respondent, he refused to execute a lease on the terms proposed in his letter to appellant, and which they were willing to sign, the respondent demanding that a bond be posted, then saying that a bond could not be obtained in such a matter; that later the parties agreed upon the terms of a lease which was approved by all concerned and for which an escrow was opened with the Farmers' & Merchants' Bank of Long Beach providing that $10,000 should be deposited by Chudnow and Marx in said escrow to be paid to respondent upon his signing said lease; that they were ready to sign the lease and pay the $10,000 into escrow, but that respondent, being present at the bank, then refused to sign the lease, unless the $10,000 were paid to him directly instead of through escrow as previously agreed; that they on their part refused to pay the money directly to respondent, who thereupon left the bank without signing the lease; that they were ready, willing, and able at all times to sign the lease which had been prepared; that their offer to enter into the lease was made in good faith; that, at the time of making the affidavit, they were financially responsible to enter into and execute the contemplated lease.

[1, 2] In the discussion that ensued upon the court's suggesting that an objection to the introduction of further testimony be made, counsel for appellant insisted upon his right to proceed with his witnesses, calling attention particularly to his second cause of action based upon a quantum meruit. In response to that contention, the trial court stated: "Quantum meruit does not arise under this sort of contract if I understand it correctly. The pleadings themselves raise the questions of law without any evidence whatever in connection with it. * * * If there had been a demurrer filed to the complaint I would have sustained it,—if there had been an objection interposed to the introduction of any evidence to the effect that the complaint did not state a cause of action I would have sustained the objection. Now we have the unqualified statement of the plaintiff himself as to Exhibit A. Judgment for defendant."

If this transaction had involved a lease upon real property, not a sale or exchange, an action for services rendered might have been based upon an oral agreement, Guy v. Brennen, 60 Cal. App. 452, 213 P. 265, and in such a state of facts suit in quantum meruit is proper. Nave v. Taugher, 49 Cal. App. 308, 310, 193 P. 508. See, also, Brown v. Crown Gold Milling Co., 150 Cal. 376, 382, 89 P. 86.

However, examination of the letter of April 12th, which is replete with references to a lease discloses nevertheless that the owner contemplated, as part of the deal, placing a deed to the premises in trust, title to pass at expiration of the twenty-five year term or earlier, if necessary for building purposes. No additional payment above the "$2,000 per month for a period of twenty-five years" was called for. This payment referred to as in the above quotation marks and again in the same letter as a "monthly payment" is not called rent, but, even if it had been, we should still construe the transaction as a contemplated conditional sale and not a lease under the authority of McCollough v. Home Ins. Co., 155 Cal. 659, 102 P. 814, 18 Ann. Cas. 862.

Since an action to recover commission for services rendered in effecting a sale of real estate must be based upon a written contract under the statute of frauds, Code of Civil Procedure, § 1973, subd. 5, it follows that the court was right in ruling that a suit in quantum meruit would not lie. "A broker cannot recover for his services in buying or selling real estate upon a quantum meruit where his contract was not in writing, when that is required by the statute in relation to brokers." 17 A. L. R. 891, citing McCarthy v. Loupe, 62 Cal. 299, and various other California cases.

We do not overlook the fact that appellant was prepared to prove that at a date subsequent to April 29th the parties agreed upon the terms of a lease which may or may not have contained an agreement to transfer title; however, in this action the common count refers to services rendered between April 12th and April 20th, and the offered proof therefore would not sustain the action in quantum meruit.

[3, 4] Having determined that the transactions referred to in these pleadings involved, not a lease, but a contemplated conditional sale, we must consider the letter of April 12th as the groundwork of the action and pass upon appellant's contention that the court's ruling which barred him from producing further evidence deprived him of his day in court. To determine the merit of this contention, we turn, as did the trial court, to the letter of April 12th, noting first its closing words: "I believe this brings out the necessary high spots for your people to shoot at, as a preliminary outline to work from."

In our opinion, this language clearly imports a reservation in the seller of the right to work out with the buyers final details of the transfer acceptable to both parties. We are strengthened in this belief when we consider the nature of the transaction, involving as it did the contemplated transfer of title after the lapse of twenty-five years or earlier under certain conditions, payments aggregating $600,000, permitting construction of new buildings upon premises in the business center of Long Beach, furnishing possible means of financing such construction and requiring security therefor. No provision is made in the letter for payment of taxes or assessments, for providing insurance in any amount or determining the use or disposition of money that might be secured in case of loss, for conditions upon which default might be declared or manner or time of notice to remedy a claimed default. These are only a few of the important details that the owner of property of this character has a right to pass upon before parting with possession or contracting to deliver title, and this defendant inferentially but undeniably asserted that right in himself when he stated at the close of his letter that the high spots therein constituted but a preliminary outline to work from. It may be noted that the letter speaks of security to be posted, "bonds or property before turning over deed to property." Here is one high spot, in itself so indefinite and uncertain as to require for the protection of both parties a further agreement fixing the amount and nature of the security. Concluding, as we must, that the defendant reserved the right to negotiate further with any prospective lessees or purchasers whom the plaintiff might bring to him, we now are called upon to decide whether the court was justified in terminating this trial as soon as he heard from the plaintiff that no lease was actually signed. In this connection the following language appearing in the letter of April 12th commands our attention: "I will pay you a commission on the basis we talked about, that $8,750 is to be the full amount paid when the lease is signed, payable $500 per month."

It seems to us that here is a condition, under which the broker accepted this employment, that no commission would be due unless a lease (or selling agreement) was actually signed. While it is a fact that an owner who agrees to pay a commission when a sale is made may not bar his broker from recovering the amount earned by merely refusing to convey to a purchaser who has been procured by the broker and who is ready, willing, and able to perform (Carlin v. Lifur, 2 Cal. App. 590, 84 P. 292), it can hardly be gainsaid that owner and broker may, if they wish, enter into a binding agreement that no commission shall be considered as earned until the happening of a certain specified event. See Shepherd-Teague Co. v. Hermann, 12 Cal. App. 394, at page 397, 107 P. 622. Evidently the trial court concluded that there was such an agreement in this case, and, feeling that no useful purpose would be served by taking additional testimony when it became apparent that no lease was signed, decided to terminate the hearing forthwith.

The appellant claims that various findings made by the trial court are unsupported by the evidence. We agree, but the findings that are not so supported relate to matters that are quite immaterial, in view of the conclusion reached by the court that no commission was due because no lease was executed.

[5] A clerical error appears in the findings as well as in the conclusions of law in this record where the letter of April 12, 1929, is referred to as Plaintiff's Exhibit 1, instead of Exhibit 2, its proper designation. Having this necessary correction in mind, we observe that there are sufficient findings supported by the evidence to warrant the conclusions drawn by the court and to sustain the judgment. "It is indisputable that if there are unobjectionable findings which amply support the judgment, findings on other issues become immaterial, and the fact that they are contrary to the evidence is not ground for reversal." 24 Cal. Jur. p. 993, citing many cases.

Judgment affirmed.

We concur: HOUSER, Acting P. J.; YORK, J.

132 Cal.App. 303

TORREY v. INDUSTRIAL ACCIDENT COMMISSION OF STATE OF CALIFORNIA et al.

Civ. 4907.

District Court of Appeal, Third District, California.

May 26, 1933.

Rehearing Denied June 24, 1933.

Hearing Denied by Supreme Court July 25, 1933.

1. Master and servant ⇐375(1).

Death of employee of Department of Agriculture, Bureau of Dairy Control, while on speedboat ride with local inspector, *held* not to have occurred "in course of employment."

[Ed. Note.—For other definitions of "Course of Employment," see Words and Phrases.]

2. Courts ⇐89.

Decisions of Accident Commission are not controlling on District Court of Appeal.

3. Master and servant ⇐405(1).

Adverse as well as favorable inferences may be drawn from evidence produced by petitioner for workmen's compensation where no evidence other than petitioner's was produced.

4. Master and servant ⇐375(1).

Accident, to be compensable, must result from risk reasonably incident to employment.

5. Master and servant ⇐375(1).

Risk attendant on ride in speedboat *held* not reasonably incident to employment by Department of Agriculture, Bureau of Dairy Control.

Certiorari to Industrial Accident Commission.

Proceedings under the Workmen's Compensation Act by Maude R. Torrey for the death of Ivor F. Torrey, opposed by the Department of Agriculture, Bureau of Dairy Control, and State Compensation Insurance Fund. The Industrial Accident Commission found that death did not occur in course of employment, and Maude R. Torrey brings certiorari.

Affirmed.

Chas. A. Bliss, of Sacramento, for petitioner.

A. I. Townsend, of San Francisco, for respondents.

MILLER, Justice pro tem., delivered the opinion of the court.

This is a petition to review and annul a decision of the Industrial Accident Commission of the State of California, finding that the death of Ivor F. Torrey, who was an employee of the Department of Agriculture Bureau of Dairy Control of the State of California, did not occur in the course of his employment.

The deceased, at the time of his death, which occurred July 24, 1932, was a resident of Sacramento, and was an employee of said department. He was a supervising inspector, and his duties required him to travel over the state, conferring with local inspectors of the department, and arranging for and conducting meetings of dairymen in an effort to obtain their co-operation in enforcing the laws and regulations affecting them and their products. Such meeting was scheduled to be held at Eureka on July 25, 1932, and it was expected to last three days. One Louis Brown was the inspector in charge at Eureka. He lived at Ferndale, some miles southerly from Eureka. Mr. Torrey was on his way from Sacramento to Eureka, and drove by Ferndale for the purpose of conferring with Mr. Brown concerning business of the meeting on the following day. On arriving at Ferndale, he learned that Mr. Brown was attending a picnic some miles away, and he proceeded to hunt him up at the picnic, and they there discussed the proposed meeting and a surprise test they were to make of the milk of the dairymen of the Eureka district. They were frequently interrupted during their discussion because of the fact that Mr. Brown was a moving spirit at the picnic, if not the directing head. Motorboats were plying on the river nearby. Mr. Torrey had with him his small son, who expressed a wish to have a boat ride. Mr. Brown was accompanied by a lady friend to whom he was desirous of giving a ride on the fanciest speedboat on the river. Torrey and Brown had been conferring for half an hour, and were talking, but about what it does not appear, when the operator of the star boat called Brown and announced that he was ready to leave on his last trip of the day, whereupon Brown invited Mr. and Mrs. Torrey and their small son to join him and his companion on the ride. Torrey and the son accepted, Mrs. Torrey preferring to remain ashore. Mr. Brown's companion and the Torrey boy were seated inside the cabin of the boat, and there being ten other passengers aboard, Brown and Torrey went on top of the boat. The trip was to last only five minutes, but the boat capsized and both Brown and Torrey with six other persons were drowned.

[1] Petitioner contends that because Brown and Torrey were discussing the business he went to see Brown about at the time Brown was advised that the boat was making its last trip for the day, it must be presumed that they went upon the boat to continue their discussion, and that they were engaged in that discussion at the moment of the accident and resulting death; hence, that deceased was acting in the course of his employment at

the time of his death, and therefore entitled to compensation.

With petitioner's view of the case we find ourselves unable to agree. We believe that the natural thing to assume, and to our minds the only reasonable conclusion one may reach in the circumstances under which the deceased went upon the boat, was that if he had not already concluded his discussion of the business under consideration, he and Brown at least laid it aside for five minutes so they could enjoy a little diversion and the thrill of a ride on a bounding speedboat. Surely, it is far-fetched to assume that Torrey, or any one else save the operator of the boat, who ran it as a business, whether young or old, full of the exuberance of health or borne down by the weight of years, or the most exacting demands of business, went on that boat ride for any other purpose than his personal pleasure.

[2] The decisions of the Accident Commission cited by petitioner as supporting her position are not, in the first place, controlling on this court, and, in the second place, present facts essentially different from the instant case.

The case of Griffith v. Arrowhead Hot Springs, 15 I. A. C. 55, is more nearly in point. That was a case where the driver of a truck was on his way home from work, when he left his truck and ran across a street to get himself some tobacco, and while crossing the street on that mission, was struck by an automobile. We cannot subscribe to the commission's holding in that case, that the truck driver was injured in the course of his employment, as being either sound law or based on sound reasoning.

[3] Petitioner declares that there is no evidence in the case other than what she produced. It is true she produced all of the evidence that there is in the case, but it does not follow, as petitioner seems to think, that because she produced all the evidence, no finding may be made against her, and that the evidence must be considered as favorable to her side of the case. Adverse as well as favorable inferences may be drawn from evidence produced by her, and there is an inference or presumption to be drawn from the boat ride (in the absence of some evidence other than the inference contended for by petitioner that a five-minute ride was taken so the conference might continue), that Torrey had, for the time being at least, turned aside from the business of his employment to fields of personal recreation. Hufstetler v. Department of Industrial Relations, 107 Cal. App. 741, 290 P. 922.

[4] The accident must be one resulting from a risk reasonably incident to the employment, to justify an award. Coronado Beach Co. v. Pillsbury et al., 172 Cal. 682, 158 P. 212, L. R. A. 1916F, 1164; Ward v. Industrial Accident Commission, 175 Cal. 42, 164 P. 1123, L. R. A. 1918A, 233; Balboa Amusement Producing Co. v. Industrial Accident Commission, 35 Cal. App. 793, 171 P. 108.

[5] It would require a long stretch of the imagination to believe that the risk attendant upon the boat ride involved in this case was reasonably incident to the employment of the decedent. The evidence would not have justified any other conclusion than that reached by the commission.

The award is affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.

132 Cal.App. 118

PEOPLE v. KELLY.

Cr. 246.

District Court of Appeal, Fourth District, California.

May 19, 1933.

1. Criminal law ⇐183.

Ordinarily, where jury is discharged without defendant's consent before reaching verdict, defendant has been in jeopardy, but not where defendant has consented.

2. Criminal law ⇐183.

Defendant's consent to discharge of jury before verdict is implied under some circumstances, as where defendant moves in arrest of judgment, for vacation of judgment, or for new trial.

3. Criminal law ⇐290.

Former jeopardy must be specially pleaded, and facts constituting bar must be found by court or jury.

4. Criminal law ⇐183.

Language of defendant's counsel when former jury was discharged before reaching verdict *held* to imply consent, barring former jeopardy plea.

Appeal from Superior Court, San Diego County; Arthur L. Mundo, Judge.

William B. Kelly was convicted of burglary of the second degree, and he appeals.

Affirmed.

George A. Malette, of San Diego, for appellant.

U. S. Webb, Atty. Gen., and John L. Flynn, Deputy Atty. Gen., for the People.

BARNARD, Presiding Justice.

The defendant was charged in an information filed by the district attorney of San

Diego county with the crime of burglary, to which charge he pleaded not guilty and also entered a plea of once in jeopardy, in that he had theretofore been tried for the same offense in the superior court of that county. A jury found the defendant guilty of burglary in the second degree and returned a verdict for the people on the plea of once in jeopardy. From the ensuing judgment and from an order denying his motion for a new trial, this appeal is taken.

The only point raised by appellant is that the evidence does not sustain the jury's verdict against him on the plea of once in jeopardy, the contention being that it conclusively appears that upon a previous trial of the appellant for the same offense a mistrial was ordered without his consent.

At the close of the people's case this appellant introduced evidence in support of his plea of once in jeopardy only. This evidence consisted of a stipulation and an exhibit. Because of the importance of the question to the appellant, the stipulation, the exhibit, and what was said in reference to admitting the exhibit is set forth in full as they appear in the transcript:

"Mr. Malette: I will state for the purposes of the record and for the ladies and gentlemen of the jury the stipulation:

"It is stipulated that on January 3rd, 1933, before the Hon. Judge Mundo, a judge of the superior court of San Diego county, California, the defendant, William B. Kelly, who is now on trial was at that time placed on trial before a competent jury, the jury was sworn to try the issues, evidence was taken, and in the course of the prosecution's presenting of certain evidence of J. L. Berg, the court adjourned, as is shown by an exhibit to be introduced and a mistrial declared by the court, is that satisfactory?

"Mr. Bristow: That is the facts.

"Mr. Malette: And I offer this exhibit—you will stipulate this may be introduced as an exhibit?

"Mr. Bristow: Oh, yes.

"The Court: It may be received in evidence and marked the Defendant's Exhibit A.

"Mr. Malette: And, Ladies and Gentlemen of the Jury, I will read this to you. You will be instructed by the court if you desire you may take it to the jury rooms with you. This is a section of part of the transcript of the shorthand notes as taken by the shorthand reporter and transcribed which has a bearing upon the mistrial, it refers to the book and page of the transcript (Mr. Malette reads):

"'(B. 2682–p. 81)

"'January 4, 1933.

"'J. L. Berg, under cross-examination by Mr. Malette: * * *

"'Q. On the 20th, I believe, was the next time that you—?

"'A. 21st.

"'Q. 21st; when you interrogated Mr. Kelly and made certain statements to him, at that time did he deny participation in the crime he is here charged with? A. Yes, he made denials at that time.

"'Mr. Malette: If the court please, at this time I ask that all of the testimony pertaining to these statements be struck from the record and the jury admonished not to consider them.

"'The Court: We will take a fifteen minute recess at this time, and remember the admonition of the court. Counsel will remain. (Jury retires)

"'The Court: Now, I am going to take up the matter here.

"'Mr. Bristow: May I call Mr. Berg back to the stand, your honor? I asked him in the room just now—

"'The Court: No. I am sorry. You have gone beyond the line, this case is another mistrial and that is all there is to it.

"'Mr. Bristow: I talked to the detectives. I talked to them time and again; he says, in there, he meant by denials, he meant, he says "I have nothing to say." That is his interpretation of a denial. Now, I talked to them, very carefully went over this to be sure there was no mistake this time. I went over it carefully, and was very careful in it, and I said "Now, at any time was there any denial by him that he done—took part in it?" He said, at that time he said "It is up to the jury to determine. You cannot incriminate me. You cannot get me to incriminate myself, and I have nothing to say." And, at no time was there an overt denial.

"'Mr. Malette: His testimony on the witness stand cannot be any more clear and explicit than the answer to my question. I am satisfied, if the court please, this case should either result in a mistrial or an instructed verdict. I am going to ask that we have an instructed verdict in this case, because I hate to see the county go to the expense of three different trials in this case on the same point; the same question was up in Harden's court and the same ruling was made.

"'Mr. Bristow: It is not the same thing at all, you know it.

"'Mr. Malette: The question was asked in practically the same words, and, Mr. Berg—his answer was the same as given here. The court said it was a mistrial.

"'Mr. Bristow: It was not the same thing, Mr. Malette, and you knew the facts were entirely different. Mr. Berg testified to the conversation on the train, at that time was asked if he made a denial. I brought it out myself at that time, because he said he made denials all the way down. And the court here—at our—I do not want to be in the position, your honor, of being in the attitude of attempting to impose upon this court. The court heard

me at the time we argued this matter out. He asked the witness what he said, what was done, and I went over it, in the court's presence—

" 'The Court: We will have a ten minute recess. (Stipulated the jury is present.)

" 'The Court: Because of certain testimony which was given by Officer Berg the court finds that it constitutes error, reversible error, constitutes grounds for a mistrial, and therefore the court declares a mistrial, excuses and discharges the jury from further duty upon this trial.' "

[1-3] Appellant and respondent are in accord upon the general principles of law that, with certain exceptions not applicable here, where a defendant is placed upon trial before a competent court and jury upon a valid indictment or information, and where the jury, without the consent of the defendant, is discharged before reaching a verdict, the defendant has been in jeopardy and may not again be tried upon the same charge. It is equally well settled that, where a defendant has consented to the discharge of a jury before a verdict is reached, the plea of once in jeopardy is not available to him. People v. Webb, 38 Cal. 467; People v. Hunckeler, 48 Cal. 331; People v. Young, 100 Cal. App. 18, 279 P. 824. Consent is implied under some circumstances, as, for instance, where a defendant moves in arrest of judgment, asks to have the judgment vacated, or seeks a new trial. People v. Tong, 155 Cal. 579, 102 P. 263, 24 L. R. A. (N. S.) 481, 132 Am. St. Rep. 110. That a defendant has been once in jeopardy is a matter of defense to be relied on in another trial, must be specially pleaded as a bar, and the facts constituting the bar must be found by the court or the jury. In re Harron, 191 Cal. 457, 217 P. 728.

[4] In the case before us, former jeopardy was pleaded and evidence introduced in support of that plea. While this evidence is in fact deficient, in that it nowhere appears therefrom that the former trial referred to, in which a mistrial was declared and the jury discharged, was upon the same charge as that in the present case, the only question here argued is whether the evidence is sufficient to support a finding that the appellant consented to the action taken by the trial court in the former proceeding, in declaring a mistrial and discharging the jury.

The language used by appellant's counsel at the time in question, that he was satisfied that "this case should either result in a mistrial or an instructed verdict," not only expresses satisfaction with either of the things referred to, but practically amounts to a request on the part of the defendant that the court either declare a mistrial or in due time advise a verdict. To say that a defendant is satisfied that a case should result in a mistrial, in sound reason and common sense, strongly implies a consent that such a result should obtain.

We think this conclusion is borne out by what followed. After making the remark referred to, counsel went on to say that he intended to ask for an instructed verdict because he hated "to see the county go to the expense of three different trials in this case on the same point." In effect he was arguing that, while the case must result in either a mistrial or an instructed verdict, an instructed verdict was to be preferred as saving expense to the county. His statement indicates specifically an expectation that such a third trial, if ordered, would be upon the same point that had just arisen in that trial and which had apparently arisen once before, and not upon the issue of former jeopardy now relied upon. While this expression indicates a hope that the court might be induced to advise a verdict, it also indicates an intention to meet the same point again and strengthens the conclusion that the defendant consented to having a mistrial ordered unless the court was willing to advise a verdict.

This matter had started with a request that certain testimony deemed erroneous be stricken from the record and the jury admonished not to consider the same. After the jury had retired, the court suggested that the circumstances indicated a mistrial. The only reasonable interpretation of what followed is that counsel, for the time at least, abandoned his request to strike out testimony and, a mistrial having been suggested by the court, was taking advantage of the circumstances to press a larger issue. The matter then under immediate consideration was the question of a mistrial, and counsel added the suggestion that he proposed to ask for an advised verdict because of the expense involved in another trial. The only subsequent discussion was between counsel and conceived whether the matter that had arisen was the same point that had previously caused trouble. Appellant's counsel reinforced his argument that the points were the same with the statement, "The court said it was a mistrial." The natural and reasonable effect of the language used is to indicate consent to the matter under immediate consideration, the ordering of a mistrial, unless the court was disposed to favor the suggestion made for an advised verdict.

It may be further observed that the statements made were such as would naturally lead the court to believe that the defendant consented to a mistrial order. Had nothing been said in this regard, the court could have protected the rights of the people by proceeding with the case. Even if the statements made are capable of a double construction, they should be viewed in the light of the circumstances in which they were uttered and with a view of determining what was intended. Thus viewed, we think the statements

made were such as to justify the court in believing that an order of mistrial was consented to. Under such circumstances an appellant may not insist upon such a construction of statements made by him as would only tend to show that the court was misled thereby.

We think the evidence supports the verdict upon the plea in bar. The judgment and order appealed from are affirmed.

We concur: JENNINGS, J.; ANDREWS, Justice pro tem.

132 Cal.App. 275

WELFARE INV. CO. v. STOWELL.

Civ. 8996.

District Court of Appeal, First District, Division 2, California.

May 26, 1933.

1. Appeal and error ⇐1042(1).

Comaker of joint and several note sued by assignee was not prejudiced by striking his cross-complaint against payee and comakers where issue, attempted to be raised in cross-complaint, was same as that raised in answer which was filed.

Comaker alleged in answer that purported assignment was made at request of one of comakers, and that assignee was alter ego of that comaker, that obligation to payee was satisfied by assignee, and that assignment was made to release other comakers from obligation on note. In cross-complaint comaker made same allegation and brought in payee and other comakers as parties defendant.

2. Pleading ⇐354(2).

As respects striking cross-complaint, payee who assigned all his interest in joint and several note could not be made party by comaker who was sued by assignee, since payee had no controversy with comaker as to his obligations under note.

3. Pleading ⇐354(2).

As respects striking cross-complaint, comakers of joint and several note could not be made parties by comaker who was sued by assignee, since other comakers' rights and obligations under note were equal to those of comaker who was sued.

4. Action ⇐6.

Purpose of statute providing for actions for declaratory relief is to provide ready and speedy remedy in cases of actual controversy relating to legal rights and duties of respective parties (Code Civ. Proc. § 1060 et seq.).

5. Pleading ⇐354(2).

Where assignee of joint and several note sued one of several comakers, and comaker answered and filed cross-complaint, and it appeared that issue raised in cross-complaint could be determined on trial of defenses raised in answer, court was justified in striking cross-complaint (Code Civ. Proc. § 1060 et seq.).

Appeal from Superior Court, Los Angeles County; Lester W. Roth, Judge.

Action by the Welfare Investment Company against N. W. Stowell, wherein defendant filed a cross-complaint. From order granting plaintiff's motion to strike cross-complaint from files, defendant appeals.

Affirmed.

Davis & Thorne, of Los Angeles, for appellant.

Meserve, Mumper, Hughes & Robertson, of Los Angeles, for respondent.

NOURSE, Presiding Judge.

The plaintiff, as assignee of the payee, sued one of four comakers of a joint and several promissory note. The defendant answered, setting up special defenses of payment through allegations that the purported assignment to the plaintiff herein was made at the instance and request of one of the comakers of said promissory note; that the plaintiff herein is in fact the alter ego of said comaker; that the obligation of the defendant to the payee upon said promissory note was in fact satisfied and discharged by the plaintiff herein; and that the purported assignment thereof to this plaintiff was made for the purpose of enforcing said obligation against this defendant alone and for releasing therefrom the other comakers of said note. At the time of filing the answer the defendant also filed a cross-complaint bringing in as additional parties the three other comakers of the note and the payee named therein. Summons was issued and served upon these parties pursuant to an order of court duly made for that purpose. This cross-complaint pleaded in somewhat briefer detail the same issue raised in the answer, and alleged that a controversy existed as to the legal rights and duties of the cross-complainant and of the several cross-defendants. Before any of the cross-defendants had appeared, the plaintiff in the main action moved to strike the cross-complaint from the files on the grounds that it did not state facts entitling the defendant to declaratory relief because the facts alleged therein were the same facts alleged in the separate defenses pleaded in defendant's answer to the complaint. The motion to strike was granted, and the appeal was taken upon a typewritten transcript.

[1-3] Assuming that the order striking the cross-complaint from the files is an appealable order within the rule of Howe v. Key System Transit Co., 198 Cal. 525, 246 P. 39, as argued by the appellant, this appeal cannot avail him because he has suffered no prejudice. The issue attempted to be raised in the cross-complaint is precisely the same as that pleaded in the special defenses found in the answer. It is appellant's theory that when one of several comakers of a promissory note, either in his own name or through a dummy in his behalf, satisfies the primary obligation and takes an assignment of the note from the payee thereof, the primary obligation is thereby discharged and is no longer a living obligation on the part of the makers thereof. It is then said that when this is done the assignee of the payee cannot sue his comakers on the primary obligation, but is reduced to an action for either reimbursement or contribution. The theory advanced in the pleadings is supported by numerous authorities which are cited in Harris v. King, 113 Cal. App. 357, 362–364, 298 P. 100. Hence, if the facts alleged in the cross-complaint can be proved by competent evidence in support of the prayer for affirmative relief, they can with equal facility be proved in support of the special defenses pleaded in the answer. If the cross-complaint is a good pleading for declaratory relief, the extent of the relief which the court could grant upon it would be a declaration that by reason of the assignment under the circumstances alleged the primary obligation was discharged and was therefore unenforceable in the hands of the assignee. The real controversy therefore exists between the plaintiff and the defendant. There are no facts alleged in the cross-complaint which support the contention that a controversy exists between the appellant and the other parties whom he seeks to bring into the litigation. The payee having assigned all interest in the note is no longer a party to it and has no controversy with the appellant as to his obligations under it. The other comakers of the note are in the same situation as the appellant. They can have no controversy with the appellant as to their obligations under the note because their rights and obligations under it are equal to his in every degree.

[4, 5] The purpose of section 1060 et seq., Code of Civil Procedure, providing for actions for declaratory relief, is to provide a ready and speedy remedy in cases of actual controversy relating to the legal rights and duties of the respective parties. By section 1061, the court is permitted to refuse to exercise the power in any case where its declaration or determination is not necessary under the circumstances. This is such a case. All the issues raised in the cross-complaint can be readily determined in the trial of the special defenses raised in the answer and, because this affirmatively appears upon the face of the pleading, the trial court properly refused to exercise the power granted by these sections of the code.

The order is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

132 Cal.App. 256

DE NURE LAND & INVESTMENT CORPORATION v. SECURITY FIRST NAT. BANK OF LOS ANGELES et al.

Civ. 8998.

District Court of Appeal, First District, Division 2, California.

May 25, 1933.

1. Principal and surety ⇐5.

Landowners entering triparty trust agreement whereby they conveyed to bank as trustee for benefit of purchaser *held* not sureties as to persons claiming out of "improvement fund" established by beneficiary with their consent (Code Civ. Proc. § 1192).

2. Principal and surety ⇐5.

Rule that one not nominally surety, who would suffer same injurious consequences as would express surety if he were compelled to pay debt, will be accorded same rights as express surety, *held* inapplicable to landowners entering triparty trust agreement whereby they conveyed to bank as trustee for benefit of purchaser.

Facts showed that landowners had entered triparty trust agreement whereby they conveyed to bank as trustee for benefit of third persons who wished to purchase property and that such third persons agreed to make certain improvements, giving a surety bond to secure the payment of the costs thereof, and that subsequently the beneficiaries established an "improvement fund" to which the landowners consented, out of which the improvements were to be paid.

3. Novation ⇐1.

To effect "novation" involving introduction of new party into agreement, there must be mutual agreement among parties to old contract and parties to new contract, whereby new obligation is substituted for old one.

[Ed. Note.—For other definitions of "Novation," see Words and Phrases.]

Appeal from Superior Court, Los Angeles County; J. T. B. Warne, Judge.

Action for declaratory relief brought by De Nure Land & Investment Corporation against the Security First National Bank of Los Angeles and others. From the judgment, plaintiff appeals.

Affirmed.

Finlayson, Bennett & Morrow and Henry L. Knoop, all of Los Angeles, for appellant.

Rohe & Weikert, of Los Angeles (Alfred C. Bowman, of Los Angeles, of counsel), for respondents James Oviatt and W. L. Alexander.

STURTEVANT, Justice.

The plaintiff commenced an action to obtain a judgment of declaratory relief. The defendants answered and after the trial findings were made in favor of the plaintiff. Contending that through errors of law the trial court did not grant it all the relief to which it was entitled, the plaintiff has appealed.

Heretofore D. D. De Nure and Flora W. De Nure, his wife, were the owners of certain lands in Los Angeles. H. W. Genter and his associate desired to purchase the land, make certain improvements thereon, subdivide it, and sell lots according to the subdivision. To carry out the plan the De Nures conveyed to the Pacific Southwest Trust & Savings Bank, the predecessor of the defendant Security First National Bank of Los Angeles. At the same time a declaration of trust was made in which the De Nures were named as the sellers, the bank as the trustee, and H. W. Genter and his associate as beneficiaries. Under the terms of the declaration of trust the De Nures were to be paid $66,250. Of that sum $15,000 was to be paid on the execution of the trust agreement and the balance was to be paid out of installments to be collected on the sales of lots. The beneficiaries agreed to grade the streets, put in water pipes, and install some sidewalks and curbs. Said improvements were to be made at the cost and expense of the beneficiaries and to secure the payment of the cost a surety bond in the sum of $10,000 in favor of the bank was to be executed. The execution of said bond was made a condition precedent to the operation of the trust; furthermore, if said beneficiaries failed to put up the bond then the trustee was authorized to post notices and record the same in such manner as to comply with section 1192 of the Code of Civil Procedure. Under different provisions of the declaration forfeitures were provided for and under certain contingencies the lands could be foreclosed and taken back by the sellers. Shortly after the execution of the above papers H. W. Genter became the sole beneficiary. Stewart E. Bruce became interested in a financial way, but his rights are in no manner in controversy. Toward the end of 1924, H. W. Genter desired to proceed to install the improvements above mentioned. He arranged a contract with George N. Snyder as contractor. Under the terms of that contract the contractor undertook to install the improvements for the sum of $19,000. Said sum was to be paid in installments. For the making of the payments Genter covenanted that he would instruct the defendant bank, as trustee, to establish an "Improvement Fund." The contract provided that before it should take effect H. W. Genter should obtain the consent of Stewart E. Bruce, the bonding company, and the De Nures. The consents were obtained. The consent of the De Nures, among other things, provided as follows: "That the undersigned jointly and severally agree that in the event the undersigned or either of them should at any time foreclose or otherwise take back directly or indirectly any of said real estate covered by said trust and known as tract number 3809, that they hereby agree to thereupon pay to said George N. Snyder, contractor, for the improvements installed upon said tract by said Snyder in accordance with the foregoing contract a sum or sums equal to $83.33 for each lot which may be taken back or received by them, or either of them, said sum of $83.33 per lot being agreed proportionate cost per lot for such improvements. * * *" To secure the contract H. W. Genter assigned to the contractor his rights as a beneficiary under the trust. In due time the contractor had fully performed his contract, but he had not been paid. There remained payable to Snyder approximately $11,000. At about that time Genter assigned one-third of his beneficial interest to the defendant Kate E. Alexander. The contractor commenced to make demands that the balance be paid to him. Thereupon Genter went to San Antonio, Tex., where he met by appointment the defendant W. L. Alexander, the son of Kate E. Alexander. Genter explained to W. L. Alexander the indebtedness to Snyder and that the latter was threatening to foreclose under the power given to him in the improvement contract. Thereupon W. L. Alexander gave to Genter his check for $11,000, and directed him to return to Los Angeles, purchase the Snyder contract and everything that went with it for W. L. Alexander's account. As Mr. Alexander resided in Mexico he directed that title be taken in the name of his mother, Kate E. Alexander. Genter returned to Los Angeles and, contrary to instructions, he purchased the improvement contract in the name of Caroline Vonderahe, and he caused Snyder to assign the beneficial interest in the trust to Genter. Later W. L. Alexander went to Los Angeles and on ascertaining the facts he caused Caroline Vonderahe to transfer the improvement contract to Kate E. Alexander in trust for her son and a little later she in turn assigned it to James Oviatt, who now holds it in trust for W. L. Alexander. Hay-

ing found the foregoing facts, as a conclusion of law the court found that in the event of a foreclosure by the De Nures that they "shall pay to the defendant W. L. Alexander for the improvements installed on said real property by the said Snyder, in accordance with the improvement contract, the sum of $83.33 for each lot which may be so taken back or received by them * * *" not to exceed the balance due under the improvement contract. It is that specific finding of which the plaintiff complains and makes the following points:

[1, 2] The plaintiff contends that the liability of the De Nures was that of sureties. It argues that the "Improvement Fund" provided for in the improvement contract must be considered as the principal and the De Nures as the sureties. The proposition is not sustained by the facts. There is nothing in the contract which supports that contention. Designating Genter's moneys by the name "Improvement Fund" injected no new principle. Braun v. Crew, 183 Cal. 728, 192 P. 531, and Jensen v. Burton, 117 Cal. App. 66, 3 P.(2d) 324, contain nothing to the contrary. Continuing the plaintiff asserts that one who is not nominally a surety, but who would suffer the same injurious consequences as would an express surety if he were compelled to pay the debt, will be accorded in equity the same rights as an express surety. Finnell v. Finnell, 159 Cal. 535, 114 P. 820. The rule of law is as claimed, but no relation between that rule and the facts of this case is shown. Again, the plaintiff cites Hoffman v. Habighorst, 38 Or. 261, 63 P. 610, 612, 53 L. R. A. 908, in which the court quotes with approval: "If a promise be made for the benefit of another, without sharing in the consideration, the promisor will be a surety, whatever may be the form of the agreement." That rule is well settled. 50 C. J. 15. But, in the instant case the promise of the De Nures was for their own benefit and not that of another. Furthermore, if they elected to take over any lots the consideration would wholly move to them and no part thereof would move to another. Not only were they to share in the consideration, they were to get all of it. The fact that, in the absence of the consent contract, the burden of paying for the improvements rested on Genter, did not change the rule in the least. In Megraw v. Hamilton Trust Co., 252 Pa. 425, 97 A. 581, the Supreme Court of Pennsylvania was considering the following facts: Richard McDougal was the owner of a lot in Philadelphia on which he desired to erect twelve dwellings. He conveyed to the Hamilton Trust Company. The latter employed C. F. McFadden as contractor. The latter contracted to purchase tile from Standard Tile Company. To protect the latter, the trust company agreed in writing that if McFadden did not pay it would see that the property was made available to the Standard Company by payment of its bill out of the proceeds on sale, by conveyance to the Standard Company, or else by mortgage in the amount of its bill. The Standard Company sued the trust company. The latter claimed it was a surety. On page 582 of 97 A., 252 Pa. 425, the court said: "No complaint is made that the measure of damage applied was incorrect, but it is contended that the obligation of the defendant under the declaration above recited was that of surety, and that, because the principal had notified the surety that the claim made against him by the plaintiff was contested, the surety had the right to decline performance of this contract until the debt due from the principal had been legally determined. A sufficient answer to this is that the obligation cannot be construed as a contract of suretyship. It does not by its terms make the trust company answerable to the plaintiff for the debt of McFadden. A suit against the trust company for McFadden's debt could not have been maintained. What the trust company agreed to do was to make available to the plaintiff, to answer McFadden's debt, a certain property over which, while not the holder of the legal title, it had absolute control quite as much as though it had been the holder of such title, in one or other of three ways, by payment of the proceeds on sale of the property, by conveyance, or by mortgage in the amount that McFadden owed. When the plaintiff made demand of the trust company that it keep its promise by doing one or other of these things, the plaintiff's contract with McFadden was at an end. The indebtedness had been contracted, and McFadden had failed. The plaintiff therefore was in position to made the demand." Having cited Hoffman v. Habighorst, supra, the plaintiff hastens to assert that no part of the consideration in the consent contract was to move to its assignors. The plaintiff cites and relies on Hughes v. Ladd, 42 Or. 123, 69 P. 548; First Nat. Bank v. Alexander (Tex. Civ. App.) 4 S.W.(2d) 298; McCandless & Co. v. Hadden, 9 B. Mon. (Ky.) 186; 50 C. J. 14. Those authorities are not helpful. Each one involved a set of facts in which, by the terms of the contract, no consideration moved to the alleged surety. The defendants cite and rely on section 2831 of the Civil Code. That section, with interpolations, provides: A surety is one who at the request of another (Snyder), and for the purpose of securing to him (Snyder) a benefit, becomes responsible for the performance by the latter (Snyder) of some act in favor of a third person (the improvement fund or Genter). Having done so, they argue vigorously that such was not the contract and therefore the relation of surety was never created between the De Nures and either the fund or Snyder. We think they are entirely correct.

The plaintiff claims that when Snyder assigned the improvement contract to Mrs. Alexander for the account of her son and, without the consent of the De Nures, assigned the beneficial interest of Genter under the trust agreement back to Genter, that the De Nures, as sureties, were thereby discharged. As we have shown above that the De Nures were not sureties, it is immaterial what Snyder assigned without their consent.

[3] In its final brief the plaintiff asserts that if the De Nures were not sureties that then they were principal debtors and that when they signed the consent agreement a novation occurred as to the trust agreement. The point is not well founded. The trust agreement was a tripartite contract. Snyder was not a party to it. In order to effect a novation involving the introduction of a new party there must be a mutual agreement among the parties to the old contract and the parties to the new contract whereby the new obligation is substituted for the old one. 46 C. J. 600. The record does not show that this case comes within that rule.

We find no error in the record. The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

ERICKSON v. MUNICIPAL COURT OF CITY AND COUNTY OF SAN FRANCISCO et al.*

Civ. 8884.

District Court of Appeal, First District, Division 1, California.

May 26, 1933.

Rehearing Denied June 24, 1933.

Hearing Granted by Supreme Court July 25, 1933.

1. Certiorari ⇐5(1).

Error in issuance of writ of execution *held* reviewable only by appeal from order denying motion to quash writ, and not by certiorari (Code Civ. Proc. §§ 963, 983, 1068).

2. Courts ⇐190(2).

Municipal court's order denying motion to quash writ of execution, being special order made after final judgment, is appealable (Code Civ. Proc. §§ 963, 983).

3. Certiorari ⇐5(1).

Appellant having right of appeal from order could not have order reviewed by certiorari proceeding, though court was without jurisdiction to make order (Code Civ. Proc. §§ 963, 983, 1068).

Appeal from Superior Court, City and County of San Francisco; C. J. Goodell, Judge.

Petition by A. F. Erickson for a writ of review to be directed to the municipal court of the city and county of San Francisco, and Daniel S. O'Brien, Judge thereof. From a judgment of the superior court affirming an order of the municipal court, and discharging the writ, petitioner appeals.

Affirmed.

See, also, 21 P.(2d) 480.

Stanley Burke, of San Francisco, for appellant.

Leo J. Rabinowitz, of San Francisco, for respondents.

GRAY, Justice pro tem.

[1] An abstract of a judgment for money, previously entered against appellant by the municipal court of the city of Los Angeles, was filed in the municipal court of the city and county of San Francisco. A writ of execution, based upon such abstract, was issued by the clerk of the latter court to the sheriff of said city and county, who levied upon appellant's automobile. After hearing, respondents denied appellant's motion to quash such writ, made upon the ground that there was no jurisdiction to issue the same upon the abstract so filed. The superior court in and for said city and county, after a hearing upon the return to its writ of review, rendered judgment affirming respondent's order of denial and discharging the writ of review. In support of his appeal from that judgment, appellant argues that the writ of execution should have been quashed because superior court practice, which, by reason of section 831d of the Code of Civil Procedure, governs the enforcement of municipal court judgments, does not authorize issuance of a writ of execution upon an abstract of judgment. In reply, respondents contend that, since section 26 of Statutes 1925, pp. 648, 657 (Act 5238, Deering's Gen. Laws), empowered municipal courts to exercise all powers conferred upon predecessor justice courts, issuance of the writ was authorized by section 905 of the Code of Civil Procedure, which permits a justice of the peace to issue execution upon an abstract of judgment. Respondents further claim that any error in the issuance of the writ of execution can only be reviewed by an appeal from the order denying its quashing and cannot be reviewed by certiorari. Such contention, if correct, precludes, in this proceeding, decision of the major question, raised by the parties, and compels affirmance of the judgment.

[2, 3] Respondents' order denying appellant's motion to quash the writ of execution, being a special order made after final judg-

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 29 P.2d 192.

ment, is an appealable order. Flint v. Conner, 53 Cal. App. 279, 200 P. 37; Demens v. Huene, 89 Cal. App. 748, 265 P. 389; Rogers v. Superior Court, 158 Cal. 467, 111 P. 357. Since appellant had a right of appeal from the order, he cannot have the order reviewed in this certiorari proceeding. Code Civ. Proc. § 1068; Magee v. Superior Court, 10 Cal. App. 154, 101 P. 532; Cline v. Superior Court, 35 Cal. App. 150, 169 P. 453; Stensland v. Superior Court, 39 Cal. App. 172, 178 P. 549. Even though respondents were without jurisdiction to make the order, such order being appealable, certiorari will not lie. Helbush v. Superior Court, 99 Cal. App. 501, 278 P. 1062. Respondents' order is none the less a special order made after final judgment because it was made in ancillary proceedings by a court other than the one rendering the judgment. Wells Fargo & Co. v. Anthony, 35 Cal. 696. Although the above citations deal with attempts to review, by certiorari, special orders made after final judgments by superior courts, the rules there enunciated are equally applicable to similar orders of municipal courts, for a comparison of sections 963 and 983 of the Code of Civil Procedure shows that the right of appeal from such orders is the same as to both courts.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

132 Cal.App. 235

NATIONAL PAVEMENTS CORPORATION OF CALIFORNIA v HUTCHINSON CO.

Civ. 8701.

District Court of Appeal, First District, Division 2, California.

May 24, 1933.

Hearing Denied by Supreme Court July 21, 1933.

1. Contracts ⇐303(2).

Action does not lie for breach of contract when performance is prevented by operation of law (Civ. Code, § 1511).

2. Contracts ⇐303(4).

Contract for furnishing of services or materials to street improvement contractor was executed in contemplation of city's power to terminate proceedings for good cause.

3. Contracts ⇐303(4).

City council's determination that public welfare demanded abandonment was conclusive in action against street improvement contractor for breach of his contract to use plaintiff's services in connection with improvement contract where no charges of fraud were laid to contractor.

4. Pleading ⇐216(2), 312.

Where complaint alleged agreement was evidenced by exhibits to complaint, trial court in hearing demurrer would examine exhibits and treat pleader's conclusions as surplusage.

5. Contracts ⇐337(1).

Complaint alleging contractor's breach of contract to use plaintiff's services or materials in connection with street improvement contract, and alleging contractor entered into cancellation agreement with city, but showing by attached exhibits that abandonment proceedings were initiated by city and that contractor merely agreed to release city from all claims, disclosed prevention of performance excusing contractor (Civ. Code, § 1511).

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by National Pavements Corporation of California against Hutchinson Company. From a judgment for defendant, plaintiff appeals.

Affirmed.

Carter, Peterson & McDonough and Peterson & McDonough, all of Oakland, for appellant.

Fitzgerald, Abbott & Beardsley, of Oakland, for respondent.

NOURSE, Presiding Justice.

Plaintiff sued for damages for breach of contract. Defendant's demurrer was sustained and defendant had judgment, from which plaintiff has appealed on the judgment roll.

The complaint alleges that the plaintiff was the owner of the exclusive license to manufacture a certain paving material and, on January 18, 1927, filed with the city of Oakland an agreement to furnish to the city or to any one to whom the city might award a contract for the paving of any street, such material, together with such expert assistance as might be needed and the right to use the patented process. Thereafter proceedings were duly inaugurated by the city council for the paving of certain streets within the city and for the use therein of the materials and processes owned by the plaintiff. A contract for this purpose was duly executed with the defendant which, in turn, entered into a contract with plaintiff whereby the defendant agreed to furnish all "sand, stone, clay, asphalt and mineral ingredients needed * * *" for said work and to furnish and equip a paving plant and all the "fuel, labor, incidental materials and ingredients nec-

essary for the production of said mixture." Payments were to be made by defendant to the plaintiff on the basis of 80 per cent. of 36 cents per square yard of such mixture "laid in the said improvement during the next preceding calendar month." After the work had proceeded for a short period the city council abandoned the entire proceedings by resolution finding and determining that the public interests and welfare required such action. In this resolution it was recited that certain units of said improvement had been completed in accordance with the plans and specifications and that "the sum of $9,523.55 is the fair and reasonable value of said completed units of said work * * *." The superintendent of streets was then authorized to cause that sum to be paid to defendant in full settlement for all work completed and to take a receipt from defendant "in full settlement of all claims for advances, damages, compensation or costs that have accrued or might accrue growing out of said contract * * *." It is not alleged that any further sum was paid for a release of claims that might accrue.

In respect to the proceedings leading to the abandonment of the contract the plaintiff alleges that the defendant prevented performance of said contract (with plaintiff) by entering into an agreement of cancellation with the city and that this agreement is evidenced by four several instruments which are attached in hæc verba to the complaint and made a part thereof. These exhibits are the resolution reciting that the public interests required an abandonment heretofore noted, the defendant's receipt of payment, a letter of defendant undertaking to hold the city free from certain claims, and the final resolution declaring the work abandoned.

In a second cause of action the plaintiff pleads substantially the same facts and relies on a contract made coincident with that alleged in the first and calling for the purchase from plaintiff of a quantity of clay filler to be used in connection with the same street improvement.

[1-3] Many of the points raised by both parties may be disregarded because the judgment must be affirmed for the reason that an action for breach of contract does not lie when its performance is prevented by operation of law. Civ. Code, § 1511; 13 C. J. p. 646; Collins Hotel Co. v. Collins, 4 Cal. App. 379, 381, 88 P. 292. The pleading discloses that the service tendered by the appellant was to be used exclusively in connection with the particular street improvement contracted for by respondent and, whether that service be a sale of materials or a joinder with respondent in the manufacture of a patented material, we need not decide because, in either case, the contract was executed in contemplation of the city's power to terminate the proceedings for good cause. This power is not seriously questioned. It is confirmed in Warren v. Chandos, 115 Cal. 382, 387, 47 P. 132. The legislative determination that public welfare demanded that action is conclusive in this proceeding. The good faith of the city is not questioned and no charges of fraud are laid to respondent.

[4, 5] It is true that appellant alleged that the respondent entered into an agreement of cancellation with the city. But it alleged that the "evidence" of that agreement was four named exhibits to the complaint. These exhibits do not show such an agreement. When a pleading is made in this form, the trial court in hearing the demurrer will examine the exhibits and treat the pleader's conclusions as surplusage. Peak v. Republic Truck Sales Corp., 194 Cal. 782, 790, 230 P. 948; Bashford v. Levy & Zentner, 123 Cal. App. 204, 210, 11 P.(2d) 51. Turning to the exhibits we find that the abandonment proceedings were initiated by the city and that the only "agreement" made by respondent was to release the city from all claims that "have accrued or might accrue." This release of claims that might accrue was merely a precautionary measure on the city's part. The sum paid to respondent had previously been determined as the "fair and reasonable value" of the completed units. Hence the complaint clearly discloses in both causes of action a prevention of performance which fully excuses the respondent.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

132 Cal.App. 278

PERKINS v. PACIFIC FRUIT EXCHANGE.

Civ. 8787.

District Court of Appeal, First District, Division 2, California.

May 26, 1933.

Hearing Denied by Supreme Court July 25, 1933.

1. Principal and agent ⇐119(6).

Third party seeking to hold principal to guaranty made by agent has burden of proving agent's authority to make guaranty.

2. Principal and agent ⇐123(1).

Evidence showed agent of consignment shipper of fruit did not have authority to bind principal to any guaranty of net return upon produce sold for grower.

3. Appeal and error ⇐930(1).

Where plaintiff had burden of proving authority of defendant's agent to make guaranty, appellate court could not assume that because jury found in plaintiff's favor jury

disbelieved direct evidence of want of authority.

4. Evidence ⇐65.

Fruit producer must be presumed to have known that neither consignment shipper nor his agent could legally make contract guaranteeing minimum return on fruit delivered (Gen. Laws 1931, Acts 6154 and 6155).

5. Factors ⇐1.

One handling fruit under produce dealer's license was not "deciduous fruit dealer," but was "consignment shipper" (Gen. Laws 1931, Acts 6154 and 6155).

[Ed. Note.—For other definitions of "Consignment" and "Fruit Dealer," see Words and Phrases.]

6. Factors ⇐30.

One operating under produce dealer's license and not licensed as dealer under deciduous fruit dealer's act could not guarantee price to grower for deciduous fruit (Gen. Laws 1931, Acts 6154 and 6155).

7. Evidence ⇐69.

Presumption in transaction between fruit grower and produce dealer was that ordinary course of business was followed.

8. Evidence ⇐69.

Courts take judicial knowledge that men do not ordinarily violate penal statute on chance it may be declared unconstitutional, but that in ordinary course of business they follow statute.

9. Judgment ⇐199(3).

Where there was no evidence supporting verdict for plaintiff, defendant's motion for judgment notwithstanding verdict should have been granted.

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

Action by W. S. Perkins against the Pacific Fruit Exchange. From a judgment for plaintiff, defendant appeals.

Reversed, with directions.

Athearn, Chandler & Farmer, Frank R. Devlin, Walter Hoffman, and Edward Chandler, all of San Francisco, for appellant.

Treadwell, Van Fleet & Laughlin, of San Francisco, for respondent.

NOURSE, Presiding Justice.

Plaintiff sued on an alleged guaranty of a minimum return on fruit delivered to the defendant and sold for plaintiff's account. The cause was tried with a jury and plaintiff had judgment. The defendant moved for an instructed verdict and, this motion having been denied, thereafter moved for judgment notwithstanding the verdict. This motion was denied and defendant appeals upon typewritten transcripts.

The plaintiff was the owner of a pear orchard; the defendant for twenty years past had been engaged in the business of receiving fruit on consignment and selling the same for the account of growers. The principal place of business and office of the defendant was located at San Francisco. Special agents were employed at various points in the state, one of whom was located at San Jose. During the year 1929 this special agent procured a contract from the plaintiff whereby the defendant handled his pears upon consignment, taking a 7 per cent. commission for the service. During the year 1930 the plaintiff approached the special agent in San Jose on several occasions, urging him to purchase on behalf of defendant his 1930 crop. The agent declined to do so, telling him that if he desired to sell his pears he should go to another company which was engaged in that business. The plaintiff testified that the agent then told him that if he would let the defendant ship his pears he would net the plaintiff from 50 cents to 75 cents on each box. The agent testified that he merely told the plaintiff that his pears "should bring around fifty cents to seventy-five cents a box as they did last year." Plaintiff also testified that although the defendant thus undertook the additional obligation of a guaranty he was to pay the defendant the same commission for handling his crop as he paid in 1929. Plaintiff employed a truckman to haul his pears to the defendant's plant and as each lot of fruit was delivered to the defendant's plant a receipt was given to the truckman which expressly stipulated that the defendant "in no way guarantees that the grower shall receive a particular or any price for said fruit." After each lot of fruit was packed out, the company mailed to the plaintiff a statement entitled, "Consigned fruit pack out statement," and after each sale was made by the defendant it mailed to the plaintiff a statement specifying the number of boxes sold, the date sold, the variety, and total selling price yielded. Each of these statements itemized the amount of charges incurred with respect to each lot sold and specified the profit or loss on each lot. Where profit was shown in the statement, a check was mailed to the plaintiff with the statement and the proceeds of checks so received were retained by him without protest. The bulk of the fruit was sold by the defendant by the end of the year 1930. In July, 1931, the defendant made demand on the plaintiff for the payment of $760 claimed to be due for charges in handling the fruit in excess of the total proceeds. On August 8, 1931, the plaintiff, after consultation with his attorneys, for the first time informed the de-

fendant that he claimed a guaranty of the net return from the sale of the fruit.

[1] On this appeal the real question involved is whether the respondent sustained the burden of proving that the agent had actual or ostensible authority to bind his principal to the alleged guaranty. At the outset it must be conceded that when a third party seeks to hold a principal to a guaranty made by an agent the burden is on such party to prove authority of the agent to make the contract. Peterkin v. Randolph Marketing Co., 48 Cal. App. 300, 302, 191 P. 947; People v. Ray, 91 Cal. App. 781, 786, 267 P. 593; Acme Gravel Co. v. Bryant, 111 Cal. App. 411, 414, 295 P. 909; Ewing v. Hayward, 50 Cal. App. 708, 715, 195 P. 970.

[2, 3] Though there is a sharp conflict in the testimony as to the making of the contract with the agent, there is no conflict in the proof that the agent did not have any authority to bind his principal to any guaranty of a net return upon the produce sold. The direct and only evidence is that such authority was not conferred upon the agent. The respondent does not contest this state of the evidence, but argues that because the jury found in his favor we must assume that it disbelieved the direct evidence of the want of such authority. If the burden of proof rested upon the principal to show want of authority in his agent this point might be well taken, but it falls before the settled rule that that burden rests upon the plaintiff. We have read the evidence with extreme care and fail to find a single word which supports the contention that the agent was expressly or impliedly authorized to make any guaranty of this character. (We disregard, of course, respondent's statement that the agent was a "fruit buyer" for the appellant because that is not in the evidence.) So far the case is parallel to Peterkin v. Randolph Marketing Co., supra, which, in turn, is supported by abundant authority. See 2 C. J. pp. 588, 665; Cannon v. Long, 135 Wash. 52, 236 P. 788; Fargason v. Dudley, 173 Ark. 1148, 294 S. W. 6; First National Bank v. Farson, 226 N. Y. 218, 123 N. E. 490.

[4-6] But beyond the rule of these authorities we find the additional factor in this case that under the statutes of this state neither the principal nor the agent could legally make the contract sued on and of this the respondent must, of course, be presumed to have had knowledge. The business of produce dealers in this state is controlled by the "Produce Dealers' Act" of 1927 (Deering's Gen. Laws, Act No. 6154), supplemented by the "Deciduous Fruit Dealers' Act" of 1929 (Deering's Gen. Laws, Act 6155). The first act defined a "produce dealer" as one who shall receive produce for sale on commission and requires him to procure a license from the state department of agriculture and to deposit a bond for the faithful performance of his duties. The second act defines three classes of those dealing with growers in deciduous fruit. (1) "the cash buyer," (2) "the consignment shipper," and (3) "the dealer." The consignment shipper is defined as one who contracts with the grower for the marketing of deciduous fruits for the sole account and risk of the grower and who does not either in writing or verbally guarantee any price to said grower. A license and bond is required of the dealer as in the "Produce Dealers' Act." Violations of the first act are made a misdemeanor and violations of the second are made a felony. The undisputed evidence is that the appellant was operating under a "produce dealer's" license. The appellant was not, therefore, a deciduous fruit dealer within the terms of the 1929 act, but came within the terms of a "consignment shipper" as defined in the "Deciduous Fruit Dealers' Act." Hence, not being licensed as a dealer under the latter act, the appellant could not "either in writing or verbally guarantee any price to said grower for his deciduous fruits." If the appellant or its agent had made the guaranty alleged to have been made, they would have run counter to the penal provisions of the 1929 act.

[7, 8] For these reasons the appellant argues that it must be presumed that the guaranty was not made because of the legal presumption against crime. The respondent answers that this does not follow because the acts dealing with produce dealers are unconstitutional upon ground which we need not state. We may assume for the moment that these acts are unconstitutional and that accordingly the presumption of innocence of crime is not applicable. But if we make this assumption there is another presumption which comes into play—that the ordinary course of business has been followed. The courts may take judicial knowledge that men do not ordinarily violate a penal statute on the chance it may at some time be declared unconstitutional and they might thus escape punishment, but that, in the ordinary course of business they will follow the terms of the statute.

[9] In its final analysis the case is that the respondent offered no evidence tending to prove the authority of the agent to make the guaranty relied on and presented no facts from which an inference of that authority could be drawn. On the other hand, the undisputed direct evidence is that such authority did not exist and when this evidence is added to the presumptions that the authority was not conferred upon the agent the case is one not of a mere preponderance of evidence, but one where the only evidence supports the contention of the appellant. As there is no evidence, direct or inferential,

which supports the verdict, the appellant's motion for a judgment notwithstanding the verdict should have been granted.

The judgment is reversed, with directions to the trial court to enter judgment for the appellant as herein indicated.

We concur: STURTEVANT, J.; SPENCE, J.

132 Cal.App. 207

OCEAN ACCIDENT & GUARANTEE CORPORATION, Limited, v. INDUSTRIAL ACCIDENT COMMISSION OF STATE OF CALIFORNIA et al.

Civ. 8892.

District Court of Appeal, Second District, Division 2, California.

May 23, 1933.

Rehearing Denied June 20, 1933.

Hearing Denied by Supreme Court July 21, 1933.

1. **Master and servant ⇐405(2).**

Evidence *held* to support finding that deceased salesman was not employee of distributor of roof material, but employee of retailer.

2. **Master and servant ⇐405(4).**

Evidence *held* to establish that salesman of roof material, injured while on way to keep business appointment in evening, was acting within scope of employment.

3. **Master and servant ⇐405(2).**

Evidence *held* insufficient to establish that deceased salesman, engaged by retailer of roof material, was independent contractor within Compensation Law.

4. **Master and servant ⇐385(1).**

Where deceased salesman worked for commission and earnings were irregular, compensation award *held* sustainable under third subdivision of statute governing determination of compensation (Gen. Laws 1931, Act 4749, § 12(a).

> Gen. Laws 1931, Act 4749, § 12(a), subd. 3, provides that, if earnings be irregular or specified to be by the week, month, or other period, then the average weekly earnings mentioned in subdivisions 1 and 2 shall be 95 per cent. of the average earnings during such period of time, not exceeding one year, as may conveniently be taken to determine an average weekly rate of pay.

Original application by the Ocean Accident & Guarantee Corporation, Limited, for a writ of certiorari to review an order of the Industrial Accident Commission, awarding compensation to Grace L. Biggar for the death of William B. Biggar.

Award affirmed.

Redman, Alexander & Bacon, and R. P. Wisecarver, all of San Francisco, for petitioner.

A. I. Townsend, of San Francisco, for respondent Industrial Accident Commission.

B. P. Oakford, of Los Angeles, for respondent Grace L. Biggar.

WORKS, Presiding Justice.

Original application for the writ of review.

Respondent Grace L. Biggar, the relict of William B. Biggar, who was killed in an automobile accident, was allowed an adjustment of industrial compensation for her husband's death. The award ran against T. G. Murphy, who was doing business as the Sun Roof & Paint Company at Santa Monica. The place of business of respondent Paraffine Companies was in Los Angeles. Petitioner, the insurance carrier of Murphy, asks that the award be wholly annulled, or in default of that outcome that it be annulled, with directions to the Industrial Accident Commission to adjust compensation to the widow in a less amount than that already awarded her, and under a process other than that employed by the commission in making the award. In disposing of the points arising in the proceeding we shall naturally recite only those portions of the evidence which show a substantial support for the findings of the commission.

[1] Petitioner contends that either respondent Paraffine Companies, hereafter to be called Paraffine, was the employer of Biggar, or that he was in the joint employ of that concern and Murphy. We think Murphy was the sole employer. In truth, we fail to perceive how the commission could have found otherwise. Paraffine was either the manufacturer or the general distributor of certain roof material and paints. The products were by the company furnished to wholly independent concerns, which carried the stuff as part of their stock in trade. Murphy's was one of these independent places. It was the custom of Paraffine, because of its interest in the disposition broadcast of its products, to procure and aid in the training of salesmen and to send them to dealers in the products who needed salesmen. Paraffine often advertised in the newspapers for such men, and Biggar responded to one of these advertisements. He was placed under the tutelage of one Pierce, an employee of Paraffine and apparently an able instructor of student salesmen. Pierce often continued his instruction of these men, or at least aided them in their work, after they had been offered to sellers of the products of Paraffine, and had been accepted by such sellers. Mur-

phy's place at Santa Monica was in charge of a man named England, although Murphy had another place of business, managed by himself, in Los Angeles. The Santa Monica place was a "branch" of the Los Angeles one. England, at the time of the hearing before the commission, had disappeared, and his testimony was for that reason never obtained. Murphy himself testified, however, that Biggar had been sent to the Santa Monica place by Paraffine, as a salesman, and that England had accepted him and put him to work. Murphy, because of his absences from the Santa Monica house, had never seen Biggar, but he testified distinctly that Biggar was in his employ at the time of his death. There was other evidence to support this admission, particularly in the testimony of Pierce, but more is not necessary. Paraffine, the commission could hardly have avoided finding, was never the employer of Biggar, either sole or joint.

[2] Biggar was under employment by Murphy but four or five days before his death. Pierce aided him in his work, principally watching him while he performed it, and coached and in a sense instructed him—Pierce testified that Biggar was above the average of salesmen in intelligence and ability—until the day of his death. Pierce was told by one Davis, an officer of Paraffine, to report to Murphy when he went to Santa Monica to aid Biggar. On the day of Biggar's death, England, at Murphy's place of business in Santa Monica, and in the presence of both Pierce and Biggar, made an engagement for the two latter to meet at a certain place in Sawtelle, in the Santa Monica district, at 6 o'clock that evening. The place was at a certain street corner. The meeting was arranged so that Biggar and Pierce might go together from the corner to see certain "prospects" of Biggar's who were likely to be at home at that time. Pierce arrived at the street intersection 5 or 10 minutes late, but Biggar was not there. Pierce noticed a crowd congregated about fifty feet from the corner, went to the spot, found there had been an automobile accident, and that Biggar had been injured in it. He died at a hospital two hours later. It is contended that Biggar, at the time of the accident, was within the so-called "going and coming" rule. We think all the evidence shows the contrary. It is true that Biggar went from home—for he had an early dinner there in order to keep his appointment with Pierce—but he did not travel toward his employer's place of business, but toward a location designated by England and which was convenient to the place where Biggar and Pierce expected to interview the prospects, and he therefore traveled on a special mission for his employer.

[3] It is also insisted that Biggar was an independent contractor, and the brief of petitioner contains this statement: "There was a failure to show one single thing in which Murphy had any direction and control over Biggar." This observation is nullified by the statement already made, to the effect that England arranged for Biggar to meet Pierce at the street intersection on the evening of Biggar's death. Murphy testified that on that day England "instructed" Biggar "to go out during the day and get prospects and then meet Pierce at the time and place designated." Further, it was the duty of Biggar to report at the Santa Monica office at 9 o'clock each morning. It is true that thereafter, during the day, it was customary for him to search for prospects in his own way, and that he drove and furnished the upkeep of his own car. His compensation was to be a certain commission on sales made by him. The employment called for service on six days of the week. Murphy testified that the purpose of the morning report at the office was to "get started for the day's work, get out in the territory." He instructed England that "each man should be thoroughly trained before he is put out on his own." Murphy also testified that England handled the selling for the Santa Monica office and that he had men "working under him in the territory" in the month of Biggar's death for that purpose, but corrected the statement in response to a clearing-up question by saying that Biggar was the only man "working for him or under him" during that month. He also said that England "took charge of the men under him" during the time when Biggar was with the office, but when he was asked what he meant by "took charge of the men" he responded, "I mean Mr. Biggar." He had gotten this information from Pierce and from Davis, the latter being the officer of Paraffine who had sent Pierce to Santa Monica. The following occurs in the testimony of Pierce:

"Q. Who fixed the time that you were to meet him [Biggar] on Monday, Tuesday and Wednesday mornings [days during which Pierce was aiding or instructing Biggar]? A. Mr. England.

"Q. Who fixed the time that you would report there? A. Mr. England."

Murphy testified: "Q. Did the men in the Santa Monica district work under you or under Mr. England? A. They worked under Mr. England."

The records of the Santa Monica office disappeared with England, but certain material papers were found on the body of Biggar at the time of his death. These were three in number and were printed on cardboard. Each was headed "Salesman's Report Shingle Prospect." They were ruled, and at the left ends of various printed lines it was indicated in appropriate words in type that certain information was to be placed on the respective lines. This information included the name, address, and telephone number of

the prospect and the location of the job he contemplated. There was also a place for a date, and several lines were left under the word "Remarks." On the bottom line was printed "Salesman," and after this word on each card was signed Biggar's name in his handwriting. Each of the cards was filled out, also, in his handwriting. We think the evidence showed that Biggar was an employee and not an independent contractor. The last item of evidence was significant. It would be unreasonable to suppose that Biggar was making out reports to himself. The reports, on the other hand, must be supposed to have been made for an employer, and the very making of them indicated a control of the employer over Biggar, that factor being the principal one, under all the authorities, which distinguishes an employee from an independent contractor.

We are satisfied that Biggar's widow was entitled to an adjustment of compensation against Murphy, but the remaining question in the proceeding is whether the Industrial Accident Commission adopted the proper mode in fixing the compensation it awarded her. The means to be followed in providing compensation are prescribed by section 12 (a) of the Workmen's Compensation Act (Deering's Gen. Laws, 1931, Act 4749), which, after a preliminary statement of some length, contains four subdivisions. Each of these latter fits a case which is different from that covered by any of the others.

The four subdivisions of the section read thus:

"(1) If the injured employee has worked in the same employment, whether for the same employer or not, during at least two hundred sixty days of the year preceding his injury, his average weekly earnings shall consist of ninety-five per cent of six times the daily earnings at the time of such injury where the employment is for six full working days a week. Where his employment is for five, five and one-half, six and one-half or seven working days a week, the average weekly earnings shall be ninety-five per cent of five, five and one-half, six and one-half or seven times the daily earnings at the time of the injury, as the case may be.

"(2) If the injured employee has not worked in such employment during at least two hundred sixty days of such preceding year, his average weekly earnings shall be based upon the daily earnings, wage or salary of an employee of the same class working at least two hundred sixty days of such preceding year in the same or a similar kind of employment in the same or a neighboring place; computed in accordance with the provisions of the preceding subdivision.

"(3) If the earnings be irregular or specified to be by the week, month, or other period, then the average weekly earnings mentioned in subdivisions (1) and (2) above shall be ninety-five per cent of the average earnings during such period of time, not exceeding one year, as may conveniently be taken to determine an average weekly rate of pay.

"(4) Where the employment is for less than five days per week or is seasonal or where for any reason the foregoing methods of arriving at the average weekly earnings of the injured employee cannot reasonably and fairly be applied, such average weekly earnings shall be taken at ninety-five per cent of such sum as shall reasonably represent the average weekly earning capacity of the injured employee at the time of his injury, due consideration being given to his actual earnings from all sources and employments during the year preceding his injury; provided, that the earnings from other occupations shall not be allowed in excess of the rate of wages paid at the time of the injury."

The difficulties presented to us are indicated by these warring contentions: Petitioner contends that the award should have been made pursuant to subdivision 4, but asserts that the commission proceeded under subdivision 2. The commission itself insists that the award was proper under the latter named subdivision. Respondent Grace L. Biggar says that the award was made under subdivision 3.

[4] It seems plain that the award is not sustainable under subdivision 2. Under subdivision 1, where the employee has worked at least 260 days of the year preceding a casualty to him, "his average weekly earnings shall consist of ninety-five per cent of six times the daily earnings at the time" of the accident. As the weekly earnings are to be computed from the "daily earnings," we think the clause quoted must contemplate a daily wage or stipend fixed by the employer as the compensation for the employee, something stable in character. With the clause in that form we cannot perceive that the Legislature intended to refer to an average daily wage, to be computed from the erratic earnings, for instance, of a salesman working for a percentage of the amount of his sales. We think the phrase "daily earnings," where it is employed the second time in subdivision 1, must receive the same construction. Surely the Legislature, in using the same expression twice, in such close juxtaposition, must have intended the same meaning in each. Where the phrase "daily earnings" is used in subdivision 2 it must have the same meaning for the same reasons. It is to be observed here, in passing, and as affecting the whole subject, that the kinds of employees covered by subdivisions 1 and 2 are the same. The basic difference in the two is that one refers to employees who have themselves worked at a job "at least two hundred sixty days of the year," etc., and the other to em-

ployees who have not worked so long. Upon this basic difference the method to be employed under one subdivision is different from that to be applied under the other; but, logically and ethically, the compensation awarded to a man under one should be the same as that awarded to one under the other, all other things being equal.

We think it patent that subdivision 4 cannot be invoked to uphold the award. It applies only to those cases in which "the employment is for less than five days per week." The only evidence to which we are pointed on this question—and we think it is the only evidence adduced upon the subject—was to the effect that Biggar's employment was for six days the week. Because of the potent influence of this point we have not thoroughly considered others affecting the applicability of subdivision 4.

This leaves remaining only subdivision 3, and we think the award may be upheld under it. Before we go to that point let us first refer to a clause in 3, that aids in the construction we have already placed upon the expression "daily earnings," as it occurs in 1 and 2. Subdivision 3 begins: "If the earnings be irregular or specified to be by the week, month, or other period. * * *" This language is by the form and arrangement of the statute placed in opposition to the phrase "daily earnings," found in 1 and 2. Under 3 the earnings may be "irregular." Therefore, the "daily earnings," referred to in 1 and 2, must be regular while the weekly average must be ascertained from regular daily earnings. Under 3 the earnings may be "specified," or fixed and determinate, for periods of time other than the day. Therefore, the Legislature must have intended that the "daily earnings" also should be specified, fixed, and determinate, and not average.

From all that has been said, and upon the face of the subdivision itself, 3 must be applicable in the present instance. Biggar's earnings were to have been "irregular," and no subdivision of section 12 (a) fits such a case except 3 alone.

Without discussing the evidence, we think it abundantly upholds the award of the commission under subdivision 3. Indeed, our failure to analyze the evidence arises from the fact that it is so complete and satisfactory. We merely point out that 3 adopts the methods provided for by 1 and 2 as means to ascertain weekly earnings, and provides, especially, that the weekly earnings to be fixed shall be a percentage "of the average earnings during such period of time, not exceeding one year, as may be taken," etc.

Award affirmed.

We concur: STEPHENS, J.; ARCHBALD, Justice pro tem.

132 Cal.App. 262

LOS ANGELES ROCK & GRAVEL CO. v. CITY OF LOS ANGELES.

Civ. 9008.

District Court of Appeal, First District, Division 2, California.

May 25, 1933.

Hearing Denied by Supreme Court July 25, 1933.

Interest ⊂⇒38(1).

City *held* liable for interest at statutory rate from entry of judgment against city for costs (Usury Law [Gen. Laws 1931, Act 3757], § 1).

Appeal from Superior Court, Los Angeles County; Minor Moore, Judge.

Action by Los Angeles Rock & Gravel Company against the City of Los Angeles, for declaratory relief in which defendant filed a cross-complaint. From a judgment for defendant, plaintiff appeals.

Reversed.

See, also, 119 Cal. App. 548, 6 P.(2d) 976.

Charles H. Mattingly, of Los Angeles, for appellant.

Erwin P. Werner, City Atty., Frederick Von Schrader, Asst. City Atty., and D. M. Kitzmiller, Deputy City Atty., all of Los Angeles, for the People.

NOURSE, Presiding Justice.

This is an action for declaratory relief, the complaint alleging that a controversy existed between the parties as to whether the defendant was liable to the plaintiff for the payment of interest from the entry of two several judgments against the city for costs. The defendant filed a cross-complaint alleging that by mistake it had paid interest on one of these judgments; that it had tendered to the plaintiff in full settlement of the second judgment a sum equal to the difference between the face of the judgment and the sum thus alleged to have been paid through mistake. The trial court sustained defendant's demurrer to plaintiff's amended complaint without leave to amend and awarded defendant judgment on the pleadings. The appeal is on the judgment roll. The primary question is whether a municipality is included within the general terms of the Usury Law of 1918 (Deering's Gen. Laws 1931, Act 3757), which fixes the rate of interest upon "judgments rendered in any court of this state" (section 1) at 7 per cent. per annum. The question is not a new one, and the authorities in this state have uniformly held that, in the case of a money judgment against a municipality, interest should be allowed from the date of the entry of the judgment. In this case the respondent concedes that "the only cases holding interest is allowed on judg-

ments against a municipality are where the judgment itself expressly provides for interest or where a municipality wrongfully and wilfully detains money not belonging to it." The cases do not support the first statement made, but it will be found in those hereafter cited that the Supreme Court did not base its ruling on the ground that the trial court had expressly declared in its judgment that interest should run from the date of its entry. In fact, if the principle upon which the respondent relies—that because the municipality is not expressly mentioned in the interest act it should not therefore be charged with interest upon judgment against it—is sound as a principle of law, then that principle could not be changed by the order of the trial court.

It is upon the second statement of what we term the concession of the respondent that the appeal in this case must be decided. The two judgments were entered against the city on July 17, 1925, for costs incurred by the plaintiff in the trial court in the trial of two separate actions against the city. The appeals from both of these judgments were affirmed by the Supreme Court on July 24, 1929 (207 Cal. 395, 279 P. 136). As both judgments were for money due the plaintiff from the municipality, it is evident that from the date of their entry the "municipality wrongfully and wilfully detains money not belonging to it."

In Columbia Savings Bank v. County of Los Angeles, 137 Cal. 467, 471, 70 P. 308, 310, the Supreme Court say: "But the judgment in the case before us fixed the liability of the defendant, and from that date the money to which the plaintiff was entitled was detained from it, and natural justice, as well as the statute which provides that interest at 7 per cent. is payable on judgments recovered in the courts of this state, justifies the judgment relating to interest (Civ. Code, § 1920); but prior to judgment it was not the duty of the defendant to pay. That duty arose, however, when the judgment was entered, and from that time the plaintiff was entitled to interest at the statutory rate. Nor is the interest suspended by appeal, writ of error, or certiorari, where the judgment of the court below is affirmed." There is no departure from this rule. See Spencer v. City of Los Angeles, 180 Cal. 103, 115, 179 P. 163; Engebretson v. City of San Diego, 185 Cal. 475, 482, 197 P. 651; Sheehan v. Board of Police Commissioners, 188 Cal. 525, 535, 206 P. 70; Los Angeles Dredging Co. v. Long Beach, 210 Cal. 348, 362, 291 P. 839, 71 A. L. R. 161.

Respondent argues that in the cases cited the principle stated was inadequately reasoned; that, if the state or its subdivisions could not be chargeable with interest before judgment because not expressly mentioned in the interest statute, there was no sound reason for holding that the state or its subdivisions should be chargeable with interest after entry of judgment. The cases cited refer to municipalities only, and, if there is any reason for including such public corporations and excluding the state, it has not appeared in the discussion of any of these cases. Suffice it to say for the purpose of this decision that, in so far as a municipality is concerned, the rule is settled in the cases cited, and that, if we should seek the "legislative intent" as expressed in the initiative Usury Law, we must bear in mind that the rule of decision was settled before that act was passed.

The judgment is reversed.

We concur: STURTEVANT, J.; SPENCE, J.

132 Cal.App. 355

BOONE v. DOYLE CATTLE CO. et al.

Civ. 1218.

District Court of Appeal, Fourth District, California.

May 31, 1933.

Rehearing Denied June 29, 1933.

Hearing Denied by Supreme Court July 28, 1933.

1. Trial ⇐388(1).

Findings of fact are all-important and all-inclusive basis for every judgment.

2. Appeal and error ⇐901.

Party bringing case to reviewing court must present record which justifies reversal.

3. Appeal and error ⇐1071(1).

In action to determine water rights, reference in findings to exhibit introduced in evidence created inconsistency, force of which was given no effect in judgment, thereby justifying reversal.

Appeal from Superior Court, Kern County; K. Van Zante, Judge.

Action to determine water rights by Charles S. Boone against the Doyle Cattle Company and others. From an adverse judgment, plaintiff appeals.

Reversed.

T. N. Harvey and Claflin & Claflin, all of Bakersfield, for appellant.

Michael F. Shannon, Thomas A. Wood, and Robert H. Dunlap, all of Los Angeles, for respondents.

ANDREWS, Justice pro tem.

The findings in this case being generally in favor of the defendants, and the judgment wholly in favor of the defendants, the question presented on this appeal is whether the fact that reference is made in the find-

ings to an exhibit introduced in evidence at the trial creates an inconsistency the force of which is given no effect in the judgment.

Finding No. 9 in its general effect is that the plaintiff had no right whatever in the waters of the river as against defendants except as to and subject to an agreement, Plaintiff's Exhibit C. Finding No. 12 determines that the use of the waters by defendants was adverse to plaintiff, except as provided by and subject to agreement of arbitration, Plaintiff's Exhibit C. Finding No. 13 relates to a custom existing along the stream which gave to defendants the right to the waters of the river to the exclusion of the plaintiff, but this language is used: "It is true that the agreement referred to and described in paragraph II of the fourth defense of defendants Doyle Cattle Company, * * * was executed as set forth in paragraph II of said fourth defense in the answer of said parties to the amended complaint; but it is also true that said agreement has not been lived up to." Finding No. 14 reads as follows: "It is also true that said agreement is and has the force of a judgment but it is also true that the rights established by said judgment have not been generally asserted or relied upon."

In the conclusions of law it is determined that defendants are entitled to the use of the waters of the river, and that they could divert all of the waters of the river at all times of the year except as provided in the arbitration agreement, Plaintiff's Exhibit C.

[1-3] Findings of fact are the all-important and all-inclusive basis for every judgment. When the facts are ascertained, the law will work out the rights of the parties whether it is done by the trial court or in the upper courts. This appeal was taken upon the judgment roll alone, and therefore this Exhibit C, referred to in the findings, is not brought to this court, and the rights to which it relates are not worked out in the judgment. A party bringing a case to this court for review must present a record which justifies reversal. The judgment roll alone reveals the uncertainty which plaintiff insists requires a reversal of the case. There is no escape from the inference arising from the reference to the exhibit that some right existed as between the parties not shown by the judgment. The facts were all before the trial court, and it was required to work out the rights of the parties in its judgment in accordance with the findings of fact. The matter was one clearly within the issues of the case, and the judgment is incomplete without determining the effect of the instrument.

Judgment reversed.

We concur: BARNARD, P. J.; JENNINGS, J.

132 Cal.App. 265

PEOPLE v. JOHNSON.

Cr. 2367.

District Court of Appeal, Second District, Division 1, California.

May 25, 1933.

Rehearing Denied June 7, 1933.

Hearing Denied by Supreme Court June 23, 1933.

1. Criminal law ⇐553.

That character of no witnesses who testified in support of defendant's alibi was attacked, or that such testimony was not impeached by evidence relative to general reputation of witnesses for truth, honesty, or integrity, *held* not to require trial judge to adopt such testimony as unqualified expression of ultimate fact, in robbery prosecution.

2. Criminal law ⇐1159(4).

Credibility of witnesses is for trial court and not appellate court.

3. Criminal law ⇐1159(2).

Judgment of conviction is conclusive when based upon substantial evidence.

4. Criminal law ⇐1036(2).

On appeal, accused cannot complain that he was improperly cross-examined, absent objection thereto below.

5. Witnesses ⇐337(5).

On cross-examination of accused in robbery prosecution, question whether accused had theretofore been convicted of felony *held* permissible as affecting his credibility.

Appeal from Superior Court, Los Angeles County; Fletcher Bowron, Judge.

Robert Johnson was convicted of robbery, and from the judgment and from an order denying his motion for new trial, he appeals.

Affirmed.

M. H. Broyles, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

HOUSER, Justice.

Defendant appeals from a judgment which was rendered pursuant to his conviction of the crime of robbery, and from an order by which his motion for a new trial was denied.

The principal reason urged by appellant for reversal of the judgment and the order is that, notwithstanding the fact that defendant was positively identified by the complaining witness as one of the persons who committed the robbery, nevertheless defendant introduced evidence which in its substance and effect should have established a complete and perfect "alibi."

[1-3] The fact that the character of none of the several witnesses who gave testimony in support of the "alibi" was attacked, or that such testimony was not impeached by means of evidence relative to his general reputation for truth, honesty, or integrity, although possibly constituting an acceptable basis for placing reliance upon the truth of the testimony of such witness, does not create a situation from or by reason of which the trial judge was legally required to adopt the testimony as an unqualified expression of an ultimate fact. It is only in exceptional circumstances, not suggested by appellant as having been present on the trial of the instant action, that an appellate tribunal is authorized to disturb the conclusion reached by the trial court. In circumstances such as appear herein, the law of this state is well settled that the jury, or, where the action is tried without a jury, the trial court, is the exclusive judge of the credibility to be attached to the testimony of the witnesses who testified in the case. His conclusion in the premises, when based upon substantial evidence, is final. It follows that, even assuming that on the evidence this court either might have believed in the innocence of the defendant, or that it would have had a reasonable doubt as to his guilt, furnishes no legal ground for disturbing the judgment of the trial court.

[4, 5] Appellant also complains that on his cross-examination he was asked the question whether theretofore he had been convicted of a felony. The point is unavailing: First, for the reason that no objection was interposed to the question; secondly, because, as frequently has been observed by the appellate tribunals of this state, the question is permissible for the purpose of testing the credibility of the testimony offered by the defendant. People v. La Verne, 212 Cal. 29, 297 P. 561.

The judgment and the order are affirmed.

We concur: CONREY, P. J.; YORK, J.

132 Cal.App. 357

ABBOTT et al. v. PEOPLE'S NAT. FIRE INS. CO. OF DELAWARE et al.

Civ. 1233.

District Court of Appeal, Fourth District, California.

May 31, 1933.

1. Venue ⇐66.

Defendants' affidavits that draft sued on was not made, or to be performed in county of suit, and that no breach occurred in such county, were not conclusions where draft on face showed it was drawn and payable outside of county and that payee's indorsement was only intermediate act.

2. Venue ⇐70.

Order of transfer *held* justified in suit on draft drawn and payable outside of county of suit.

3. Venue ⇐66.

Defendants' affidavit in suit on draft and for damages from conspiracy to prevent its delivery, stating that conspiracy did not occur in county of suit, *held* not conclusion.

4. Venue ⇐66.

Defendants' allegations in suit on draft, that no obligation, liability, or damage arose in county of suit, *held* legal conclusion.

5. Venue ⇐8.

Damages for conspiracy to prevent delivery of draft would arise at plaintiff's residence, so that order of transfer to county of defendants' residence could not be based on such cause of action.

6. Venue ⇐16½.

Joining cause of action which did not justify transfer to cause entitling defendants to transfer, would not prevent transfer.

7. Venue ⇐40.

If no cause of action is stated in suit, transfer to defendants' residence would be made as of course and dismissal made in county where transferred.

8. Appeal and error ⇐912.

Reviewing court will not assume that plaintiff would ask to amend, that trial court would permit amendment, and that cause of action would then be such as to prevent transfer, and will make no order on such assumption even to avoid transfer and new suit.

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Action by E. Allen Abbott and another against the People's National Fire Insurance Company of Delaware, and others. From an order granting a motion for a change of venue, plaintiffs appeal.

Affirmed.

J. A. Chase, of Visalia, for appellants.

Percy V. Long, Bert W. Levit, and William H. Levit, all of San Francisco, for respondents People's Nat. Fire Ins. Co. and Woodward-Phipps General Agency, Limited.

Carlyle Miller, of San Francisco, for respondent Mercantile Acceptance Corporation.

ANDREWS, Justice pro tem.

This suit was started in Tulare county. One cause of action is upon a draft, and

a second cause of action was for damages arising from a conspiracy between certain defendants to prevent delivery of the draft. Defendants moved for change of venue to the county where they reside.

[1, 2] (1) As to the first cause of action, the draft shows on its face that it was drawn and payable outside of Tulare county and that the indorsement by payee was only an intermediate act, so defendants' affidavit that it was not made nor to be performed, and that no breach occurred in Tulare county, were not conclusions, and, because suit was upon the draft as a writing obligatory, and not upon the policy out of which it arose, the order of transfer was justified.

[3-6] (2) The affidavits of defendants as related to the second cause of action in stating that the conspiracy did not take place in Tulare county were not open to objection as conclusions, but the allegations that no obligation or liability or damage arose in Tulare county are conclusions and fail to set forth the evidentiary facts. Damages for tort of the kind here attempted to be recovered would arise at the place of residence of plaintiff and no order of transfer could be based on this cause of action. However, if one cause of action entitled defendants to a transfer, joining another cause which did not justify a transfer would not prevent the transfer.

[7, 8] (3) A question is presented as to whether the first cause states a cause of action. The draft was drawn by an agent on its principal as a step in the adjustment of loss under a policy of insurance not intended to create a liability against the agent, but when accepted to complete the settlement and make the draft import liability. There is no allegation that it was accepted. It might be that by amendment this cause could be converted into an action on the policy for the loss, in which case the change of venue would not be proper. Attention is given with reluctance to this point as counsel have had no opportunity to be heard. If no cause of action is stated in a suit, transfer to the residence of defendant would be made as of course, and dismissal would be made in the county where transferred. A court of review will not assume that plaintiff would ask to amend and that the trial court would permit amendment and that the cause of action would then be such as to prevent transfer and will make no order on such an assumption even to avoid the idle act of transfer and bringing a new suit. Amendment might be had in the court where transferred. Lapse of time might affect rights of action.

The order of the trial court is affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

132 Cal.App. 307

SCANDALIS v. JENNY.

Civ. 4805.

District Court of Appeal, Third District, California.

May 26, 1933.

Rehearing Denied June 24, 1933.

Hearing Denied by Supreme Court July 25, 1933.

1. Automobiles ⇐162(8).

Where children were playing in street, and three year old boy with back to automobile sprang into path of automobile, automobilist's failure to stop, slow down, or turn aside *held* negligence.

2. Automobiles ⇐223(2).

Three year old child playing in street with other children, with back to automobile, and springing into path of automobile, *held* not contributorily negligent.

3. Appeal and error ⇐1066.

In action for injuries to child struck by automobile while playing in street, instruction on unavoidable accident *held* reversible error because not warranted by evidence.

4. Trial ⇐253(4).

Instruction respecting duty of one put in situation where collision is imminent *held* not objectionable as ignoring question whether situation was brought about wholly by negligence of automobilist striking child.

Instruction was in substance that if person, without fault on his part, is suddenly put into situation where collision is imminent, without sufficient time to consider all circumstances, he is excusable for omitting some precautions or making unwise choice under such disturbing influence, although, if his mind had been clear, he ought to have done otherwise.

5. Appeal and error ⇐1066.

In action for injuries to child struck by automobile, instruction regarding duty of one put in situation where collision is imminent *held* reversible error because not warranted by evidence.

6. Appeal and error ⇐216(1).

Defendant could not complain on appeal of failure to give instruction not requested.

7. Trial ⇐240.

In action for injuries to child struck by automobile, instruction respecting child's failure to use proper care *held* objectionable as argumentative.

Instruction that, even if automobilist was not using ordinary care and was negligent, yet if child immediately preceding accident was walking or standing on westerly side of street, and, while so walking or standing, child suddenly and without warning ran into and collided with automobile on easterly side of street proceeding northerly, and jury further found that

child in so acting failed to exercise degree of care which child of his maturity and capacity, under similar circumstances, ordinarily exercises, and that in so acting contributed proximately to accident, then child could not recover.

8. Trial ⇐194(16).

In action for injuries to child struck by automobile, instruction stating defendant's automobile was on east side of street, when testimony on question was conflicting, *held* reversible error.

9. Trial ⇐260(1).

Refusing correct instruction covered substantially by instructions given *held* not error.

Appeal from Superior Court, Sutter County; K. S. Mahon, Judge.

Action by Gregory Scandalis, a minor, by Pedro Scandalis, his guardian ad litem, against Aloysius Jenny, also known as A. Jenny. From a judgment for defendant, plaintiff appeals.

Reversed.

J. E. Ebert and W. E. Davies, both of Marysville, for appellant.

Rich, Weis & Carlin, of Marysville, for respondent.

MILLER, Justice pro tem., delivered the opinion of the court.

This is an appeal from a judgment for defendant.

Plaintiff, a boy of the age of three years, was struck and injured by an automobile driven by defendant on July 23, 1931, on Shasta street, in Yuba City, at about 6:30 o'clock p. m. Shasta street is paved, and is 44 feet from curb to curb, and runs in a northerly and southerly direction. Tea Garden avenue crosses Shasta street between 400 and 500 feet south of the scene of the accident. Defendant pleaded negligence on the part of plaintiff as the sole cause of the accident and resulting injury, and also that plaintiff was guilty of contributory negligence.

It appears from the testimony that seven or eight other small children were playing in Shasta street at a point opposite the Scandalis home, which was on the west side of Shasta street. Defendant was driving his automobile north on Shasta street, and first observed the children playing in the street when he was at Tea Garden avenue. There was no obstruction to defendant's view of the children from Tea Garden avenue to the point of accident, and he saw the children at all times thereafter as he approached them. He claims that he was driving between 10 and 15 miles an hour on the right or east half of Shasta street. When he arrived at a point about 15 feet from the children, he noticed that the plaintiff was standing still about 4 feet east of the center line of Shasta street, with his head turned away from defendant, and looking down. The evidence on behalf of defendant shows that he was at the time driving straight up the street on a course that would carry him within 2 or 3 feet of plaintiff; that he did not vary his course either to the left or the right until the accident happened, when he swerved slightly to the right. At one time defendant testified that he sounded his horn when the front of his automobile was about opposite the plaintiff. Later he qualified that statement and was not positive, although he thinks he sounded his horn.

The testimony further shows that, when defendant was about opposite the plaintiff, the plaintiff, without warning, suddenly whirled to his right and ran against the running-board of defendant's car, was knocked down and run over, and sustained a broken leg and thumb.

[1] The testimony is conflicting as to whether defendant sounded his horn immediately before or immediately after he struck the plaintiff. There is also a conflict in the testimony as to what part of the street the plaintiff was standing on at the time of the accident—whether on the west or the east half of the street. The defendant places it at 4 feet east of the center, but also testifies that there was only 5 or 6 feet between the right side of his automobile and the east curb of the street. Of necessity, if plaintiff was 4 feet east of the center of the street, and defendant was driving on a line 2 or 3 feet east of the plaintiff, then the defendant had much more clear space to his right than 5 or 6 feet. If, on the other hand, defendant had but 5 or 6 feet clear space between the right side of his automobile and the east curb line of the street, and the left side of his automobile came within 2 or 3 feet of where the plaintiff was standing when he whirled and stepped against the automobile, then, of necessity, the plaintiff was more than 4 feet east of the center line of the street. In either event, it is admitted by defendant that he drove his automobile at from 10 to 15 miles an hour on a straight line, that would, and did, bring him within 2 or 3 feet of a three year old child who had been playing in the street, and was at the time standing still, facing away from the automobile, and apparently oblivious to the close proximity of the automobile. The automobile was a Chevrolet, and was laden with two people and sixteen sacks of sand, and was equipped with two-wheeled brakes. If, under those circumstances, the defendant failed to sound his horn until he was within 2 or 3 feet of the child, and then sounded it, he, as a reasonable man, should have been fearful that the

child, thus startled by the nearness of the horn, might well be expected to spring into the path of the automobile, and hence that ordinary care on his part should have led him to give way to his right, for, according to his testimony, he had from 5 to 6 feet to his right, or, if he must proceed in a straight course that would carry him within 2 or 3 feet of a small child apparently unconscious of his approach, neither yielding to the right nor to the left, he should have slowed down or stopped his machine until the hazard that confronted him had been removed. Defendant testified that the children were in the street nearly every day, and that he did not consider it necessary for him to give way to his right. Possibly defendant sought to frighten the child, thereby keeping him out of the street. But, in any event, his failure to stop, or slow down, or turn aside, we are forced to conclude, was negligence as a matter of law.

[2] The next question is, was the plaintiff guilty of contributory negligence? To this question there can be but one answer, and that is in the negative. Even if it were negligence for a child of three years of age to stand in or near the center of a city street and look down, apparently unaware of the approach of an automobile, we are unable to see that such negligence contributed proximately to the injury that came to him by reason of the negligence of the defendant in the manner hereinbefore stated. By the exercise of ordinary care, defendant should have seen and realized that plaintiff was unaware of the approach of the automobile, and his failure so to do placed upon him the whole blame for the accident.

Defendant in his brief asserts: "If the children had continued playing in the street, showing that they had not observed the approach of defendant's automobile, then it would have been the duty of defendant to stop his car or take some other precaution in plenty of time to have avoided hitting any of them. However, in the case at bar, all of the children had given evidence that they had observed defendant's car and made room for him to pass. This amounted to an invitation to proceed." But respondent's assertion that the children had given evidence that they had observed defendant's car and made room for him to pass is not supported by the evidence. We have carefully read and reread the testimony, and find nothing in it to justify respondent's assertion. On the contrary, the defendant testified on that subject as follows:

"Q. As you came near Sumner street, what or who did you see in the street? A. There was a bunch of children playing in the street. * * *

"Q. Where were those children with reference to the center line of the street? A. Around the center of the street.

"Q. Did you say some of them were on the righthand side and some on the lefthand side of the center line? A. Yes.

"Q. What were they doing? A. Playing.

"Q. How many children were there? A. Eight or nine, I should judge. * * * You could see them clear from Tea Garden avenue.

"Q. That is when you first saw the children? A. Yes, sir. * * *

"Q. Describe what happened as you got opposite the group of children? A. When I got opposite the group of children, this one little fellow whirled around and ran right into the car. * * *

"Q. How far was your car from him when he broke from the group and started toward you? A. Two or three feet. * * * As I approached, the boy stopped playing in the street and stood still in the street.

"Q. Now, this child that broke from the group and ran toward the car, what direction was he looking when you first noticed him? A. Looking west.

"Q. Looking west. That would be looking away from your car? A. Yes. * * * The child whirled toward his right, away from the car, and turned completely around and ran into the car. * * * He whirled north and then right square east into the car."

Mrs. Marie Peterson, who was riding in Mr. Jenny's car, testified concerning the movements of the children, as follows:

"Q. Now, as you got near the upper end of Shasta street, did you see some children playing in the street? A. Yes.

"Q. What part of the street were they playing in? A. Three of them on that side of the middle of the street, and four or five on the east side. * * *

"Q. How far was your automobile from this little boy when you first saw him? * * * A. I guess two or three feet. * * *

"Q. How far was your automobile south when you first saw the boy? A. I saw him from the other block. * * *

"Q. When you were on Tea Garden avenue? Yes.

"Q. From the time you saw them, did they stay in the same place all the time? A. Yes; they stand still as long as I see them.

"Q. From the time you saw them when you were crossing Tea Garden avenue, until you got opposite, he didn't move? A. They stood still. * * *

"Q. When he started to turn, where was the front of this automobile? A. Right even with him. * * *

"Q. When he started to turn, the automobile was right here? A. Yes, one or two feet.

"Q. He was looking that way? A. Looking right down, as far as I could see.

"Q. Wasn't he looking down? A. His head was down—standing just like that, but his head was down."

[3] Had the child been concealed from defendant, or if he had been looking at defendant, and defendant could see that the child saw him, and if, under such circumstances, the boy had darted out into the path of defendant's automobile, there might have been some ground for defendant's contention that this was an unavoidable accident, but, under the circumstances appearing from the foregoing quotation from the testimony, we are of the opinion that there was no basis in fact for the giving of the following instruction: "An unavoidable accident is one which occurs despite the exercise of reasonable care on the part of all concerned to avoid it. There can be no recovery by plaintiff for injuries received as a result of such an accident. If you find that the injuries of plaintiff were the result of an unavoidable accident, then in such a case you will render your verdict in favor of defendant."

We are of the opinion, therefore, that the instruction was misleading, and that the giving of it constituted reversible error.

[4, 5] Complaint is made of the following instruction given at the request of defendant, namely: "I instruct you that if a person, without fault on his part, is suddenly put into a situation where a collision is imminent, without sufficient time to consider all the circumstances, he is excusable for omitting some precautions or making an unwise choice under this disturbing influence, although if his mind had been clear he ought to have done otherwise."

It is contended that the instruction ignores the question of whether or not the situation was brought about by the negligence of the plaintiff, or was due wholly to the negligence of the defendant. We do not consider the instruction objectionable for that reason. The use of the word "fault" instead of the word "negligence" in the instruction could not, we think, in view of the instructions as a whole, have been misunderstood by the jury. But the evidence is, without conflict, that the defendant brought about the situation that confronted him by his own gross negligence, and that, in acting as the evidence shows he acted, he was guilty of negligence as a matter of law. There is no evidence to support the instruction, and, for that reason, the giving of it must have been misleading to the jury, and its giving constituted reversible error.

[6] Complaint is made by appellant that the court did not instruct the jury on the doctrine of the last clear chance, and that such an instruction should have been given. It is true that an instruction on that subject might properly have been given from the plaintiff's standpoint, whether the plaintiff was in a position of danger from which he knew he could not escape, and from which defendant knew it was physically impossible for him to escape, or whether the plaintiff was in a place of danger due to the fact that he did not know of the danger, and which danger was apparent to defendant, when by the exercise of ordinary care defendant could have avoided the accident. But the record fails to show that any such instruction was either submitted to the court, or that the court was requested to give such an instruction, and, under the well-settled rule, complaint under such circumstances is unavailing. Castagnino v. Balletta, 82 Cal. 262, 23 P. 127; Wyatt v. Pacific Elec. Ry. Co., 156 Cal. 176, 103 P. 892.

[7, 8] Complaint is also made of the following instruction offered by defendant and given by the court: "Even if you find that defendant was not using usual and ordinary care, and was therefore negligent, yet if you find from all the evidence in the case that the plaintiff immediately preceding the accident which resulted in the injuries to him, was walking or standing on the westerly side of Shasta street, and that while he was so walking or standing, said plaintiff suddenly and without warning ran into and collided with the automobile of the defendant, whose automobile at said time was on the easterly side of Shasta street proceeding northerly; and if you further find from the evidence that the said plaintiff in so acting, failed to exercise that degree of care which a child of his maturity and capacity, under similar circumstances, ordinarily exercises for his own protection, and that in so acting he contributed proximately to the accident which resulted in plaintiff's injuries, then and in that event the plaintiff cannot recover, and your verdict must be in favor of defendant."

This instruction is objectionable for the reason that it is argumentative, and also instructs the jury on a question of fact; namely, that defendant's automobile was, at the time of the accident, on the east side of Shasta street, whereas the testimony was sharply conflicting as to whether the automobile was on the east or the west side of Shasta street at the time of the accident. The question, therefore, as to which side of the street the automobile was on, was taken from the jury, and the giving of it constituted reversible error.

The other instructions of which appellant complains, when considered in connection with other instructions given that are not objectionable, substantially and correctly stated the law.

[9] Likewise, the refusal to give certain instructions requested by plaintiff and refused by the court, which correctly stated the law, was not error, for the reason that the subjects covered by them were substantially covered by other instructions given by

the court. Under such circumstances their refusal was not error. Offerdahl v. Motor Transit Co., 80 Cal. App. 667, 252 P. 773.

The judgment is reversed.

We concur: PULLEN, P. J.; R. L. THOMPSON, J.

132 Cal.App. 267

PEOPLE v. GILLSTARR et al.

Cr. 2371.

District Court of Appeal, Second District, Division 1, California.

May 25, 1933.

Hearing Denied by Supreme Court June 23, 1933.

1. Criminal law ⊂⊃982.

Granting or refusing of motion for leave to file application for probation is matter addressed to sound discretion of trial court (Pen. Code § 1203).

2. Criminal law ⊂⊃982.

Where defendant participated in robbery with another who was armed with deadly weapon, refusing permission to make application for probation *held* not error (Pen. Code §§ 31, 211, 1203).

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

Thomas Gillstarr and Jeff Reed were convicted of robbery in the first degree, and the latter appeals.

Judgment affirmed.

Philip S. Schutz and Alexander L. Oster, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John L. Flynn, Deputy Atty. Gen., for the People.

HENDERSON, Justice pro tem.

The defendant Jeff Reed and one Thomas Gillstarr were charged by an information containing two counts with the crime of robbery. The jury before whom the defendants were tried returned verdicts finding each of them guilty of robbery in the first degree. The defendant Reed appeals from the judgment. The evidence at the trial proved that defendant Gillstarr was armed with a deadly weapon, which was, however, the property of appellant Reed, and both defendants took part in the robbery.

[1, 2] Appellant, by reason of the fact that the evidence did not prove that he had any deadly weapon in his own possession, contends that the court erred in denying him permission to make application for probation, for the reason, as stated by the trial judge, that he did not have jurisdiction to grant probation. From the facts before us, however, we must conclude that defendant's motion was finally summarily denied pursuant to section 1203 of the Penal Code. While it is, in general terms, the right of a defendant under this section to apply to the court for leave to file an application for probation, the granting or the refusing of the motion is a matter addressed to the sound discretion of the trial court. People v. Keylon, 122 Cal. App. 408, 415, 10 P.(2d) 86. Moreover, in view of the provision of said section 1203 of the Penal Code expressly providing that a defendant, who has been convicted of robbery and who at the time of the robbery "was armed with a deadly weapon," shall not be granted probation, the granting of defendant's motion would have been but an idle act, and the trial court was justified in its action. For it must be remembered that robbery of the first degree, the crime of which appellant was convicted, is robbery "perpetrated by torture or by a person being armed with a dangerous or deadly weapon." Pen. Code, § 211a. Appellant, having actually joined in the commission of the crime, was a principal therein. Pen. Code, § 31. Taking the several sections together, it appears that appellant was a person "armed with a deadly weapon," within the meaning of those words as used in said sections of the Penal Code.

The judgment is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

132 Cal.App. 131

In re HEINS' ESTATE.

HEINS et al. v. BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N et al.

Civ. 8861.

District Court of Appeal, First District, Division 2, California.

May 20, 1933.

1. Wills ⊂⊃570.

Where will bequeathed "all of my common stock" in named company, but proof showed that testator never owned any common stock in such company, but did own preferred stock therein, there was developed a "latent" as distinguished from "patent" ambiguity, and doctrine of "false demonstration" applied.

[Ed. Note.—For other definitions of "Latent Ambiguity"; "Patent Ambiguity," see Words and Phrases.]

2. Wills ⇐492, 558(1).

Where description of person or thing in will is partly true and partly false, if part which is true describes subject or object of gift with sufficient certainty, untrue part may be rejected and gift sustained, under doctrine of "false demonstration."

3. Wills ⇐490.

Function of parol evidence under doctrine of "false demonstration" is to enable court to strike out part of description which is false and to identify subject-matter, but it is indispensable that enough remain to plainly show testator's intent, otherwise devise will be void.

4. Wills ⇐490.

Evidence sustained decree distributing preferred stock in corporation under will bequeathing "common stock" therein where testator had never owned any such common stock.

Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

In the matter of the estate of John D. Heins, also known as John Diedrich Heins and J. D. Heins, deceased. From portion of decree of distribution directing the Bank of America National Trust & Savings Association, executor, to distribute certain stock to trust whereof John Heins and others were beneficiaries, Adolf F. Heins and another appeal.

Affirmed.

R. F. Mogan and E. R. Hoerchner, both of San Francisco, for appellants.

Randolph V. Whiting and Henry F. Wrigley, both of San Francisco, for respondents John and Erna Heins.

Dreher & McClellan, of San Francisco, for respondents John and Adeline Minderman.

William F. Traverso, of San Francisco, for respondent executor.

DOOLING, Justice pro tem.

This is an appeal from a portion of a decree of distribution distributing certain preferred stock of the Pacific Gas & Electric Company. The testator's will created in paragraphs 5 and 6 thereof two separate trusts; that created by paragraph 5 being for the benefit of respondents herein, John Heins, Erna Heins, John Minderman, and Adeline Minderman; and that created by paragraph 6 being for the benefit of appellants Adolf F. Heins and John Heins, and of the two Mindermans. The fifth paragraph purported to bequeath to the trustee "all of my common stock of the Pacific Gas and Electric Company" and of two other named corporations. The sixth paragraph created a trust in the residue of the testator's estate. The will was executed on January 25, 1930, and the testator died six days later on January 31, 1930. It appeared and the court found that the testator never at any time owned any common stock of the Pacific Gas & Electric Company, but that at the time of the execution of his will and at the time of his death he owned 90 shares of the first preferred capital stock of that company of $100 par value each, and 340 shares of 6 per cent. preferred capital stock of the same company of $25 par value each. The court further found that "said deceased intended to give and bequeath all of said shares of preferred capital stock of said Pacific Gas and Electric Company by and in accordance with the terms of paragraph fifth of his said will." The portion of the decree distributing this preferred stock in accordance with this finding is attacked by this appeal.

[1] Upon the face of the will no uncertainty or ambiguity appeared. The descriptive words "all of my common stock of the Pacific Gas and Electric Company" are definite and certain upon their face. No patent ambiguity existed. The proof, however, showed that neither at the time of making his will nor at any other time had defendant owned any of the common stock of the Pacific Gas & Electric Company, but that he did own certain shares of the preferred stock of such company. Thus was developed an uncertainty or ambiguity not apparent upon the face of the will; a latent ambiguity, as distinguished from a patent one. Of latent ambiguities in wills our Supreme Court said in Taylor v. McCowen, 154 Cal. 798, 99 P. 351, 353, quoting from Patch v. White, 117 U. S. 210, 217, 6 S. Ct. 617, 710, 29 L. Ed. 860: "It is settled doctrine that, as a latent ambiguity is only disclosed by extrinsic evidence, it may be removed by extrinsic evidence. Such an ambiguity may arise upon a will, either when it names a person as the object of a gift, or a thing as the subject of it, and there are two persons or things that answer the name or description; or, secondly, it may arise when the will contains a misdescription of the object or subject, as where there is no such person or thing in existence, or, if in existence, the person is not the one intended, or the thing does not belong to the testator. * * * Where it consists of a misdescription, * * * if the misdescription can be struck out and enough remain in the will to identify the person or thing, the court will deal with it in that way, or, if it is an obvious mistake, will read it as if corrected."

[2, 3] It will be observed of the ambiguity here disclosed that it is of that character described in the above quotation where the subject of the bequest as described in the will does not belong to the testator. It is

further to be observed that by striking out the single word "common" the latent ambiguity is cured and the remaining words "all of my * * * stock of the Pacific Gas and Electric Company" are sufficient to identify the preferred stock of that company owned by the testator at the time his will was made and at the time of his death. The rule applicable to latent ambiguities of this character is thus stated in 28 Ruling Case Law, p. 279, § 250: "Where the description of a person or thing in a will is made up of more than one part, and one part is true while the other is inexact or false, then, if the part which is true describes the subject or object of the gift with sufficient certainty, the untrue part may be rejected and the gift sustained. This is known as the doctrine of false demonstration, which is derived from the maxim, 'Falsa demonstratio non nocet, cum de corpore constat.' The function of parol evidence under this doctrine is to enable the court to strike out that part of the description which is false and to identify the subject matter, but under this rule it is indispensable that enough remains of the words of the will after the false parts have been rejected plainly to show the intent. When the false language is eliminated, and nothing remains directing inquiry which may result in discovering the true subject of the devise, it is void. In the application of the rule now under consideration it has been held that where a will bequeaths the testator's black horse but at the time he has only one horse, which is white, the white horse will be construed as passing. In such a case the additional misdescription which does not apply to any subject introduces no ambiguity. Similarly a devise of real estate by description partly false may be effective if what remains after rejecting the false part of the description reasonably corresponds with real estate indicated by extrinsic evidence."

Without attempting an exhaustive citation of the authorities, the following are some of the many cases in which courts have admitted extrinsic evidence to show that the property as described in a will was not owned by the testator, but that a portion of the description truly applied, and was intended to apply, to property owned by the testator, and distributing such property accordingly: Bullard v. Leach, 213 Mass. 117, 100 N. E. 57; Stevenson v. Stevenson, 297 Ill. 338, 130 N. E. 771; Hertford v. Harned, 185 Ind. 213, 113 N. E. 727; Wilmes v. Tiernay, 187 Iowa, 390, 174 N. W. 271; Brooklyn Trust Co. v. Warrington, 277 Pa. 204, 120 A. 825; Pemberton v. Perrin, 94 Neb. 718, 144 N. W. 164, Ann. Cas. 1915B, 68; Pring v. Swarm, 176 Iowa, 153, 157 N. W. 734; Armstrong v. Armstrong, 327 Ill. 85, 158 N. E. 356; In re Snyder's Estate, 217 Pa. 71, 66 A. 157, 11 L. R. A. (N. S.) 49, 118 Am. St. Rep. 900, 10 Ann. Cas. 488; In re Boeck's Estate, 160 Wis. 577, 152 N. W. 155, L. R. A. 1915E, 1008; Whitehouse v. Whitehouse, 136 Iowa, 165, 113 N. W. 759, 125 Am. St. Rep. 250; Patch v. White, supra.

While our own appellate courts have apparently not been called upon to apply this rule to a false description of the subject of a devise or bequest in a will, they have on more than one occasion applied it to a false description of the person who was intended as the object of the gift. Taylor v. McCowen, supra; In re Estate of Donnellan, 164 Cal. 14, 127 P. 166; In re Estate of Brehm, 116 Cal. App. 206, 2 P.(2d) 402; In re Estate of Moeller, 199 Cal. 705, 251 P. 311.

When it was shown to the court that the testator never at any time owned common stock of the Pacific Gas & Electric Company, but did at the time of making his will and of his death own preferred stock of that company, a proper case was made for applying the rule above discussed.

There is nothing in Re Estate of Callaghan, 119 Cal. 571, 51 P. 860, 39 L. R. A. 689, opposed to this conclusion. There the testatrix purported by her will to devise certain land in Alameda county, which she had never owned, to certain grandchildren. It was attempted on behalf of the grandchildren to show that they were pretermitted heirs by proving that the testatrix had never owned the property described. This the court held could not be done, since the mention of the grandchildren in the will showed that at the time of its execution the testatrix had them in mind. The court was careful to say on page 576 of 119 Cal., 51 P. 860, 861: "It is not contended that either by extrinsic evidence or otherwise, the description of the property mentioned in the will could be made to apply to any other tract of land, and appellants do not claim any other particular piece of land. The case is therefore materially different from Patch v. White, supra, cited by appellants."

[4] Here in addition to the facts previously discussed the appraisement and will were before the court. From the inventory and appraisement it appeared that the preferred stock of the Pacific Gas & Electric Company was appraised at $16,541 and the other stock which went into the trust created by paragraph 5 of the will had a value of only a little over $2,000. The will provided a trust for the payment of income with a provision for its termination and the transfer of the corpus upon certain contingencies. Into the second trust under the decree of the court went property of a somewhat higher appraised value than that distributed to the trust created by paragraph 5, but some of it of a less desirable character. The beneficiaries of each trust bore the same relationship to the testator. We cannot say in view of all the

evidence that the court erred in distributing the preferred stock of the Pacific Gas & Electric Company as it did.

Decree affirmed.

We concur: SPENCE, Acting P. J.; STURTEVANT, J.

131 Cal.App. 329

NEWCOMB v. TITLE GUARANTEE & TRUST CO. et al.

Civ. 8750.

District Court of Appeal, First District, Division 1, California.

May 24, 1933.

Hearing Denied by Supreme Court June 22, 1933.

Appeal and error ⇐762.

Points raised by appellant for first time in reply brief will be refused consideration unless meritorious reason is shown why points were not made in opening brief.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

On petition for rehearing.

Rehearing denied.

For original opinion, see 21 P.(2d) 456.

Fred W. Morrison, of Los Angeles, for appellants.

Y. B. Arsen, of Los Angeles, for respondent.

PER CURIAM.

In their petition for rehearing appellants urge two points. We find no merit in the first, and we are not called upon to consider the second, for the reason that it was presented for the first time in appellants' reply brief. As held in the cases hereinafter cited, points raised by an appellant for the first time in his reply brief will be refused consideration unless some meritorious reason is shown why they were not made in the opening brief. Monk v. Ehret, 192 Cal. 186, 219 P. 452; Thompson v. Koeller, 183 Cal. 476, 191 P. 927; Phelps v. Mayers, 126 Cal. 549, 58 P. 1048; Kahn v. Wilson, 120 Cal. 643, 53 P. 24; Haley v. Traeger, 92 Cal. App. 360, 268 P. 459. Here no excuse whatever was offered for not having presented the point in the opening brief. The appeal was not argued orally, and consequently respondent was afforded no opportunity to answer the point.

Rehearing denied.

132 Cal.App. 169

LOGAN et ux. v. CITY OF GLENDALE et al.

Civ. 9017.

District Court of Appeal, First District, Division 2, California.

May 22, 1933.

1. Municipal corporations ⇐323(1).

Ornamental street lighting system *held* street improvement, as distinguished from replacement or extension of plan of existing public utility so that city could not be restrained from making improvement (Gen. Laws 1931, Act 8194; Glendale City Charter, art. 23, §§ 2, 6, and art. 11, § 17 [St. 1931, p. 2695]).

2. Electricity ⇐1½.

In operating electric plant, city acts in proprietary capacity.

Appeal from Superior Court, Los Angeles County; Emmett H. Wilson, Judge.

Suit to enjoin street improvements brought by O. C. Logan and wife against City of Glendale and others. From an adverse judgment, plaintiffs appeal.

Affirmed.

James F. McBryde, of Glendale, for appellants.

Bernard Brennan, City Atty., Aubrey N. Irwin, Asst. City Atty., and A. L. Lawson, Deputy City Atty., all of Glendale, for respondents.

NOURSE, Presiding Justice.

[1] Plaintiffs sued for an injunction to restrain defendant from proceeding under the Vrooman Act (Stats. 1885, p. 147, as amended, Deering's Gen. Laws 1931, Act 8194) to improve portions of Brand boulevard with an ornamental electric lighting system. Defendants had judgment, and the plaintiffs have appealed upon typewritten transcripts.

In their opening brief the appellants assigned six questions as involved on the appeal. The first assignment reads, "Is an ornamental electric street lighting system a public utility or a part of the plant and equipment of a public utility?" As our answer to this question requires an affirmance of the judgment, it is unnecessary to pass upon the other assignments. The charter of the city of Glendale authorizes the city authorities to construct, maintain and operate public utilities, and for that purpose creates a public service department and a public service sinking fund, which fund "shall be used only for the replacement, betterment and extensions of the plants and equipment of said public utilities respectively." (Article 11, § 17, Stats. 1931,

p. 2695. Article 23, § 6, of the charter provides: "The improvement, widening and opening of streets, the planting of trees and all public improvements not specified in this charter may be done, and assessments therefor may be levied in conformity with and under authority conferred by general laws." Section 2 of the same article provides that "all general laws of the state applicable to municipal corporations, now or hereafter enacted, and which are not in conflict with the provisions of this charter or with ordinances or resolutions adopted in pursuance of this charter, shall be applicable to the city." Hence, it is conceded, as it must be, that, if the improvement contemplated by the city authorities is a street improvement as distinguished from a replacement or an extension of the plant of an existing public utility, the provisions of the Vrooman Act are applicable.

[2] The public utility owned and operated by the city is the business of acquiring and distributing electric energy for the use of the public generally and for the city in its governmental capacity. In the operation of this public utility the city acts in a proprietary capacity, and in this respect is no different from a private corporation or individual furnishing electric energy to the municipal corporation for public purposes. The distinction between these two capacities of a municipality was pointed out in Davoust v. City of Alameda, 149 Cal. 69, 71, 84 P. 760, 5 L. R. A. (N. S.) 536, 9 Ann. Cas. 847, which has been universally followed in this state. This distinction is the all-important factor in determining the question before us. In Park v. Pac. Fire Extinguisher Co., 37 Cal. App. 112, 117, 173 P. 615, it was held that an ornamental street lighting system to be owned and operated by the municipality was not a part of the public utility furnishing the electric energy, but was the property of the municipality, and as such an improvement of the street which the city might construct under the provisions of the Street Improvement Act. That case has never been overruled, and has stood for many years without criticism. The principle upon which this decision rests is found in those authorities holding that the lighting of the streets of a municipality falls within the police powers of the city, whereas the furnishing of electric energy to the city and its inhabitants generally is a business distinct from the governmental functions of the municipality, the right to do which must be expressly conferred. See, generally, Davoust v. City of Alameda, supra; Osburn v. Stone, 170 Cal. 480, 489, 150 P. 367; Hyatt v. Williams, 148 Cal. 585, 588, 84 P. 41; Ex parte Goodrich, 160 Cal. 410, 421, 117 P. 451, 456, Ann. Cas. 1913A, 56. In the latter case, which involved a municipal ordinance requiring a public utility corporation to furnish incandescent lamps to its customers, it is said: "No one can seriously assert that the furnishing of incandescent lamps is a part of the public duty of a quasi public corporation supplying electricity for light or power. No law of the state attempts in the remotest extent to impose such a duty. The public duty of such a corporation is fully performed when it has brought its commodity safely and conveniently to the door of the consumer. Within that door the company is not by law obliged, and may not by law be compelled, to go for any purpose foreign to the public service it is called upon to render, and that the purpose here contemplated is foreign is abundantly established. Snell v. Clinton Electric L., H. & Power Co., 196 Ill. 626, 63 N. E. 1082, 58 L. R. A. 284, 89 Am. St. Rep. 341; Burk v. Mead, 159 Ind. 252, 64 N. E. 880."

The ruling of the Park Case is based upon sound reason, and seems to be determinative of the issue involved here. Manifestly a private utility which is operated for the purpose of selling electric energy for profit is not interested in the character of poles or ornaments used in connection with the lighting of the public streets. On the other hand, these poles and ornamental lights are a distinct improvement of the property abutting the public street, and are erected by the city in its governmental capacity as an improvement of the street. In the maintenance of these poles, the city is the "consumer" referred to in the Goodrich Case, and, in that respect, acts in its governmental capacity. When, therefore, the city in its proprietary capacity takes the place of the private utility, and furnishes the electric energy, it is not concerned in that capacity with the character of ornaments used in lighting any particular street. No additional revenue comes to the city by reason of those ornaments and hence its business of furnishing electric energy is not interested therein.

The fairness of this rule is apparent. The municipal council determined that the proposed improvement would benefit a designated district and planned to assess the property in that district according to those benefits. If the proposed improvement must be paid for out of the public utility funds, it would be a charge upon the entire city; hence that portion of the city which the council found would receive no benefit from the improvement would be unjustly taxed.

Because we hold that the proposed improvement would not be a part of the public utility operated by the city, no issue of fact is raised by the pleadings. Hence the criticisms of the rulings upon the admission of evidence do not require consideration.

Judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

131 Cal.App. 774

GRITSCH v. PICKWICK STAGES SYSTEM.

GRITSCH et al. v. SAME.

Civ. 8365.

District Court of Appeal, First District, Division 2, California.

May 15, 1933.

Rehearing Denied June 14, 1933.

Hearing Denied by Supreme Court July 13, 1933.

1. Carriers ⇐300.

Stage driver on through street having right of way could assume automobile approaching on cross street would obey law and stop before entering through street (Gen. Laws 1931, Act 5128, § 22½).

2. Carriers ⇐295(7).

Statutory duty of driver of stage on through street was to drive at careful and prudent speed, having due regard to traffic, surface, and width of highway (Gen. Laws 1925–1927, Act 5128, § 113(a); Gen. Laws 1931, Act 5128, § 22½).

3. Carriers ⇐295(7).

Statute limiting speed to fifteen miles an hour at intersection *held* controlled by subsequently enacted provisions respecting through highways (Gen. Laws 1925–1927, Act 5128, § 113(b); Gen. Laws 1931, Act 5128, § 22½).

4. Carriers ⇐295(7).

One driving vehicle on established through highway appropriately marked with stop-signs at intersections need not reduce speed at intersections to 15 miles an hour, but rate of speed, unless governed by local regulation, is controlled by statute requiring speed not greater than is reasonable and proper (Gen. Laws 1931, Act 5128, § 22½).

5. Carriers ⇐321(12, 19).

Where one driving on through highway is involved in collision at intersection, and question of his negligence relates to speed, jury should be properly instructed to determine whether speed was greater than reasonable and proper and also whether speed was proximate cause of accident (Gen. Laws 1925–1927, Act 5128, § 113(a); Gen. Laws 1931, Act 5128, § 22½).

6. Carriers ⇐320(17).
Trial ⇐194(18).

In stage passenger's action for injuries sustained in intersectional collision with automobile, question whether speed alone constituted negligence was for jury, and court improperly instructed that statute expressly limited speed of stage, on through street, to 15 miles an hour (Gen. Laws 1925–1927, Act 5128, § 113(a); Gen. Laws 1931, Act 5128, § 22½).

7. Carriers ⇐321(12).

In stage passenger's action for injuries sustained in intersectional collision with automobile, instruction that it was stage driver's duty to anticipate that other automobiles would enter through street in violation of law and that driver did not have right of way *held* erroneous (Gen. Laws 1925–1927, Act 5128, § 113(a); Gen. Laws 1931, Act 5128, § 22½).

8. Carriers ⇐295(1).

One operating vehicle on highway may assume that another will proceed in accordance with law and cannot be charged with negligence because of such assumption, unless he continues on after he has knowledge that other is not acting within law.

9. Carriers ⇐321(12).

In stage passenger's action for injuries sustained in intersectional collision with automobile, instruction respecting automobiles on through streets together with instruction on speed *held* erroneous as instructing jury that, if stage driver crossed intersection in excess of 15 miles an hour, he was negligent (Gen. Laws 1925–1927, Act 5128, § 113(a, b); Gen. Laws 1931, Act 5128, § 22½).

One instruction was in substance that ordinance which required operator of automobile to stop before entering street did not give stage driver right to traverse intersection in excess of speed allowed by Vehicle Act, and that, if stage traversed intersection in excess of speed allowed by Vehicle Act, such speed constituted prima facie evidence of negligence, and another instruction quoted Gen. Laws 1925–1927, Act 5128, § 113(b), making it unlawful for driver of vehicle to drive it at speed exceeding 15 miles an hour in traversing intersection of highway when driver's view is obstructed.

10. Negligence ⇐121(2).

Essentials of "res ipsa loquitur" doctrine are that instrumentality causing injury is in exclusive control of defendant, that circumstances attending accident carry strong probability of negligence on defendant's part, and that accident would not have happened if defendant had exercised proper care, and that actual cause of accident is otherwise unknown.

[Ed. Note.—For other definitions of "Res Ipsa Loquitur," see Words and Phrases.]

11. Carriers ⇐316(4).

Where passenger suing stage owner for injuries sustained in collision did not sue owner of other colliding automobile, and evidence warranted inference that operator of other automobile was alone guilty of negligence, res ipsa loquitur doctrine did not apply.

12. Carriers ⇐316(4).

Where plaintiffs' proof shows actual cause of collision which is other than negli-

gence of defendant, there is no room for inference that defendant was negligent under res ipsa loquitur doctrine.

Appeals from Superior Court, City and County of San Francisco; Edmund P. Mogan, Judge.

Actions by Frank M. Gritsch and by Helen G. Gritsch and another against the Pickwick Stages System, which were tried together. From a judgment for plaintiffs, defendant appeals.

Judgment reversed.

B. P. Gibbs, of Los Angeles, and Orla St. Clair, of San Francisco (Harry C. Lucas, of San Francisco, of counsel), for appellant.

Ford & Johnson, of San Francisco, for respondents.

NOURSE, Presiding Justice.

These two actions were tried together before a jury, which returned a verdict in each case for the plaintiffs. The defendant has appealed on typewritten transcripts, and both appeals are presented on the same set of briefs.

The plaintiffs were passengers on a stage operated by the defendant on the main highway designated as El Camino Real running through the city of San Mateo. Both plaintiffs were injured when the stage upon which they were riding was struck by a Buick automobile driven by Milton Hamilton at the intersection of El Camino Real with El Cerito avenue. The stage was struck on the left side near the middle, the impact causing damages to the steering apparatus of the stage, which in turn caused the driver of the stage to lose control, so that the stage went up on the right-hand curb across the parkway and came to a stop against a dwelling. Throughout its course through the city of San Mateo, and for many miles on each side thereof, El Camino Real was designated and marked as a through highway or boulevard, and was at the time of the collision the only such through highway or boulevard leading from San Francisco south through the peninsula. The evidence introduced by plaintiffs, as well as that offered by defendant, showed that Hamilton failed to stop before entering the boulevard, that he entered the intersection while driving at a speed of thirty miles an hour, and crashed into the side of the stage.

On this appeal the appellant attacks the ruling of the trial court permitting the plaintiffs to have a jury, the defendant insisting that a jury was waived because of plaintiffs' failure to deposit jury fees within the time prescribed by law. The evidence relating to the cause of the accident is reviewed at length, and the defendant argues that from this evidence it must be ruled as matter of law that there was no competent evidence of negligence on the part of the defendant which was the proximate cause of the collision. Numerous instructions requested by the plaintiffs are attacked by the defendant, among which are those relating to the statutory limitations on the speed of the stage at the point of intersection and those concerning the res ipsa loquitur doctrine. If any one of these grounds be good, a reversal of the judgment must follow, and, as the questions relating to the instructions present matters which are of a frequent occurrence in trials of this nature, we will confine our opinion to a discussion of those instructions.

Instruction No. 35, given at the request of the plaintiffs, quotes section 113, subd. (a), of the California Vehicle Act, requiring that the operator of a motor vehicle drive the same at a careful and prudent speed. This was followed by a quotation of subdivision (b) of that section which made it lawful for the driver of such a vehicle to drive the same at a speed not exceeding "fifteen miles an hour in traversing an intersection of highways when the driver's view is obstructed. A driver's view shall be deemed to be obstructed when at any time during the last one hundred feet of his approach to such intersection he does not have a clear and uninterrupted view of such intersection and of the traffic upon all of the highways entering such intersection for a distance of two hundred feet from such intersection."

This was followed by instruction No. 36, also given at the request of plaintiffs, which read, "You are instructed that the ordinance of the City of San Mateo which required the operator of the Buick automobile to stop before entering El Camino Real did not give the operator of the stage the right to traverse said intersection in excess of the speed allowed by the California Vehicle Act, if you so find. On the contrary, if you believe, from the evidence, that the stage traversed said intersection in excess of the speed allowed by said California Vehicle Act, this constitutes prima facie evidence of negligence on the part of defendant Pickwick Stages System, a corporation."

Instruction No. 44, given at the request of plaintiffs, reads: "I charge you that the violation, if any, of the provisions of the 'California Vehicle Act' regulating the operation of motor vehicles, and read to you in these instructions, constitutes prima facie evidence of negligence."

The effect of these instructions was to create in the minds of the jury the impression that the defendant was guilty of negligence if the driver of the stage operated his vehicle upon a through public highway or boulevard at a speed in excess of fifteen miles an hour while crossing any intersection of such boulevard or if the driver thereof violated

any other provision of the California Vehicle Act.

These instructions were erroneous, and as such prejudicial to this defendant. It should be noted that, just preceding the instruction under consideration, instruction No. 33 was given, which reads in part as follows: "You are instructed that it was the duty of the defendant in operating its automobile along the public highway at the time and place in question, to anticipate the presence of and look for other automobiles crossing said public highway." The accident occurred on February 14, 1930. The effective provisions of the California Vehicle Act (Deering's Gen. Laws, Act No. 5128) therein define a highway or public highway (section 21) as every highway dedicated to the public or intended or used by or for the general public. Section 22½ reads as follows:

"*Through highway or boulevard.* (a) Every highway designated by ordinance enacted by local authorities at the entrance to which vehicles are required to stop before entering or crossing such through highway when there shall be in place upon the highway intersecting any said through highway at or near the boundary line of such through highway appropriate stop signs so located as to be plainly visible at all times to the driver of an approaching vehicle.

"(b) Every public highway under the jurisdiction of the department of public works shall be a through highway, and all vehicles shall stop before entering or crossing such through highway when there shall be in place upon each and every public highway intersecting such through highway at or near the boundary line of such through highway appropriate stop signs so placed by or under the authority of the department of public works, and so located as to be plainly visible at all times to the operator of an approaching vehicle."

Section 113 of the act as amended (Deering's Gen. Laws 1925–1927, p. 1533) reads (subdivision a): "Any person driving a vehicle on the public highways of this state shall drive the same at a careful and prudent speed not greater than is reasonable and proper, having due regard to the traffic, surface and width of the highway, and no person shall drive any vehicle upon a public highway at such speed as to endanger the life, limb or property of any person."

In Lindenbaum v. Barbour, 213 Cal. 277, 2 P.(2d) 161, 164, our Supreme Court had occasion to consider a local ordinance in establishing a boulevard and providing for the erection of stop-signs at intersections; the local authority having been conferred by section 145 of the Vehicle Act. In that case the plaintiff was riding along Foothill boulevard and was injured when the car in which she was riding collided with one operated by the defendant, and which had entered the boulevard from an intersection without having stopped before entering in obedience to a stop-sign posted at the intersection. The particular point involved in the opinion was whether the right of way was to be determined by the general provisions of section 131 of the Vehicle Act or whether the fact that Foothill boulevard was an established through highway or boulevard where stop-signs were maintained at intersecting streets gave the plaintiff the right of way over those vehicles entering the boulevard from these intersecting streets. The Supreme Court held that the general provisions of section 131 were controlled by the later specific provisions authorizing the local authorities to create the through highways and boulevards. The cause of action accrued prior to the amendments of section 22½ of the California Vehicle Act. The same principle, however, is involved, and in commenting on the purpose of the "boulevard plan" the Supreme Court said: "The patent purpose of designating certain streets as boulevards and requiring vehicles to stop before entering upon such boulevards is to facilitate travel along and upon such streets. Having in mind this purpose, we do not believe that it was the legislative intent to limit the scope of the power of the boards of supervisors to a bare right to designate certain streets as boulevards and to require vehicles to stop before entering thereon. The power to require vehicles to stop before entering a designated street without the right to designate how long the vehicle shall stop before entering, or the right to designate that after stopping the vehicles must enter the boulevard in such a manner as not to interfere with traffic along the boulevard, would be a futile power. If the driver of a vehicle could stop at a stop signal and then immediately proceed into the intersection without regard to the traffic coming down the boulevard except that already in the intersection, the act of stopping would be an idle act, for those using the boulevard would be in no more advantageous position than if there were no stop signs, as they would have to be constantly yielding the right of way to drivers crossing the intersection. We are of the opinion, therefore, that the power to regulate the right of way at intersections of boulevards with streets properly posted with stop signs is a necessary concomitant of the power to designate certain streets as boulevards, and to require vehicles to stop before entering such boulevards, which power was intended to be reserved to boards of supervisors by section 145 of the California Vehicle Act, hereinbefore quoted."

Cases in other jurisdictions involving boulevards and "arterial highways" recognize the general principle that the purpose of creating these through highways is to facilitate traffic upon them, and to that end the state may delay all traffic entering into such highways in order that those traveling upon the

through highways may have a preferred right of way. See Dikel v. Mathers, 213 Iowa, 76, 238 N. W. 615; Bell v. Pickett, 178 Minn. 540, 227 N. W. 854; Overaa v. Tacoma Bus Co., 168 Wash. 392, 12 P.(2d) 415; Keir v. Trager, 134 Kan. 505, 7 P.(2d) 49, 50, 81 A. L. R. 181.

From the Keir Case we quote the following language, which is particularly applicable to the case here: "The appellee was acting wholly within her rights in assuming that the appellants would stop before entering the highway, and she cannot be charged with negligence in acting upon such assumption. She can only be charged with negligence under such circumstances from the time that she had knowledge that the appellants intended to disobey the stop sign and enter upon the highway. After she had such knowledge, she was bound to use the care of an ordinary, prudent person."

[1-5] Here the uncontradicted evidence is that the Hamilton car approached the boulevard at a rate of speed in excess of thirty miles per hour, and that without stopping and without any slackening of its speed it continued into the boulevard and struck the stage which was already in the intersection. That the stage had the right of way through the intersection, and that the driver thereof had the right to assume that the Hamilton car would obey the law and stop before entering the boulevard, are matters which are not open to controversy. Thus the true measure of the statutory duty of the driver of the stage is that found in section 113 of the act. To quote: "Drive the same at a careful and prudent speed not greater than is reasonable and proper, having due regard to the traffic, surface and width of the highway. * * *" He was not controlled by the provisions of subdivision (b) of that section which fixes a limit of "fifteen miles an hour in traversing an intersection of highways. * * *" The provisions of the latter subdivision relate to public highways as distinguished from "through highways" or boulevards, and, having been enacted prior to the amendments providing for through highways and boulevards, must be deemed to be controlled by the latter provisions. Otherwise, as pointed out in the Lindenbaum Case, those provisions would be without purpose. We conclude, therefore, that any person driving a vehicle on an established through highway or boulevard which is appropriately marked with stop-signs at intersections is not necessarily required to reduce his speed at those intersections to 15 miles an hour under the provisions of subdivision (b) of section 113, but that his rate of speed (unless governed by local regulations) is controlled by subdivision (a) of that section—that which is "not greater than is reasonable and proper." Thus, when one who is driving on such a highway is involved in a collision at an intersection, and the question of his negligence relates to the rate of speed at which he was driving, the jury should be properly instructed to determine whether such rate of speed was greater than was reasonable and proper under the circumstances, and also whether the speed maintained was a proximate cause of the accident.

[6-9] If the question whether the rate of speed alone constituted negligence is a question of fact to be determined by the jury, then manifestly the trial court erred in instructing the jury that the statute expressly limited the speed of the stage to fifteen miles an hour at this intersection. It likewise erred in instruction No. 33, which in effect advised the jury that it was the duty of the driver of the stage to anticipate that other automobiles would enter the boulevard in violation of law, and that the driver did not have the right of way at that point. It is the rule of all the authorities that one operating a vehicle on the public highway may assume that another will proceed in accordance with the law, and that he is not to be charged with negligence by reason of that assumption, unless he continues on after he has knowledge that the other is not acting within the law. This error was emphasized by instruction 36, which expressly advised the jury that the provisions of the San Mateo ordinance creating the boulevard and requiring all automobiles to stop before entering it did not give the operator of the stage the right to traverse the intersection "in excess of the speed allowed by the California Vehicle Act." Having emphasized the fifteen mile an hour limitation, the jury could not help but draw the conclusion from these instructions that, if the operator of the stage crossed the intersection in excess of that speed, he was guilty of negligence as a matter of law.

At the request of the plaintiffs, the trial court gave the following instruction applying the res ipsa loquitur doctrine: "The occurrence of the accident raises a presumption of negligence which such defendant is called upon to rebut or overcome by showing, if it can, that the injury was sustained without any negligence on its part or that plaintiffs themselves were guilty of contributory negligence."

The instruction is technically wrong for two reasons—it tells the jury that under this doctrine a presumption of negligence arises and that the burden of proof thereupon shifts to the defendant. We have frequently had occasion to point out the error in the use of the word "presumption" rather than the word "inference" in an instruction applying the res ipsa loquitur doctrine. This matter was discussed at some length in Hilson v. Pacific Gas & Electric Co. (Cal. App.) 21 P. (2d) 662, where Dowd v. Atlas T. & A. Service Co., 187 Cal. 523, 531, 202 P. 870; Albert v. McKay & Co., 53 Cal. App. 325, 329, 200 P.

83; Crooks v. White, 107 Cal. App. 304, 310, 290 P. 497, 500, are cited.

In Crooks v. White, supra, we said: "The inaccurate use by courts of the word 'presumption,' when the word 'inference' was intended, has led to some confusion. Furthermore, these words have been frequently used by the courts interchangeably." See Smith v. O'Donnell, 215 Cal. 714, 12 P.(2d) 933; St. Clair v. McAlister, 216 Cal. 95, 13 P.(2d) 924, 925. We do not, however, find any case which has discussed this matter from an analytical standpoint and has held that the use of the word "presumption" is correct.

However, we are compelled to reverse the judgment, not because of the error in the wording of the instruction, but because in our view the res ipsa loquitur doctrine was not applicable to the facts of this case.

[10] The essentials of the doctrine of res ipsa loquitur, or "the thing speaks for itself," are that the instrumentality causing the injury must be in the exclusive management or control of the defendant; that the circumstances attending the accident must be such as to carry a strong probability of negligence on the part of the defendant, and that the accident would not have happened if the defendant had exercised proper care in the management of the instrumentality; and that the actual cause of the accident must be otherwise unknown. 45 Cor. Jur. 1197–1211. Thus it has been said that the doctrine is applicable only when the nature of the accident itself not only supports the inference of defendant's negligence but excludes all others. Scellars v. Universal Service Everywhere, 68 Cal. App. 252, 228 P. 879; Carlsen v. Diehl, 57 Cal. App. 731, 208 P. 150; Olson v. Whitthorne & Swan, 203 Cal. 206–208, 263 P. 518, 58 A. L. R. 129; 19 Cal. Jur. 707, 710, 711.

Originally, the doctrine was applicable only in cases against common carriers. The underlying principle of the doctrine was that a passenger who was injured while riding upon a common carrier might not be able to allege or prove the precise act of negligence causing the injury, but that, because of the exclusive management and control of the instrumentality, the common carrier was in a better position to explain or designate the circumstances attending the accident. Hence it was said that, when the instrumentality causing the injury was in the exclusive management and control of the defendant, and the circumstances were such as to carry a strong probability of negligence on his part, these circumstances were such as would permit the jury to draw an inference of negligence within the meaning of section 1958, Code of Civil Procedure.

[11] It will be recalled that from plaintiffs' evidence it was shown that the operator of the Buick car failed to stop at the arterial intersection, and that his car struck the stage in the middle of the intersection while going at a speed far in excess of that permitted by law. To say that under these circumstances the jury could not have drawn the inference that the operator of the Buick was negligent, and that his negligence, independent of any negligence of the stage driver, was the proximate cause of the collision, would be to disregard plain common sense. Bearing in mind that the operator of the Buick was not joined as a party defendant in this case, but that the negligence of the stage alone was charged as the sole proximate cause of the accident, we must conclude that the respondents elected to confine their charge of negligence to the one instrumentality and to thus limit the application of the res ipsa loquitur doctrine to the operator of that instrumentality. Where this is done, and upon plaintiffs' own case it appears that another independent instrumentality was involved in the collision, and that it is reasonable to infer from the evidence adduced that the operator of that instrumentality was alone guilty of negligence, the primary principle of the doctrine is lacking because it is just as feasible for the plaintiffs to prove the negligence of the operator of the second car as it is for the defendant to explain it.

[12] Herein lies the distinction between the present case and St. Clair v. McAlister, supra. The latter case was a suit by a passenger on a stage against the owners of the stage and the operator of a second car which collided with the stage in an ordinary street intersection. In the presentation of her case against both defendants the plaintiff showed the circumstances of the collision and endeavored to prove negligence on the part of both. The Supreme Court held that in thus "charging concurrent negligence" plaintiff was bound to prove the particular acts of negligence charged to McAlister (operator of the second car) without the aid of the doctrine, but that: "By producing such proof it should not be held that she waived or forfeited her right to invoke the doctrine as to the defendant's carrying her as a passenger." But where, as here, the plaintiff sues the carrier alone, and then proves an independent act of negligence for which the party charged was not responsible, her case is "no wise different from a supposititious case where some malefactor might have maliciously * * *" [Gerdes v. Pacific Gas & Electric Co. (Cal. Sup.) 21 P.(2d) 571] wrecked the stage in the course of its progress along the highway. In other words, when plaintiffs' proof shows the actual cause of the collision which is other than negligence of the party sought to be charged, there is no room for an inference that he was negligent under this doctrine. Carlsen v. Diehl, 57 Cal. App. 731, 737, 208

P. 150; 29 Cyc. 624; Lejeune v. General Petroleum Corp. (Cal. App.) 18 P.(2d) 429; Gerdes v. Pacific Gas & Electric Co. (Cal. Sup.) 21 P.(2d) 571.

The judgments are reversed.

We concur: STURTEVANT, J.; SPENCE, J.

132 Cal.App. 4

PRUDENTIAL PETROLEUM CO. v. PECK et al.

Civ. 7730.

District Court of Appeal, Second District, Division 2, California.

May 15, 1933.

1. Executors and administrators ⇐39.

Executors of decedent's estate are entitled to residuary estate during administration (Code Civ. Proc. §§ 1452, 1563, 1581).

2. Corporations ⇐141.

Consent or estoppel could not be implied from executors' mistakenly voting stock of which they were not real owners.

3. Executors and administrators ⇐271.

Residuary estate must first be taken for payment of debts not appropriated for by will and for expenses of administration, where will disposed of decedent's whole estate (Code Civ. Proc. § 1563).

4. Wills ⇐732(6).

Residuary estate must first be taken when it is necessary to resort to property of estate to pay legacies for which no property is expressly appropriated (Civ. Code, § 1360).

5. Pleading ⇐8(11).

In action for unpaid stock subscription, allegation of ownership was conclusion of law, where complaint showed that alleged owners were executors of estate, including unpaid stock subscribed by testator (Code Civ. Proc. §§ 1452, 1563, 1581).

6. Corporations ⇐90(5).

Complaint to recover from residuary legatees for unpaid stock subscription of testator was defective against general demurrer, where complaint did not allege that decree was made distributing subscription rights, and complaint showed that estate was in process of administration (Code Civ. Proc. §§ 1452, 1563, 1581).

7. Executors and administrators ⇐43.

That executors and residuary legatees were same individuals did not merge in them as individuals rights in stock subscribed by testator, since their rights as executors were fixed by law, and their rights as individuals were determined under will when administration was completed (Code Civ. Proc. §§ 1452, 1563, 1581).

8. Corporations ⇐89(1).

Corporation can look only to stockholders whose names are registered on its books for purpose of ascertaining those liable to it for assessment.

9. Corporations ⇐90(5).

Complaint to recover from residuary legatees for unpaid stock subscription of testator was specially demurrable because of uncertainty of ownership appearing in complaint which showed that estate was in process of administration (Code Civ. Proc. §§ 1452, 1563, 1581).

10. Appeal and error ⇐854(3).

Order sustaining demurrer to complaint generally, where it was specially demurrable, must be affirmed, though complaint was good against general demurrer.

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Action by the Prudential Petroleum Company against Carrie A. Peck and Aldrich R. Peck. Judgment for defendants, and plaintiff appeals.

Affirmed.

Samuel W. Newman, of Los Angeles, for appellant.

Barker & Keithly and Barker, Smiley & Keithly, all of Los Angeles, for respondents.

ARCHBALD, Justice pro tem.

A demurrer to plaintiff's third amended complaint for the recovery of an unpaid stock subscription was sustained without leave to amend, and plaintiff has appealed from the judgment of dismissal thereafter entered.

The complaint contains two counts, the first of which, after alleging the corporate capacity of plaintiff, avers in substance that one Arthur R. Peck died on or about the 18th of September, 1927, leaving an estate in Los Angeles county, and leaving as his sole residuary legatees and devisees the defendants, "who heretofore have been duly and regularly appointed executors of the estate of said Arthur R. Peck, deceased, and *are now the duly appointed, qualified and acting executors of said estate*" (italics ours); "that all interest of said Arthur R. Peck, deceased, in and to the stock and subscription agreement hereinafter mentioned is part of his residuary estate, and by the terms of his will passed to and is now the property of the defendants in equal shares"; that said Arthur R. Peck, on or about March 19, 1920, agreed in writing to pay for and receive 333,333 shares of the

capital stock of plaintiff corporation at $1 per share; and that 252,210 shares were issued to him or his order, for which payment was made; that 81,123 shares of said stock so subscribed for "remain unissued and unpaid for"; and "that said subscription agreement and all rights thereunder are a part of the residuary estate of said Arthur R. Peck, deceased"; that from the date of said subscription agreement to the time of his death said Peck voted said 81,123 shares of subscribed stock, was a member of the board of directors of plaintiff corporation, and acted as president of plaintiff corporation, and at all times "acknowledged his liability to receive and pay for said 81,123 shares of the capital stock of the plaintiff if, as and when called for." The foregoing is the substance of the allegations contained in the first four paragraphs of the first cause of action. Paragraph V alleges "that from and after the death of said Arthur R. Peck the defendants herein, both individually and as executors of the estate of said Arthur R. Peck, deceased, having succeeded to all of the rights and ownership of said Arthur R. Peck, deceased, in and to said subscription agreement and said subscribed stock, and well knowing that said stock had not been paid for, have exercised acts of ownership of said 81,123 shares of such subscribed stock, have voted and caused the same to be voted at stockholders' meetings, and have issued proxies to permit" said shares to be voted, and by reason thereof "are and in good conscience ought to be estopped to deny their ownership of said stock and any and all liability existing as against them in favor of said corporation and said other stockholders by reason of such ownership; and said defendants are now and at the times hereinafter mentioned were the owners of all of the subscribers' rights in and to said stock and said subscription agreement, and they and each of them assumed and agreed to pay any and all sums due and to become due thereon by reason of any and all liability for the unpaid purchase price of said stock and the whole thereof." Such paragraph further alleges that the stock above mentioned was the only stock held, owned, or voted by defendants or either of them at any time mentioned in the complaint.

Paragraphs VI, VII, and VIII of said first cause of action allege in effect that on or about May 24, 1929, the board of directors of plaintiff corporation adopted a resolution calling for payment of the unpaid subscription price of $1 per share for said 81,123 shares, and levied an assessment of that amount for the purpose of procuring payment of said subscription; that said assessment was made payable immediately to the treasurer of plaintiff at the office of the corporation, and declared that any stock upon which the assessment was not paid by June 29, 1929, would be delinquent and sold on a date named for the purpose of paying such assessment, costs of advertising, and expenses of sale; that the secretary of the corporation was directed to give notice "as required by statutes of the state" of said assessment, etc., and "that said notice was duly given to the defendants, but no part of said assessment was paid on or before June 29, 1929, or at all"; that thereafter, and prior to the date fixed for the sale, the board of directors by resolution elected to waive further proceedings by sale and to proceed by action to collect said assessment.

The second cause of action adopts all paragraphs of the first cause of action except paragraph V, and in addition alleges that, after the execution of said subscription agreement of March 19, 1920, and prior to the assessment proceedings alleged, "defendants and each of them became the owners" of all the rights of said decedent in and to said subscription agreement and said 81,123 shares of stock, "and each of said defendants assumed and agreed to pay the whole of the purchase price thereof," viz., the sum of $81,123, "if, as and when demand should thereafter be made therefor."

Defendants demurred to the complaint, and each cause of action thereof generally and also specially, on the grounds of uncertainty, ambiguity, and unintelligibility on certain stated grounds. The minute order sustaining the demurrer is general, and does not indicate upon which of the grounds the court acted.

Appellant contends that respondents are stockholders because of the admitted fact that they voted the unissued and unpaid for stock represented by the subscription of decedent, having succeeded to the latter's rights under such subscription, and thereby evidenced their consent to be stockholders, and that from such facts the law implies the assumption of the unpaid purchase price.

[1-5] Under the allegations of the amended complaint, defendants are not only the residuary legatees and the individuals in whom the title to the residuary estate vested on the death of decedent, which includes all rights under such subscription agreement, but they are also the duly appointed and acting executors of the last will and testament of decedent, and as such executors are entitled to the possession of such residuary estate during administration. Sections 1452, 1581, Code Civ. Proc., in effect at time complaint filed; section 581, Probate Code. We fail to see how, as such executors, with the right to possession and their duties under it fixed by law, any consent or estoppel could be implied from their mistakenly voting stock of which they were not the real owners. As individuals, so far as the complaint shows, while the title was vested in them as such residuary legatees on the death of decedent, they may never become the owners in fact.

The complaint is silent as to the other terms of the will or the financial condition of the estate. If decedent left debts and did not expressly appropriate property by his will for their payment, or for payment of expenses of administration or family allowances, if any, the property of the residuary legatees and devisees must first be resorted to for such payment, the will having disposed of all of decedent's estate. Section 1563, Code Civ. Proc.; section 750, Probate Code. If it is necessary to resort to the property of the estate to pay legacies for which no property is expressly appropriated, the residuary estate must likewise be first taken. Section 1360, Civ. Code; section 751, Probate Code. It will be seen at a glance, then, that the allegations of the complaint come far short of supporting the averment that "said defendants are now and at all times hereinafter mentioned were the owners of all of the subscriber's rights in and to said stock and said subscription agreement"; and, in the face of the detailed allegation of the facts purporting to show how title was acquired, the allegation of ownership is merely a conclusion of law, erroneously drawn therefrom. Gruwell v. Seybolt, 82 Cal. 7, 22 P. 938.

[6] Not alleging that a decree has been made distributing the subscription rights under said subscription agreement and showing that the estate is still in process of administration, there would seem to be a fatal defect in the amended complaint as against the general demurrer, as on the face of the pleading the stock in question may never be distributed to respondents. Meilink v. Gianelli, 100 Cal. App. 615, 280 P. 561.

[7] Nor does the fact that the executors and residuary legatees are the same individuals merge in them as individuals all rights under such subscription agreement. Their rights and duties as executors are fixed by law—that of possession during course of administration. Their rights as individuals will be determined under the will when administration is completed.

[8] It is doubtful, too, if under section 324 of the Civil Code, as in force at the time the alleged acts of consent or estoppel occurred, such acts could be construed to make respondents stockholders, even assuming that certificates of stock, instead of merely rights under a subscription agreement, had been involved. "For the purpose of ascertaining those who are liable to it for the amount of the assessment, the corporation can look only to the list of stockholders as their names are registered upon its books." Visalia, etc., R. R. Co. v. Hyde, 110 Cal. 632, 636, 43 P. 10, 11, 52 Am. St. Rep. 136. See, also, Berkeley Hillside Properties Co. v. Kelly, 78 Cal. App. 29, 247 P. 600.

[9, 10] One of the grounds of special demurrer raises the same question we have discussed. Such special demurrer would seem to be good, in view of the grave uncertainty as to ownership appearing on the face of the complaint. Even if the complaint had been good as against the general demurrer, the order sustaining the demurrer generally as it does would have to be affirmed. Haddad v. McDowell, 213 Cal. 690, 3 P.(2d) 550.

The conclusion we have reached makes it unnecessary to consider the other contentions raised.

Judgment affirmed.

We concur: WORKS, P. J.; STEPHENS, J.

132 Cal.App. 242

ALLEN v. VANDERBECK et al.

Civ. 9001.

District Court of Appeal, First District, Division 2, California.

May 24, 1933.

Hearing Denied by Supreme Court July 21, 1933.

1. Brokers ⇐42.

Informing borrower where he could borrow money to redeem from mortgage foreclosure sale and arranging meeting between borrower and lender, resulting in agreement to make loan, *held* not acts covered by California Real Estate Act which requires license (Gen. Laws 1931, Act 112).

2. Mortgages ⇐563.

Where intermediary, introducing lender to execution purchaser desiring loan to redeem from mortgage foreclosure sale, was promised 10 per cent. of net profits, and execution purchaser in addition induced lender to agree to pay intermediary certain amount claim to which intermediary assigned to lender, awarding lender such amount in interpleader action out of proceeds after redemption by judgment debtor *held* not error.

3. Mortgages ⇐568.

Where judgment creditor and execution purchaser, borrowing money to redeem from mortgage foreclosure sale, agreed that lender receive undivided half of judgment balance should judgment debtor redeem, but, on discovering that loan contract recited excessive judgment balance, obtained lender's agreement that judgment assignment carried only right to collect actual balance, finding that actual balance was due lender after redemption by judgment debtor *held* not error.

Such finding was fully supported where it appeared that such judgment creditor and execution purchaser, on discovering

the error in estimating judgment balance, declared himself willing that lender should receive the actual balance, and asked lender to consent in writing, whereupon lender executed writing reciting that assignment to him vested in him a right to collect only certain amount, the actual balance, and interest thereon, and that such assignment carried no greater or other interest, as against judgment creditor's contention that construction placed on transaction by court converted conditional promise into absolute promise.

4. Joint adventures ⇐4(1).

Where lender, lending money to judgment creditor to redeem from mortgage foreclosure sale in part consideration of half interest in judgment balance should judgment debtor redeem, subsequently lent money to judgment debtor to redeem, there was no conflict of interests which would entitle judgment creditor to share of profits of other loan contract, especially where he knew of and consented to loan.

This was so as against judgment creditor's contention that when he and lender arranged to redeem, they entered on joint adventure and that when thereafter lender advanced money to judgment debtor, lender thereby obtained secret profits.

5. Interest ⇐50.

Where, at opening of trial in interpleader action, balance of fund was, by consent, paid into court, no interest *held* chargeable from such date.

Appeal from Superior Court, Los Angeles County; J. O. Moncur, Judge.

Action in interpleader by R. E. Allen against George A. Vanderbeck and others. From the judgment, named defendant appeals.

Affirmed.

James P. Clark, of Los Angeles, for appellant.

William Ellis Lady, of Los Angeles, for respondent.

STURTEVANT, Justice.

This is an action in interpleader. From the judgment one of the claimants has appealed under section 953a of the Code of Civil Procedure. As commissioner to conduct a sale under a decree of mortgage foreclosure the plaintiff received moneys. By consent of all the parties he disbursed a part of those moneys and held a portion to which several claims were interpleaded. The commissioner commenced the action and named all of the claimants as defendants. Under the findings some relief was awarded to each party. However, the defendant Vanderbeck, claiming that more relief should have been granted to him, has appealed from the judgment.

The action was commenced on January 6, 1930. At that time the plaintiff held over $18,000 which he asked permission to pay into court and be discharged. The record discloses no legal reason why the order applied for was not made at that time. Later, by consent of the parties, the undisputed claims of P. M. Reidy for $8,458.34 and of the sheriff of Los Angeles county for $7,558.93, were paid. That left in the plaintiff's hand $2,284.35. At the beginning of the trial by consent of the parties the plaintiff was authorized to pay himself $25 for costs and to pay the remainder, $2,259.35 to the clerk of the court to abide the judgment. At the same time the plaintiff asked to be discharged. No legal reason appears in the record why he was not discharged, but he was ordered to remain in court until the end of the case and at that time was discharged. While the matter was controverted, nevertheless there was a stipulation that the plaintiff should not be charged with interest. No fact appears in the record that would have warranted any charge against him for interest.

Mrs. Mills, the mortgagor, appeared and filed an answer. The defendant P. M. Reidy appeared and filed an answer and a cross-complaint. The defendant George A. Vanderbeck did the same. The cross-complaints were answered and on the issues so framed the action was tried. At the end of the trial the court made findings specifically disposing of every issue made by the pleadings. The defendant Vanderbeck attacks many of the findings and claims that they are not sustained by the evidence.

On March 2, 1929, a judgment of foreclosure was rendered in an action entitled The Prudential Insurance Company of America v. Lydia Mills for the sum of $6,996.85. The property described in the mortgage was lot 4 in block 6 of Lafayette Square. R. E. Allen was appointed commissioner to conduct the sale and the property was sold to Thomas Mortgage Company for $7,091.87, which sum was paid to the commissioner. On April 10, 1929, in an action entitled George A. Vanderbeck v. Lydia Mills, the plaintiff was awarded a judgment for one Winton automobile, one membership in the California Country Club, and also for $9,000. In the latter action an execution was levied on several lots, including lot 4 in block 6, Lafayette Square. On the sale the lots were sold to George A. Vanderbeck for $7,000. After paying $93.65, the sheriff's fees, $6,906.35 was credited by Vanderbeck on his judgment. A supplemental execution was levied on personal property and at the sale $960 was collected. After

the sheriff deducted his costs, $61, the balance, $899, was also credited by Vanderbeck on his judgment. That left the sum of $1,164.65 due Vanderbeck. To protect his interest in the real estate Vanderbeck proceeded to arrange to redeem from the above-mentioned sale to the Thomas Mortgage Company. He applied to H. C. Millsap for information as to where he could borrow the money. The latter arranged a meeting between him and Reidy. The result of that meeting was that Reidy agreed to loan the money. The money was loaned on an agreement which, among other things, provided that Vanderbeck would, as security, assign to Reidy the certificate of redemption and that he would also assign to him an undivided one-half interest in the balance remaining unpaid on the judgment in Vanderbeck v. Mills. Said balance Vanderbeck represented to be $3,000. It was also provided in the event of a redemption Reidy should receive an undivided one-half interest in the unpaid portion of the judgment in the action Vanderbeck v. Mills. The said assignment was executed and recorded. For the services rendered by Millsap, Vanderbeck executed to him an agreement to pay 10 per cent. "of the net profits made or discount collected. * * *" At the same time Vanderbeck induced Reidy to agree to pay Millsap the additional sum of $232.90. On November 14, 1929, Reidy paid to Allen $8,202.84 to redeem lot 4, block 6, Lafayette Square and received a certificate of redemption. On December 2, 1929, he paid taxes on the lot in the sum of $175.86. On November 18, 1929, Allen notified Vanderbeck and Reidy that Mrs. Mills desired to redeem and asked for a statement of their demands. That statement was furnished and, among other things, recited, "$1,200 together with interest at 7% from April 10, 1929. Said item represents: reasonable market value California Country Club membership and Winton automobile. * * *" To make a redemption Mrs. Mills did not have the full amount necessary. She applied to Reidy and he loaned her $1,200. Thereafter she made the redemption but, in doing so, she protested the charge of $1,200 on the automobile, etc., and claimed that the reasonable value was not in excess of $255. On the trial evidence was introduced to that effect, and the trial court found, that the automobile, etc., were worth $325. After obtaining his judgment, Vanderbeck collected rents in the sum of $92 and he paid out for Mrs. Mills' account $52.

[1, 2] Millsap assigned his claim, $232.90, to Reidy. The latter pleaded the assignment in his cross-complaint. The trial court allowed said amount to the latter. The appellant contests the item and quotes evidence to the effect that Millsap did not hold a license under the California Real Estate Act (1 Deering's Gen. Laws [1931] p. 25, Act 112). He did not need one. The act performed by him was not an act covered by the statute. Again, it is asserted that Millsap's claim did not come within the purview of his contract. As recited above, his contract was twofold. The contracting parties agreed to pay him 10 per cent. of the net profits. In the second place Vanderbeck induced Reidy to agree to pay Millsap $232.90 in addition to the first item. The latter sum was properly awarded in the judgment to Reidy.

[3, 4] In the original contract between Vanderbeck and Reidy it was recited that there was $3,000 still due the plaintiff on his judgment against Mrs. Mills. As a part of the contract Vanderbeck agreed to assign said judgment to secure Reidy. He also agreed to deliver to Reidy the certificate of redemption properly assigned in the case of The Prudential Insurance Company v. Mills. Before delivering the latter instrument Vanderbeck noted that he had overestimated the balance due on his judgment and that the balance was $1,164.95. If it had been as originally represented, the interest of Reidy would have been $1,500, that is, one-half of $3,000. Vanderbeck said he was willing that Reidy should receive $1,164.95 and asked Reidy to consent in writing. Reidy executed a writing to Vanderbeck reciting that the assignment to Reidy vested in him "* * * a right to collect $1164.95 and interest thereon and that said assignment carries no greater or other interest." Vanderbeck accepted that document and delivered the certificate of redemption in the case of The Prudential Insurance Company v. Mills. The trial court found that there was due Reidy $1,164.95. Under the facts set forth in the record the finding was fully supported. At this time Vanderbeck complains that this construction converts a conditional promise into an absolute promise. A more exact statement is that the original promise to pay $1,500 was, by the act of the parties, converted into a promise to pay $1,164.95. Again the appellant contends as follows: He asserts that when he and Reidy arranged to redeem that they entered upon a joint adventure. He then asserts that when thereafter Reidy loaned Mrs. Mills $1,200 that thereby Reidy obtained secret profits. It will suffice to state that a reading of the record shows no support for the contention of the appellant. There was evidence that the loan to Mrs. Mills was made with the knowledge and consent of Vanderbeck. Furthermore, we see no conflict of interests between Reidy's contract with appellant and Reidy's contract with Mrs. Mills.

The appellant states the items and finds that there was due from Mrs. Mills at the time of the redemption $325 as the reasonable value of the automobile and personal property, and $52 for legal disbursements, making $377, and that she was entitled to a credit of $92 for rents collected, leaving a

balance of $285. Deducting that sum from $1,200 he says there was due her $915 and not $971. The trouble is he overlooks the material fact that his demand on Mrs. Mills compelled her to pay "$1,200 together with interest at 7% from April 10, 1929," to December 12, 1929—in other words, $1,256 principal and interest. Deducting therefrom $285 leaves $971, the amount found by the court to be due Mrs. Mills.

[5] The defendant Vanderbeck complains because interest was not allowed. All items of the fund except $2,259.35 were disbursed by consent of the parties. On the opening of the trial, by consent, the balance of the fund was paid into court. From that date no interest should be charged. Conner v. Bank of Bakersfield, 183 Cal. 199, 203, 190 P. 801. No fact contained in the record would justify any other ruling.

We find no error in the record. The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

132 Cal.App. 301

YOUNG v. YOUNG.

Civ. 4885.

District Court of Appeal, Third District, California.

May 26, 1933.

Divorce ⊂⊃303(3).

Modifying interlocutory divorce decree awarding custody of minor son exclusively to mother so as to provide for joint custody by both parents *held* not abuse of discretion.

Appeal from Superior Court, Los Angeles County; Dudley S. Valentine, Judge.

Action by Willistene Young against Arthur L. Young. From an order modifying an interlocutory decree of divorce in respect to the custody of the minor child, plaintiff appeals.

Affirmed.

John B. Haas and John D. Home, both of Los Angeles, for appellant.

E. Llewellyn Overholt, of Los Angeles, for respondent.

TUTTLE, Justice pro tem., delivered the opinion of the court.

This is an appeal from an order modifying an interlocutory decree of divorce in respect to the custody of the minor child of the parties.

The original interlocutory decree awarded the custody and control of Newton L. Young, the minor son of appellant and respondent, to the mother, who is prosecuting this appeal. Some five months thereafter the father and respondent herein moved to modify said decree so as to provide for joint custody and control of the minor, instead of the exclusive custody granted in the original decree. After a hearing in which both parties appeared, and after listening to the testimony of six witnesses, the trial court made and entered an order modifying the decree in accordance with the contention of respondent in the following language: "That both parents shall have the joint custody of the boy until further order of the court; that he continue to attend the California Military Academy; neither party is to say anything derogatory to the boy about the other at any time; that the company of the boy will be divided between the parties on alternate week-ends provided the boy shall be returned so as to allow him the opportunity of attending Sunday school; after Sunday school on the week-ends that the father has the child, he shall have the company of the child until evening, when he shall return him to the California Military Academy; the father also to have the right to have the child for one month of the summer vacation except as to the present year of 1931, unless by agreement of the parties themselves. The defendant to have the company of the child the week-end commencing Friday, May 18, 1931, and alternate week-ends thereafter."

The only point made by appellant is that there is no evidence to justify or uphold the order of modification. It is conceded that, in respect to the children of a marriage which is being dissolved, the trial court becomes invested with jurisdiction during the pendency of the action to determine to which of the spouses the custody of the children shall be assigned; that it retains such jurisdiction while the action is pending; that the welfare of the children is the paramount consideration in such a controversy; and that, in the exercise of this jurisdiction, the trial court is invested with a very large measure of power, which will not be interfered with upon appeal except in the clearest instance of its manifest abuse. Bancroft v. Bancroft, 178 Cal. 352, 173 P. 582.

The record here discloses that the trial court appointed an investigator who filed written recommendations which were carried out substantially in the modification of the decree. In addition, a number of witnesses were heard. The trial judge also was closeted alone with the son of the parties, who was then about ten years old.

A recapitulation of the evidence is unnecessary. We are satisfied that the record here shows no abuse of discretion in the making of the order. On the contrary, the action of the trial court appears to have been dictated by every consideration of justice and fairness. The father, respondent herein, was a man whose character and reputation were not attacked or questioned at any stage of the proceedings. A boy on the verge of manhood needs the guiding counsel and advice of a loving father, as well as the deep and abiding influence of a mother's love. Neither element transcends the other. Both contribute to the welfare of the child, which is the ultimate end to be attained.

The order is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

132 Cal.App. 233

WOOD v. PETERSON FARMS CO. et al.

Civ. 1217.

District Court of Appeal, Fourth District, California.

May 23, 1933.

1. Judgment ⇐162(3).

Where defendants' notice of motion to set aside default judgment recited that they did not have knowledge of pendency of action until after judgment was rendered, admitting evidence tending to show that defendants had such knowledge before judgment was rendered, and part of which threw light on issue of service, *held* not error.

2. Judgment ⇐163.

That trial court did not specifically find that defendants had been personally served with summons *held* not to render void order denying motion to set aside default judgment because defendants were never served.

Appeal from Superior Court, Kings County; K. Van Zante, Judge.

Action by Louisa G. Wood against the Peterson Farms Company and others. Judgment in favor of plaintiff. From an order denying a motion to set aside the judgment entered by default, defendants appeal.

Affirmed.

E. L. Medler, of Los Angeles, and Clark Clement, of Lemoore, for appellants.

Harry W. Chase, of Glendale, for respondent.

BARNARD, Presiding Justice.

This is an action to foreclose a mortgage in which the complaint was filed on May 19, 1930. The return of summons shows personal service on the various defendants on May 28 and May 31, 1930, respectively. Judgment was entered on December 29, 1930. On October 20, 1931, the defendants filed what they designated as a "Notice of Motion for Opening Default," in the body of which notice was given that on October 26, 1931, they would move to have "the judgment entered by default against the defendants" set aside. This motion came on for hearing at the time named and an order was entered denying the motion, from which order this appeal is taken.

[1] The first contention seems to be that this motion was made upon the general ground that the appellants had never been served with summons in any manner and was not made under section 473 of the Code of Civil Procedure and, therefore, that the court erred in permitting evidence at the hearing which tended to show that the appellants had knowledge of the pendency of this action before judgment was entered. For the present purposes it may be conceded that a motion may be made, independently of section 473 of this Code, to set aside a judgment upon the ground that it is based upon a false return of personal service on the defendants. Waller v. Weston, 125 Cal. 201, 57 P. 892, 893; Smith v. Jones, 174 Cal. 513, 163 P. 890. Not only may the admission of this questioned evidence be probably explained by the fact that the appellants, in their notice of motion, stated that the same would be based upon the grounds that none of them were at any time served with summons and also "that none of said defendants had knowledge of the pendency of said action or of the judgment therein until long after said judgment had been rendered," but it appears that a part of the evidence objected to was material as throwing light upon the question as to whether the parties had been, in fact, served. Conceding that a part of this evidence was immaterial, no prejudice appears and the court had before it ample evidence that the appellants had been personally served at the time set forth in the return attached to the summons, which fully supports the order made.

[2] The principal point raised is that the order appealed from is void because the court did not make a specific finding to the effect that the appellants had been personally served. In Waller v. Weston, supra, a case similar in principle to the one now before us, the court said: "* * * it is contemplated by our law that findings of fact shall be made only upon issues joined by the pleadings under section 590 of the Code of Civil Procedure, where the decision of the court following the findings is a judgment. Findings of

fact and conclusions of law, therefore, had no proper place in this proceeding." In Waymire v. California Trona Co., 176 Cal. 395, 168 P. 563, 565, we find the following: "Appellant claims that the findings in this case were prematurely signed, because proposed findings were not served upon him five days before they were signed. It does not appear, however, that there were any findings, other than a review of the facts in the order of dismissal. The universal practice in this state is not to require findings on an order made after motion." Similar views are expressed in Luitwieler v. Luitwieler, 57 Cal. App. 751, 207 P. 931, and in Re Principal's Guardianship, 101 Cal. App. 669, 282 P. 26. No finding was necessary, and the order made disposed of the matter presented by the motion.

The order appealed from is affirmed.

We concur: JENNINGS, J.; ANDREWS, Justice pro tem.

132 Cal.App. 109

PEOPLE v. ABBOTT.

Cr. 2332.

District Court of Appeal, Second District, Division 2, California.

May 19, 1933.

Hearing Denied by Supreme Court June 15, 1933.

1. Criminal law ⇐938(1), 1156(3).

Motion for new trial is addressed to trial judge's discretion, and ruling will not be disturbed except on manifest and unmistakable abuse thereof.

2. Criminal law ⇐1134(6).

Order granting new trial will be affirmed without regard to particular reason given, if there is good sufficient reason present which is within terms of motion.

3. Criminal law ⇐887.

Verdict according to law will be sustained, even though jury arrived at it in disregard of erroneous instructions.

4. Criminal law ⇐933.

Order granting new trial after conviction of grand theft *held* not erroneous, in view of doubt as to whether jury properly followed instructions.

5. Criminal law ⇐1186(4).

Order granting new trial after conviction of grand theft *held* not reversible under harmless error provision of Constitution (Const. art. 6, § 4½).

Appeal from Superior Court, Los Angeles County; B. Rey Schauer, Judge.

W. E. Abbott, after being found guilty of grand theft, was granted a new trial, and the People appeal.

Affirmed.

U. S. Webb, Atty. Gen., John D. Richer, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., and Frank Stafford, Deputy Dist. Atty., both of Los Angeles, for the People.

L. V. Beaulieu, of Los Angeles, for respondent.

STEPHENS, Justice.

Defendant (respondent here) was charged with grand theft, a felony, and a jury found him guilty. A new trial was granted after motion therefor, and the people appeal.

The case is not free from difficulties. The defendant made some kind of a deal with one John G. Anderson, an old and illiterate man, whereby certain valuable certificates were indorsed to defendant and a promissory note for their face value was given to Anderson by defendant. Anderson testified that he turned the certificates over to defendant for collection, and that the note was for the purpose of a receipt. Defendant says the transaction was in the nature of a loan. This produced a sharp conflict in the evidence. After indorsement of the certificates to defendant he sold them and kept the proceeds. He was charged with grand theft before the due date of the note.

The jury was properly instructed that the charged crime included larceny, embezzlement, or obtaining property by means of false or fraudulent representations or pretenses, or by larceny by trick and device.

After carefully reviewing the whole evidence and not only the parts thereof pointed out in the briefs, we have concluded that there is evidence to sustain (as against a direct appeal) the offense of embezzlement or of larceny by trick and device. But we find the court instructing the jury that the evidence is not sufficient to support a conviction on larceny by trick and device, and after instructing the jury that they could consider embezzlement only we find the court granting a new trial after verdict of guilty had been returned. From the wording of the instruction and from several statements of the court made during the trial, it is quite evident that this instruction, and most probably the order for new trial, were based upon the mistaken theory that the term "money" in the information does not embrace other property of valuable nature. Under section 956 of the Penal Code, amended in 1927 (St. 1927, p. 1042, § 2), it is provided, in effect, that, if the information covers the act so that after trial thereon future trials would be barred, no variance results from misdescription of property stolen or from the nam-

ing of the wrong owner. People v. Fleming (Cal. App.) 17 P.(2d) 1042.

As above indicated, the case was given to the jury under a specific instruction that embezzlement was the only offense that it could consider, and in this instruction "money" is specifically mentioned.

During the argument upon the motion for a new trial it is apparent that the court considered that the charge was confined to theft of "money." Neither the deputy district attorney who tried the case for the people nor the attorney for defendant take issue with the court on this point, but agree, as it appears from the instructions offered by them both and from the deputy district attorney's statement, that their theory of the issue tried was embezzlement of the money received from the certificates.

It is also clearly intimated by the court when it directed the filing of an amended information to contain a specific charge of obtaining certificates by trick and device that he thought, if a crime had been committed at all, that it was committed when defendant received the certificates. From this analysis it appears certain that court and counsel viewed the case throughout the trial and upon motion for new trial as being based upon the taking of money as distinguished from other property.

[1-4] In these circumstances we must consider whether or not we should reverse the order granting a new trial. It is fundamental that a motion for a new trial is addressed to the discretion of the trial judge, and the ruling will not be disturbed on appeal except upon a manifest and unmistakable abuse of discretion. 2 Cal. Jur. p. 905; Green v. Soule, 145 Cal. 96, at page 102, 78 P. 337. All presumptions are in favor of the ruling made by the trial judge. 20 Cal. Jur. p. 216. An order granting a new trial will be affirmed without regard to the particular reason given if there is a good and sufficient reason present. 2 Cal. Jur. pp. 808, 813. But such reason must be within the terms of the motion. The motion for new trial was made upon three grounds: (1) Misdirection of jury in law and errors of law during trial; (2) verdict against law and evidence; and (3) newly discovered evidence which later on was abandoned. On the other hand, we are confronted with the rule that, notwithstanding it is the duty of the jury to take the law from the court, a verdict if in fact according to law will be sustained, even though the jury has arrived at it through the disregard of an erroneous instruction. The case of Altoona, etc., Co. v. Integral, etc., Co., 114 Cal. 100, 104, 45 P. 1047, followed by O'Neill v. Thomas Day Co., 152 Cal. 357, 92 P. 856, 14 Ann. Cas. 970, and others cited therein, reversed the doctrine of Emerson v. Santa Clara County, 40 Cal. 543, that the verdict must be viewed in the light of the instructions. The reason for the rule is plainly recited in O'Neill v. Thomas Day Co., supra, and it would seem to be but common sense that, where a defendant was fairly tried and the jury had found that he had done a certain act which was an offense against the law, he should not escape punishment because of an erroneous statement of the law which the jury had not followed. But it cannot be said that the facts of the instant case present this premise. The physical fact of a transfer of the certificates is of and in itself a legal act. The physical fact of a sale of certificates for money and a subsequent use thereof are of and in themselves legal acts. Whether these admitted acts were done under such conditions as to constitute an offense was the problem left to the jury. They found the defendant guilty, and this guilt could under the law have been based upon embezzlement of the certificates or of the money for which they were sold. It could have been based upon larceny by defendant's obtaining the certificates by trick and device. As we have heretofore said, we think the evidence was sufficient as against an appeal to sustain a verdict upon either of these theories. But the only issue actually presented to the jury by the court and counsel for both sides was: Is defendant guilty of embezzlement of money? In these circumstances it would seem to be flying in the face of all reason to hold that the jury did in fact find the defendant guilty of embezzlement of the certificates or of having committed larceny by trick and device. If we hold that the conviction shall stand as based upon such offenses as there was substantial evidence to support, we find a defendant suffering the loss of a constitutional right, for through a mistake in law he has been deprived of his motion for a new trial for the conviction of any and all offenses other than for embezzlement of money. This offense, and this one only, was the subject of the motion and of the ruling for a new trial. Considering the wide difference between the right of the trial judge to consider the motion for new trial and an appellate court upon an appeal, this loss is most substantial. Had the judge considered the motion for new trial upon the other offenses, the likelihood of its being granted as to all of them is enhanced by the state of the record, which shows that Anderson as a witness had great difficulty in understanding and in making himself understood by court and counsel. It is a fair presumption that the members of the jury likewise found difficulty in understanding his testimony.

There is another approach to this problem. If we here apply the rule that the verdict must be considered as based upon all or any of the offenses upon which there was substantial evidence given, presuming that the jury followed the law that "money" included the "certificates," then we should also presume that, whenever the court used the

term "money," the term also included certificates. Under this theory the order granting a new trial would be as broad and no abuse of the court's discretion could be found. That this would be avoiding the plain fact through a resort to fiction is beyond dispute. We think the day has long since passed when courts are put to the use of fiction (or near dishonesty with the immorality extracted to the vanishing point) to avoid a rule when it is not supported by the reason that created it. Upon either theory the order for a new trial must be affirmed unless there is other ground for reversal.

[5] Appellant, however, argues that, even if this be true, section 4½ of article 6 of the Constitution should rescue the case from the fate of a new trial. We do not think this constitutional section permits us to consider the evidence of the whole case as a trial tribunal and sustain or reverse every judgment that reaches us upon our own "verdict." It does not intend to repeal the fundamental rights of trial by judge and jury where witnesses appear, and their testimony may be given such weight as their words, conduct, and appearance would seem to justify. There is certainly great doubt that the jury disregarded the court and found defendant guilty of one of the offenses excluded by the terms of the court's instructions. It is almost certain it did not. The defendant is entitled to a jury trial on all offenses charged against him before being punished for them, and we should not take the chance of depriving him of such right upon unreasonable and strained constructions and presumptions.

The order granting the motion for a new trial is affirmed.

We concur: WORKS, P. J.; PARKER, Justice pro tem.

132 Cal.App. 373

NATIONAL AUTOMOBILE INS. CO. et al. v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al.

Civ. 9086.

District Court of Appeal, First District, Division 1, California.

June 1, 1933.

Hearing Denied by Supreme Court July 25, 1933.

1. Evidence ⇐512.
Physicians and surgeons ⇐18(8).
Proper or usual practice in medical treatment is question for experts, and can be established only by their testimony.

2. Evidence ⇐571(3).
When question of what is proper or usual practice in medical treatment is within knowledge of experts only, their testimony is conclusive.

3. Evidence ⇐574.
Rule that testimony of experts is conclusive does not apply where facts may be ascertained by use of senses of nonexpert.

4. Appeal and error ⇐994(3).
Credibility of both experts and nonexperts is for fact-finding body.

5. Evidence ⇐570.
Weight to be given to expert testimony may properly be controlled by consideration of interest, bias, or motives of witness, as well as of manner in which he testifies.

6. Evidence ⇐574.
Industrial Commission *held* not bound by gun dealer's testimony as to ways in which pen pistol might be exploded, where injured employee testified that he did not voluntarily manipulate mechanism in any way.

7. Master and servant ⇐405(4).
Evidence sustained Industrial Commission's finding that injury of garage floorman by explosion of pen pistol found in car was due to accident arising out of employment, and was not due to employee's misconduct.

Proceeding under the Workmen's Compensation Act by Val. S. Stall, claimant, opposed by Fred G. Armstrong, employer, and the National Automobile Insurance Company, insurer. Award of compensation by the Industrial Accident Commission of the State of California, and employer and insurer apply for writ of certiorari to review such award.

Writ denied.

Henry G. Sanford, William T. Doyle, and George C. Faulkner, all of San Francisco, for petitioners.

Arthur I. Townsend, Everett A. Corten, and Joseph T. Curley, all of San Francisco, for respondents.

PER CURIAM.

An application for a writ of certiorari to review an award of the Industrial Accident Commission.

The undisputed facts are as follows: Respondent Stall was employed by petitioner Armstrong as a garage floorman. On September 1, 1932, while cleaning one of the automobiles stored in his employer's garage, he found on the seat of the car what appeared to be and what he thought was a fountain pen. The article was in fact a loaded pen pistol which, while in Stall's hand, exploded, totally destroying the sight of one of his eyes and injuring the other. An award was made to him by the commission.

Petitioners claim that the evidence did not

justify the findings, and that consequently the commission acted in excess of its jurisdiction.

Stall testified that he did not voluntarily manipulate the mechanism of the pistol in any way, and his employer testified that it was his duty to take charge of any article found in a car and deliver the same to his employer or place it in a pocket in the car. A dealer in arms and ammunition, called on behalf of petitioners, testified that he was familiar with the type of pistol which caused the injury. He gave as his opinion that when fully compressed the spring operating it required a pull of about ten pounds on the botton. He testified to ways in which a discharge might be brought about, one being a method by which a malicious person might designedly cause the mechanism to act under circumstances similar to the present case. Another was that sometimes, after several attempts to fire the cartridge by striking the firing pin upon it, a lighter blow will cause an explosion.

[1-7] Petitioners contend that this witness being an expert, and his testimony being uncontradicted, the same was conclusive upon the question at issue, and that Stall's testimony that he did not manipulate the mechanism should have been disregarded. This claim is based upon certain decisions with respect to evidence on medical treatment and practice. The rule has been declared that what is or what is not proper practice or the usual practice in treatment are questions for experts and can be established only by their testimony (Arnold v. Hopkins, 203 Cal. 553, 265 P. 223; Perkins v. Trueblood, 180 Cal. 437, 181 P. 642; Houghton v. Dickson, 29 Cal. App. 321, 155 P. 128; Ingamells v. Goodfellow, 109 Cal. App. 62, 292 P. 162; Roberts v. Parker, 121 Cal. App. 264, 8 P.(2d) 908); and when the question is one within the knowledge of experts only, such testimony is conclusive (Pearson v. Crabtree, 70 Cal. App. 52, 232 P. 715; William Simpson Const. Co. v. Industrial Accident Commission, 74 Cal. App. 239, 240 P. 58; Nicholas v. Jacobson, 113 Cal. App. 382, 298 P. 505). However, it has been held that the rule does not apply to facts which may be ascertained by the use of the senses of a nonexpert (Barham v. Widing, 210 Cal. 207, 291 P. 173), nor is a tribunal bound by expert testimony as to facts which inspection by nonexperts would disclose (Brandes v. Rucker-Fuller Desk Co., 102 Cal. App. 221, 282 P. 1009; 10 Cal. Jur., § 211, Evidence, p. 948 et seq.). Moreover, the question of credibility is for the fact-finding body (State Compensation Ins. Fund v. Industrial Accident Commission, 195 Cal. 174, 231 P. 996); and the weight to be given such testimony may properly be controlled by consideration of the interest, bias, or motives of the witness as well as of the manner in which he testifies. The circumstances were such that the commission was not bound by the testimony of petitioners' witness, and the other evidence was amply sufficient to sustain the conclusion that the injury arose out of the employment, was accidental, and not due to misconduct on the part of respondent Stall.

The writ is denied.

132 Cal.App. 381

TAYLOR v. LEWIS.

Civ. 7790.

District Court of Appeal, Second District, Division 2, California.

June 1, 1933.

1. Libel and slander ⇐100(7).

Malice in fact must be both alleged and proved if recovery of punitive damages is sought in action for libel (Civ. Code, §§ 45, 3294).

2. Libel and slander ⇐48(2).

Fair criticism of public officials is "privileged publication" within statute defining privileged publications (Civ. Code, § 47 (3).

[Ed. Note.—For other definitions of "Privileged Publication," see Words and Phrases.]

3. Libel and slander ⇐83.

Complaint in libel action showing occasion of communication to be privileged would not state cause of action unless allegation of malice in fact shows privilege has been overstepped (Civ. Code, §§ 45, 47 (3), 48).

4. Libel and slander ⇐83.

Allegation, in complaint in libel action, that alleged libelous article was maliciously published, *held* not allegation of malice showing privilege has been overstepped (Civ. Code, §§ 45, 47 (3), 48).

5. Libel and slander ⇐51(1).

Malice necessary to defeat privilege of alleged libelous communication must be actual or express (Civ. Code, §§ 45, 47 (3), 48).

6. Libel and slander ⇐5.

Actual malice may be inferred from publication of defamatory charge that is false and libelous per se, if defendant publishes it without having probable cause for believing it to be true (Civ. Code, §§ 45, 47 (3), 48).

7. Pleading ⇐428(6).

Objection to introduction of any evidence on ground complaint failed to state cause of action is in effect general demurrer leaving all proper allegations of fact admitted.

8. Libel and slander ⇐48(2).

Former city councilman could express opinion that councilman having recall proceedings pending against him was unfit for office he held (Civ. Code, §§ 45, 47 (3), 48).

9. Libel and slander ⇐48(2).

Newspaper article charging that city councilman having recall proceedings pending against him did not consistently serve best interests of city, and exercised poor judgment in office, *held* fair criticism of public official (Civ. Code, §§ 45, 47 (3), 48).

Article charged that plaintiff and another councilman did not consistently serve the best interests of the city; that as members of the majority group they usurped the functions of the city manager, dictated appointments in violation of the charter, and forced out of office useful city employees; that they had little respect for sound business usage in the conduct of city affairs; that they did not always take the highest and best bids when selling and the lowest bids when buying; and that such condition has retarded the city's progress.

10. Libel and slander ⇐80.

Privilege of alleged libelous publication was not shown on face of complaint in libel action as abused, where publication was not libelous per se, though false (Civ. Code, §§ 45, 47 (3), 48).

11. Appeal and error ⇐681.

Denying motion for leave to amend complaint *held* no abuse of discretion where nothing appeared in record as to what showing, if any, was made as to amendments proposed.

12. Appeal and error ⇐959(3).
Pleading ⇐236(3).

Allowance of amendments during trial is in trial court's discretion, and its rulings will not be disturbed unless discretion is clearly abused, though great liberality should be shown so that litigation may be terminated by hearing on merits.

13. Appeal and error ⇐901.

Reviewing court cannot presume error.

Appeal from Superior Court, Los Angeles County; Percy Hight, Judge.

Action by E. L. Taylor against C. C. Lewis. From the judgment for defendant, plaintiff appeals.

Affirmed.

John C. Miles, of Los Angeles, for appellant.

Swaffield & Swaffield, Kenneth Sperry, and Joseph E. Madden, all of Long Beach, for respondent.

ARCHBALD, Justice pro tem.

On the day of trial of the action arising out of plaintiff's complaint for damages based on an alleged libel, defendant objected to the introduction of any evidence on behalf of plaintiff on the ground that the complaint failed to state facts sufficient to constitute a cause of action. The objection was sustained and plaintiff's motion for leave to amend was denied. From the judgment thereafter entered plaintiff has appealed.

To save expense the objection referred to was made prior to the empanelment of a jury, on stipulation of the parties.

The complaint alleges in effect that at the time of the publication of the alleged libelous article plaintiff was a duly elected and qualified member of the city council of Long Beach, and that defendant wilfully and maliciously caused to be published an article which exposed him to hatred, contempt, and ridicule, which article is alleged to be false and unprivileged; that the same was published in the Press Telegram, a newspaper of general circulation in Long Beach, the important parts thereof being hereinafter referred to.

No malice in fact in the publication appears on the face of the complaint, unless it is shown by the language used in the article. It is appellant's contention that the article is libelous per se.

[1] Section 45 of the Civil Code defines "libel," so far as material here, as "a false and unprivileged publication by writing, printing, * * * which exposes any person to hatred, contempt, ridicule, or obloquy." It will be seen from such definition that the publication is not required to have been made "maliciously" to be a libel. All that is required is that it should be both *false and unprivileged*, and of such a character as to expose the subject thereof to contempt, etc.; and such seems to be the ruling of our courts so far as compensatory damages are concerned, without either pleading or proof of malice by the plaintiff. Davis v. Hearst, 160 Cal. 143, 116 P. 530; Snively v. Record Publishing Company, 185 Cal. 565, 198 P. 1. Necessarily if the recovery of punitive damages is sought, malice in fact must be both alleged and proved. Davis v. Hearst, supra; section 3294, Civ. Code. Only compensatory damages are asked in the complaint here.

"Privileged publications," so far as material here, are defined by section 47 (3) of the Civil Code to be those "made * * * in a communication, without malice, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent." Such statutory definition seems to be but a restatement

of that of the common law. The case of Harrison v. Bush, 5 Ellis & Black (Q. B.) 344, 119 Eng. Rep. 509, laid down the rule in 1855 as follows: "A communication made bona fide upon any subject matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged if made to a person having a corresponding interest or duty, although it contained criminating matter which, without the privilege, would be slanderous and actionable." Section 48 of the Civil Code provides in effect that in the case of the privilege provided for in section 47 (3) thereof "malice is not inferred from the communication or publication."

[2] With the foregoing principles of law in mind we turn to the complaint. It shows on its face that the article is a criticism of a public official, and we think it is a fair inference therefrom also that a recall proceeding was pending against such officer at the time. It further appears that the defendant was a former city councilman and was communicating information of interest to the readers of the paper who were interested in having able and qualified men in the city council; and we think the article shows that the defendant was so interested himself, and that he stood in such relation to such interested reading citizens as to afford a reasonable ground for supposing his motive in making the publication to be innocent. A fair criticism of public officials is within the privilege of section 47 (3) of the Civil Code. Snively v. Record Publishing Co., supra; Jones v. Express Publishing Co., 87 Cal. App. 246, 262 P. 78.

[3-7] While ordinarily the question of privilege is a matter of defense, where the occasion of the communication is shown by the complaint to be privileged, as in this case, unless it also appears by an allegation of malice in fact that the privilege afforded by the occasion has been overstepped, in our opinion the pleading would fall short of stating a cause of action. Does the complaint herein allege such malice? In our opinion it does not. The allegation that the article was "maliciously published" would seem to be but a mere conclusion of the pleader, unless the article itself lends support to such conclusion. The malice necessary to defeat the privilege must be actual or express. Snively v. Record Publishing Co., supra, page 576 of 185 Cal., 198 P. 1. In the case just cited the Supreme Court held that the jury would have been at liberty to infer actual malice in the publication from the cartoon itself, as it was libelous per se, had it not been for the fact that plaintiff "waived all malice," which the court held was equivalent to an admission that the publication was made without malice. Such decision also approves the rule that actual malice may be inferred from the publication of a defamatory charge that is "false and libelous per se" if the defendant publishes it without having probable cause for believing it to be true. The complaint here alleges that the "charge as made" in the article was false. An objection to the introduction of any evidence on the ground stated here is in effect a general demurrer to the complaint, and of course all proper allegations of fact are admitted.

[8-10] This brings us to a consideration of the nature of the article. The matters charged against plaintiff appear to be the opinions of defendant formed from association with plaintiff and the other councilman mentioned in the work of the city council. His opinion was that "they did not consistently serve the best interest of the city"; that as members of the majority group "they usurped the functions of the city manager, dictated appointments in violation of the charter, and forced out of office useful employees of the city"; that they "had as little respect for sound business usage in their conduct of city affairs as they showed for the charter and the merit system in municipal service"; that they did not always "take the highest and best bids when selling, and the lowest and best when buying"; that they "lacked that conscientious regard for the city's interest which makes of public office a public trust"; that by reason of the presence of plaintiff and his associate on the council "this city has suffered from a lack of confidence in" it, and that business concerns "have not felt that they could bid on municipal contracts and be sure of receiving impartial consideration," and that "they [business concerns] have felt that business with the city has not been on a strictly business basis"; that the "condition," in defendant's opinion, "has hurt the good name of Long Beach and retarded its progress at a time when projects of major importance were to be carried forward." The reasons for the article are thus set forth: "The people elected me to office, and at this critical time I feel they are entitled to know the truth as I saw it. I have no personal feelings against Mr. Alexander and Mr. Taylor. * * * I speak because it happens that I am in a position to know the conception of city office held by these councilmen, and because I consider the situation in municipal government for which they and their political associates are responsible to be a menacing one to Long Beach." Again, defendant says: "The recall is the necessary instrument to remedy a bad situation and to preserve the reputation of the city."

The article does show that respondent considered appellant unfitted for the office he held, but he had a right to express his opinion in that respect. Eva v. Smith, 89 Cal. App. 324, 329, 264 P. 803. It does not charge appellant with corruption or fraudulent practices in office, although it clearly does charge poor judgment. On the whole, the article

seems to be a fair and temperate criticism of a public official, and does not charge anything that would follow appellant into his private life and stamp him as dishonest or bring upon him in the capacity of a private citizen the contempt of his fellows; and not being libelous per se, even though false, the privilege is not shown to be abused, on the face of the complaint.

[11-13] Appellant urges that the court erred in denying his motion for leave to amend. Nothing appears in the record before us as to what showing, if any, was made as to the amendments proposed to be made. While great liberality should always be shown to the end that litigation may be terminated by a hearing on the merits, nevertheless the allowance of amendments during trial is in the discretion of the trial court, and its ruling will not be disturbed unless an abuse of discretion is clearly shown. Milliken v. Valencia, 47 Cal. App. 16, 189 P. 1049. Such abuse not being shown here, we cannot presume error.

Judgment affirmed.

We concur: WORKS, P. J.; STEPHENS, J.

132 Cal.App. 101

ZURICH GENERAL ACCIDENT & LIABILITY ASSUR. CO., LIMITED, v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 8856.

District Court of Appeal, First District, Division 2, California.

May 19, 1933.

1. Master and servant ⇐417(7).

In reviewing sufficiency of evidence to support compensation award, court is limited to evidence most favorable to award.

2. Master and servant ⇐405(2).

Evidence *held* to support finding that injured employee was employee of lumber mill as against contention he was employed by contractor delivering logs to mill.

3. Master and servant ⇐361.

As regards right to workmen's compensation, fact that employer did not intend to enter employment contract with employee is not controlling, if conduct would lead reasonable man to believe he was being employed.

4. Master and servant ⇐361.

General employer loaning employee to special employer is liable to pay compensation by reason of employment contract, and special employer may become likewise liable by reason of assumption of control.

Certiorari to the Industrial Accident Commission.

Proceeding under the Workmen's Compensation Act by J. C. Smith, opposed by the White Lumber Mill, employer, and the Zurich General Accident & Liability Assurance Company, Limited, insurer. The Industrial Commission entered an order awarding compensation, and insurer brings certiorari.

Award affirmed.

Bronson, Bronson & Slaven, of San Francisco, for petitioner.

A. I. Townsend, of San Francisco, for respondents.

DOOLING, Justice pro tem.

This is a proceeding in certiorari to review an award by the Industrial Accident Commission. The applicant J. C. Smith received the injuries upon which the award is based while engaged in logging operations about a lumber mill operated by a copartnership composed of R. D. White and W. A. Minner and doing business under the firm name of White Lumber Mill. The Industrial Accident Commission found that at the time of the injuries the applicant was employed by White Lumber Mill and made the award complained of against petitioner herein as the insurance carrier of White Lumber Mill. The sole question presented by petitioner in this proceeding is whether there is any substantial evidence to support the finding of the respondent commission that at the time of receiving his injuries Smith was an employee of its insured, White Lumber Mill.

[1-3] In this behalf the evidence shows that one A. L. Nelson had an oral contract with White Lumber Mill to deliver logs to the mill at a flat rate per thousand feet, and that at the time of his injury Smith was working with a crew under Nelson. Petitioner claims that Nelson was an independent contractor, and that Smith was Nelson's employee and not theirs. Were these the only facts disclosed by the evidence, petitioner's position would be well founded. However, the evidence of Smith shows that he had worked for White Lumber Mill the previous year; that he asked Mr. White, one of the partners, for a job in the mill again, and was told by White that as soon as the mill opened he would be glad to put him to work; that about three weeks later he went to the mill and talked to White again, and White told him that the mill was not yet opened, and, as soon as it did open, he would put him to work in the mill, and that White told him in the meantime to go to work under Nelson, and that

his wages would be $3 per day. Smith also testified that he understood that he was working for White Lumber Mill and that Nelson was simply his boss on the job. White gave a somewhat different version of Smith's employment, with which, since this court is limited to the evidence most favorable to the award, we need not concern ourselves further than to say that White did not intend to employ Smith at the time, but intended simply to suggest that he might work for Nelson as Nelson's employee until such time as White was ready to employ him in the mill.

Given this factual basis, the first question presented is this: Was there in fact, as found by the respondent, a contract entered into by which Smith became an employee of White Lumber Mill? Taking the evidence most favorable to the award as true, we think that the answer must be in the affirmative. The fact that White did not intend to enter into a contract of employment with Smith is not controlling, if his conduct was such as to lead Smith, acting as a reasonable man, to believe that in fact he was being employed by White Lumber Mill. The rule in this regard is well stated in 13 C. J. p. 265, § 49: "The apparent mutual assent of the parties, essential to the formation of a contract, must be gathered from the language employed by them, and the law imputes to a person an intention corresponding to the reasonable meaning of his words and acts. It judges of his intention by his outward expressions and excludes all questions in regard to his unexpressed intention. If his words or acts, judged by a reasonable standard, manifest an intention to agree in regard to the matter in question, that agreement is established, and it is immaterial what may be the real but unexpressed state of his mind on the subject."

Or, as succinctly expressed by the Supreme Court of New Hampshire in McConnell v. Lamontagne, 82 N. H. 423, 134 A. 718, 719: "By the modern law of contract, the mere state of mind of the parties—with reference to the 'meeting of minds'—is not the essential object of inquiry, the terms of the promise act being determinable by an external and not by an internal standard (3 Wigmore on Evidence, 1971; Woburn Nat. Bank v. Woods, 77 N. H. 172, 174, 89 A. 491; Fitch Co. v. Phœnix Ins. Co., 82 N. H. 318, 133 A. 340), or by what distinguished writers have termed the objective rather than the subjective test. 1 Williston on Contracts, 20-22a; 14 Ill. Law Rev. 525; 6 St. Louis Law Rev. 41; 33 Harv. Law Rev. 376. The particular and nonconcurring understanding of one of the parties is therefore usually immaterial."

The application of this rule to a variety of situations is illustrated by the following cases: Williams v. Burdick & Co., 63 Or. 41, 125 P. 844, 126 P. 603; Stamm v. Wood, 86 Or. 174, 168 P. 69; Davern v. Am. Mut. Liability Ins. Co., 241 N. Y. 318, 150 N. E. 129, 131, 43 A. L. R. 522; Taplin & Rowell v. Clark, 89 Vt. 226, 95 A. 491; Embry v. Hargadine, etc., Co., 127 Mo. App. 383, 105 S. W. 777; Farnum v. Whitman, 187 Mass. 381, 73 N. E. 473; Washington Shoe Mfg. Co. v. Duke, 126 Wash. 510, 218 P. 232, 37 A. L. R. 611; Allen v. Bissinger & Co., 62 Utah, 226, 219 P. 539, 31 A. L. R. 376. See, also, Page on Contracts, vol. 1, p. 110, § 83; Williston on Contracts, vol. 1, pp. 18–24, §§ 20, 21; Wigmore on Evidence (2d Ed.) vol. 4, p. 191, § 1971, subd. (a).

We are satisfied that the finding that Smith was employed by White Lumber Mill finds sufficient support in Smith's evidence of White's conduct at the time he was employed which induced in Smith the reasonable belief that he was being employed by the lumber mill and not by Nelson.

[4] The fact that Nelson was in fact an independent contractor could no more change this contract relation between Smith and the lumber mill than could White's unexpressed intention that Smith should be employed by Nelson and not by himself. At most, Smith would be in a position analogous to that of an employee lent by a general, to a special, employer. In such a situation it is settled that the general employer is liable in any event to pay compensation by reason of the contract of employment, and the special employer may become likewise liable by reason of an assumption of control. Employers' Liab. Assur. Corp., Ltd., v. Ind. Acc. Comm., 179 Cal. 432, 177 P. 273; Famous Players, etc., Corp. v. Ind. Acc. Comm., 194 Cal. 134, 228 P. 5, 34 A. L. R. 765; Diamond Drill Cont. Co. v. Ind. Acc. Comm., 199 Cal. 694, 250 P. 862; Independence Ind. Co. v. Ind. Acc. Comm., 203 Cal. 51, 262 P. 757.

The injured employee is making no complaint of the failure to make an award against Nelson, and we do not understand that any complaint is being made on that ground by petitioner. We have, therefore, not considered that question. The only question urged by petitioner is the one which we have discussed, viz.: Does the evidence support the findings that at the time of his injury Smith was an employee of White Lumber Mill?

The award is affirmed.

We concur: SPENCE, Acting P. J.; STURTEVANT, J.

132 Cal.App. 186

THIRD AND BROADWAY BLDG. CO. et al. v. SOUTHERN CALIFORNIA EDISON CO.

Civ. 8767.

District Court of Appeal, First District, Division 1, California.

May 23, 1933.

Rehearing Denied June 22, 1933.

Hearing Denied by Supreme Court July 21, 1933.

1. Landlord and tenant ⇐148(2).

Sublease providing that sublessor should pay taxes against premises which might be levied against sublessor by reason of state or federal income, inheritance, or personal tax or other like tax, *held* intended to require sublessor to pay ad valorem taxes assessed by city and county against building and equipment.

2. Landlord and tenant ⇐148(2).

Under sublease of building to public utility, requiring sublessor to pay any taxes levied upon building and equipment and assessed against sublessor, sublessor *held* not required to pay utility tax imposed on sublessee by state.

3. Novation ⇐1.

Agreement that sublessee accepted assignee of sublease in place of assignor, and that assignor and assignee represented all rentals up to certain day were paid, *held* not novation extinguishing sublease, and did not preclude assignee from enforcing, as to future taxes, clause requiring sublessee to repay portion of taxes paid by sublessor (Civ. Code, § 1531, subd. 3).

4. Landlord and tenant ⇐148(2).

Sublessee's agreement to repay, as additional rent, portion of taxes assessed against sublessor upon building and equipment, *held* to refer only to taxes legally assessed against sublessor.

5. Landlord and tenant ⇐148(2).

County assessor's assessment of taxes against sublessor upon building and equipment *held* void as to portion of building and equipment occupied and used by sublessee as public utility, as regards sublessee's obligation under sublease to repay taxes to sublessor as additional rent (Const. art. 13, § 14, as amended in 1926; Pol. Code, § 3664a).

Const. art. 13, § 14, as amended in 1926, provides that companies engaged in transmission or sale of gas or electricity shall annually pay to state a tax upon their franchises, poles, wires, pipes, conduits, rights of way, and other property used exclusively in operation of their business, and such taxes shall be in lieu of all other taxes, and Pol. Code, § 3664a, provides that all such taxes shall be in lieu of all other taxes state, county, and municipal, upon such property.

6. Landlord and tenant ⇐148(2).

Where sublease required sublessee to repay sublessor portion of taxes assessed against sublessor, sublessor *held* not entitled to repayment of any taxes assessed against sublessor on portion of building and equipment used by sublessee as public utility, such taxes being void (Const. art. 13, § 14, as amended in 1926; Pol. Code, § 3664a).

Appeal from Superior Court, Los Angeles County; Dailey S. Stafford, Judge.

Action by the Third and Broadway Building Company and another against the Southern California Edison Company. From a judgment in favor of plaintiffs, defendant appeals.

Modified, and, as modified, affirmed.

Roy V. Reppy, E. W. Cunningham, and Gail C. Larkin, all of Los Angeles, for appellant.

Frank James, Henry Herzbrun, and Everett H. Mills, all of Los Angeles, for respondents.

PER CURIAM.

This action was brought to recover additional rent under a lease executed to defendant by the Stability Building Company and assigned by it to plaintiff Third and Broadway Building Company. Judgment was rendered for plaintiffs, and from this judgment defendant appeals.

The complaint alleges that on the 12th day of September, 1916, C. D. Stimson and Fred S. Stimson Company leased to the Stability Building Company the lot therein described for a period of ninety-nine years, providing for the construction upon said lot of an eleven-story office, store and theater building by the said Stability Building Company at its own cost. A part of the cost of the construction and equipment the Southern California Edison Company subsequently agreed to pay. It further alleges that on January 20, 1918, the Stability Building Company executed a sublease to the Edison Company for said building (excepting therefrom rooms 1, 3, 10, and 40 and a part of the basement), for the term of fifteen years, commencing May 1, 1918. The lease provided, among other things, that the lessor should pay all taxes and assessments levied or assessed against the leased premises, provided that the lessee should repay, as additional rent, to the lessor that proportion of the tax on said building and equipment that the amount paid by the lessee toward the cost of the said building bears to the total cost thereof. The complaint further alleges that the building was completed at a total cost of $802,267.25 and that the Edison company, as lessee, contributed toward the construction thereof $141,089.96; that respondent Third

and Broadway Building Company paid the taxes assessed against said building and equipment for the years 1926, 1927, 1928, and 1929. The percentage of said taxes which appellant agreed to pay amounts to $12,120.43. It is further alleged that on July 2, 1925, the Third and Broadway Building Company executed to the Citizens' National Trust & Savings Bank, under the name of the Citizens' Trust & Savings Bank, its bonds to the amount of $650,000 and secured same by a deed of trust on said leasehold; that prior to the commencement of this action plaintiffs demanded payment of the said additional rent from defendant, but that payment was refused.

The appellant answered, denying any liability to respondents, and interposed the following defenses: First, lack of consideration. Second, discharge of the obligation to pay additional rent by an alleged supplemental lease and by virtue of an alleged novation agreement. Third, mutual mistake of the parties. Fourth and fifth, waiver of the additional rent by acceptance of the fixed rent. Appellant also filed an amended cross-complaint in which it sought reformation of the lease because of the mutual mistake. For its second cause of action it alleged that from the year 1925 to the year 1931 appellant had been engaged in the business of transmitting and selling electricity as a public utility and had used the said property mentioned in the lease continuously and exclusively in said business; that the state board of equalization assessed all of its property, including the property involved in this case, during each of the five years aforesaid, and that taxes so assessed thereon were paid by appellant during each of the said five years; that the taxes upon the property named in the lease amounted, during the said five years, to the sum of $64,604.60, for which appellant asks judgment.

Respondent demurred to the second cause of action of the cross-complaint upon the ground that it did not state sufficient facts to constitute a cause of action, and the demurrer was sustained without leave to amend.

At the date of the execution of the sublease by the Stability Building Company to appellant in 1918, the building was nearing completion. Appellant desired to have certain alterations and additions made therein and thereto to suit the requirements of its utility business. It was thereupon provided in said lease that appellant would pay the cost of the said alterations and additions, and as consideration therefor appellant should repay to the Stability Company the proportion of the taxes assessed against the building and equipment that the amount paid by appellant toward the completion of said building bore toward the total cost thereof.

Many of the facts are stipulated, among which are the following: The execution of the lease by the Stimson Company to the Stability Company; the execution of the sublease by the Stability Company to appellant; that appellant entered into possession of the leased premises in 1918, has occupied same from that date to the present time exclusively as a public utility; that on June 24, 1925, the Stability Company assigned to respondent, Third and Broadway Building Company, the said lease and sublease; that on July 2, 1925, the said Third and Broadway Building Company executed to the Citizens' Trust & Savings Bank its deed of trust covering the said sublease; that the taxes claimed to have been levied and assessed for the five-year period amount to the sum of $73,815.04.

Appellant claims that the said taxes were not properly or legally assessed in excess of 30 per cent. of the said amount for the respective years; that the amount of the additional rental for the said five years claimed by respondents is $12,981.11; that demand for payment of said additional rental was made on October 18, 1928, but that appellant refuses to pay same; that prior to said last-named date no demand was ever made upon appellant by respondents for payment of said additional rental; that appellant has at all times paid all taxes due the state of California on its operative properties and properties not owned by it but leased by it and used in the operation of its said business, but respondents claim that none of said taxes were paid on the demised premises. Appellant contends that the court erred in sustaining the demurrer to the second cause of action set up in the cross-complaint.

[1, 2] The lease provides in paragraph 15 that the lessor shall pay any taxes or assessments heretofore or hereafter levied or assessed against the demised premises or against the interest of the owner or owners thereof, which may be levied against the lessor by reason of any state or federal income, inheritance, or personal tax or other tax of like nature. It is apparent from this language that the taxes which it was intended the lessor should pay were the ad valorem taxes assessed by the city and county against the building and equipment. The said taxes were taxes assessed against the entire building and equipment and not merely against that portion occupied by appellant as a public utility. The lease provided that the lessor should pay any taxes assessed and levied upon the building and equipment that are assessed against the lessor. Under these circumstances, to say that respondents should pay the utility tax imposed upon appellant by the state would be to inject into said lease an obligation upon the lessor for which no provision is made. We are therefore of the opinion that there was no error committed in sustaining the demurrer to said second cause of action without leave to amend.

[3] Appellant next contends that a novation was created by the instrument executed

on August 28, 1925, by the Third and Broadway Building Company as first party, and the appellant and the Stability Building Company as parties of the second and third parts respectively, wherein it provides that at the request of first and third parties the second party accepts the first party in place of the third party under the lease, and that first party accepts the substitution and assumes all of the obligations of the third party therein; that second and third parties represent that all rentals under the sublease of June 20, 1918, have been paid in full up to the 1st day of October, 1925, and no further, and that all accounts between them arising out of said sublease have been paid and discharged; that as a consequence of this novation the original contract between the Stability Company and the appellant was extinguished, and that consequently respondents' right to enforce the provisions of paragraph 15 of the lease relating to additional rent was nullified. In support of this contention, appellant cites Toogood v. Mack, 90 Cal. App. 673, 266 P. 375, and other cases of similar nature, but none of these cases are in point, for the reason that they are cases where the debtors were released by consent of the original creditors. By section 1531, subdivision 3 of the Civil Code, a novation is made by the substitution of a new creditor in place of the old one, with intent to transfer the rights of the latter to the former. As the Stability Company had assigned the lease to respondent on June 24, 1925, and had thereby vested respondent with all of its rights and obligations thereunder, there was no necessity for the execution of this instrument except for the sole purpose of showing that appellant had paid to the Stability Company all rents accruing thereon up to October 1, 1925. We find this contention to be without merit.

[4-6] The next contention of appellant is that at all times named in the complaint it has been engaged in business as a public utility and has used and occupied the building and equipment solely in its said business, and that it has paid to the state all taxes assessed against it as such public utility, including its said leasehold. Section 14 of article 13 of the Constitution provides that companies engaged in the transmission or sale of gas or electricity shall annually pay to the state a tax upon their franchises, poles, wires, pipes, conduits, rights of way and other property used exclusively in the operation of their business, and such taxes shall be in lieu of all other taxes. Section 3664a of the Political Code provides that all such taxes shall be in lieu of all other taxes, state, county, and municipal, upon said property, said tax to be equal to 7½ per cent. of its gross receipts.

In the recent decision of the Supreme Court in the case of Morgan Adams, Inc., v. County of Los Angeles, 209 Cal. 696, 289 P. 811, 814, it was held that real property leased to a public utility and which is used by the latter exclusively for office quarters for its various departments is not subject to local taxation, but is exempt therefrom under the said constitutional provision. Hopkins v. Southern California Telephone Co., 275 U. S. 393, 48 S. Ct. 180, 72 L. Ed. 329.

It is true, according to the stipulation of the parties, that during the whole of the said five-year period both the Third and Broadway Building Company and appellant paid the taxes on that part of said building and equipment subleased to appellant and occupied by it as a public utility, but, as was said in Morgan Adams, Inc., v. County of Los Angeles, supra: "We cannot accord weight to the argument advanced, that the owner of the property and not the utility pays the tax; therefore, the utility is not concerned with the question of whether there is double taxation."

Appellant's contract was to pay as additional rent a proportion of the taxes assessed against the lessor upon the building and equipment, that is to say, legally assessed against the lessor, for, if the assessment against the lessor was void, then in that event the lessor stood in relation to said void assessment as though no tax had been assessed. If, as a matter of fact, no taxes were legally assessed against the lessor upon that portion of the building and equipment occupied by appellant as a public utility, then no right of action accrued to the lessor for additional rent as to that portion. It was held in Great Western Power Co. v. City of Oakland, 189 Cal. 649–658, 209 P. 553, that the assessment of taxes by the county assessor upon a public utility was utterly void.

It appears from the evidence that 70 per cent. of the building was occupied by appellant as a public utility. It was stipulated that the sum of $73,815.04 was assessed by the county assessor against the Third and Broadway Building Company upon the building and equipment for the five-year period, and that this tax was paid by the said Third and Broadway Building Company. The trial court found that the percentage of said taxes that appellant should have paid as additional rental was the sum of $12,120.43. No taxes having been legally assessed upon that portion of the building and equipment occupied and used by appellant as a public utility, no cause of action exists in favor of respondents for additional rental for the said portion of the building and equipment.

Appellant further contends that by mutual mistake of the parties paragraph 15 of the said sublease does not express the agreement of the parties, but the court found upon a conflict of evidence that the said paragraph

is, in language and intent, actually as agreed upon by said parties.

Appellant also claims that by acceptance of a stated amount of rent over the period of three years, during which no claim was made by respondents for the said additional rent, they have waived their claim to it. The trial court also found that there had been no waiver. There was evidence to support this finding.

We are of the opinion that respondents' claim for additional rent can only extend to the 30 per cent. of said building and equipment that was not occupied and used by appellant as a public utility. Therefore the judgment is reduced to the sum of $4,358.72. As so modified the judgment is affirmed, appellant to recover costs of appeal.

132 Cal.App. 205

HASENDAHL v. J. D. HALSTEAD LUMBER CO.

Civ. 7838.

District Court of Appeal, Second District, Division 2, California.

May 23, 1933.

Appeal and error ⇨945.
Contracts ⇨176(1).

Interpretation of contractual effect of letter, dependent upon weight given evidence susceptible of two interpretations, was within trial court's discretion, and such interpretation was conclusive unless abused.

Appeal from Superior Court, Los Angeles County; Eugene P. McDaniel, Judge.

Action by W. Hasendahl against J. D. Halstead Lumber Company. Judgment for plaintiff, and defendant appeals.

Modified and, as modified, affirmed.

See also (Cal. App.) 21 P.(2d) 120.

Benjamin & Benjamin and Aaron Elmore, all of Los Angeles, for appellant.

L. Lee Bernstein, of Los Angeles, for respondent.

STEPHENS, Justice.

Respondent as plaintiff had judgment against appellant as defendant, upon the guaranty of a promissory note. The only point presented to us is whether or not the evidence relating to a certain document supports the trial court's conclusion as to its meaning. The document so far as material to the issue is as follows:

"Los Angeles, Cal., Sept. 18, 1928.

"Mr. Walter Hasendahl (address), Dear Sir: In consideration of your having extended the time of monthly payments under my October 17th, 1927, note and trust deed * * * this confirms my agreement to pay you interest on the unpaid balance of principal under said note at the rate of 12% per annum for the time that such monthly payments have been or will be delinquent instead of the 8% per annum mentioned on the note. (Then follows provision for paying as in past on the fifth instead of the first of each month without interest for the intervening days.)

"Yours very truly, Louis A. Voss."

On February 10, 1929, Julia B. Voss signed at request of respondent. The Vosses were husband and wife and makers of the note referred to in the above letter. Respondent owned the note and appellant was a guarantor. Payments had been kept up with reasonable promptness, but the September payment was late and respondent objected and this had been the reason for Voss's call upon respondent on the day the letter was written. Two days later the monthly $50 amortizing payment was made to a bank which was collecting on the note and the payment was credited first to interest at 8 per cent., balance to principal, and this occurred again the next month. No further payments were made until June 27, 1929, and another August 10, 1929, of $50 each, the whole being credited by the bank as interest. Much correspondence and some telephone communication was had between respondent and appellant, in which respondent was seeking to have appellant act upon the guaranty. Appellant called upon Voss and discovered the existence of the letter, but according to respondent's testimony he told appellant the letter was but an offer and asked appellant if he would accept it. Appellant, however, relied upon the letter as effectively releasing him, and the suit was brought. Both Voss and respondent testified that no word of acceptance or rejection of the letter had been given by respondent and that it was regarded by both as a mere offer. Voss testified also that he acted upon the belief that it had been accepted. There was other testimony of weight presented at the trial and appellant presents an able argument which we think could only be considered by the trial court. The letter, standing alone, is not definite nor according to ordinary practice where it is sought to change an important contract. Its effectiveness must be decided after the weighing of evidence susceptible of two interpretations. The trial court did this and decided in accord with respondent's ideas. The trial court did not abuse its discretion, therefore we cannot change its decision.

The judgment is modified in accordance with a written stipulation that the interest from date of entry shall bear 7 per cent. instead of 8 per cent., and so modified, it is affirmed.

We concur: WORKS, P. J.; CRAIG, J.

132 Cal.App. 328

PEOPLE v. CARSON.

Cr. 2343.

District Court of Appeal, Second District, Division 1, California.

May 31, 1933.

1. Criminal law ⇐730(3).

State's failure to produce purported letter alleged to implicate defendant in commission of offense *held* not prejudicial, where court emphatically admonished jury to disregard any reference to it.

2. Criminal law ⇐1159(4).

Conviction supported by evidence will not be disturbed on claim that testimony identifying defendant was improbable.

Appeal from Superior Court, Los Angeles County; Fletcher Bowron, Judge.

Robert C. Carson was convicted of robbery of the first degree, and he appeals.

Affirmed.

William I. O'Shaughnessy, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Bayard Rhone, of Los Angeles, for the People.

HENDERSON, Justice pro tem.

The defendant was charged by an information with the offense of robbery. He was tried and found guilty by a jury of robbery in the first degree. This appeal is taken from the judgment and the order denying his motion for a new trial. The testimony shows that on the morning of May 6, 1932, at the hour of 9 o'clock, the defendant and one Curtis, unmasked and armed with automatic revolvers, entered the Auto-Bank, an automobile loan company in the city of Los Angeles, where the defendant held up and robbed the credit manager, W. D. Adams, of $1,800. The robbery, which required from three to five minutes for its consummation, occurred in the presence of the other officers and employees of the company, who were at the same time covered by Curtis. The latter, who was arrested, convicted, and confined in the state penitentiary several months prior to the apprehension of the defendant, was the only witness called to testify in his behalf. During the course of his direct testimony, he denied the participation of the defendant in the robbery, and insisted that one Cline was his confederate in the commission of the offense.

[1] On cross-examination for the purpose of laying a foundation for impeachment, the witness was asked by the deputy district attorney whether he had not written a certain letter from the penitentiary to Adams stating that defendant was implicated in the offense. In response thereto the witness admitted the writing of the letter, but denied that it contained the suggested statement. On the insistence of defendant's counsel that the letter be produced, the attorney for the prosecution requested an adjournment until the following morning in order that the witness Adams might procure it from the files of his company. Subsequently, when the deputy district attorney was unable to produce the letter, the court emphatically and properly admonished the jury to entirely disregard any reference made to it or any inferences that might be drawn therefrom.

It is claimed that the failure to produce the purported letter, alleged by the deputy district attorney to implicate the defendant in the commission of the offense, was such serious misconduct as to deprive the defendant of a fair and impartial trial. There is no merit to the contention. Any harmful effect that could possibly follow from the alleged misconduct was subsequently removed by the court's timely and proper admonition to the jury. The rule is thus briefly stated in the case of People v. Ho Kim You, 24 Cal. App. 451, at page 467, 141 P. 950, 957: "* * * There is no presumption that misconduct will prevail with a jury to the detriment of a defendant in the face of an admonitory charge to disregard the same; but that, to the contrary, the presumption is ordinarily that the jury heeded the charge of the court."

[2] It is further urged that the testimony identifying appellant as a participant in the robbery was so highly improbable that the evidence is insufficient to support the verdict. In view of the evidence, however, which discloses the positive testimony of an abundance of witnesses to sustain the jury's verdict, we are bound to leave their conclusion undisturbed. People v. Willis, 70 Cal. App. 465, 233 P. 812.

The judgment and order are affirmed.

We concur: CONREY, P. J.; HOUSER, J.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

WINTHROP v. INDUSTRIAL ACCIDENT COMMISSION et al.*

Civ. 8806.

District Court of Appeal, Second District, Division 2, California.

May 12, 1933.

Hearing Granted by Supreme Court July 10, 1933

1. Witnesses ⇐208(2).

Law of privileged communications *held* inapplicable to surgeon performing operation on compensation claimant to remove disability.

2. Master and servant ⇐417(9).

Statute relating to Industrial Commission's continuing jurisdiction over awards did not authorize commission to hold second hearing and deny compensation, where on former review Supreme Court held claimant was entitled to compensation, and surgeon's testimony on second hearing was not newly discovered (St. 1917, p. 850, § 20 (d).

3. Master and servant ⇐417(9).

Where commission held second hearing on employer's request after Supreme Court on former review held claimant entitled to compensation, and evidence on first hearing on issues on which further hearing was sought was not shown, commission could, subject to review by courts, take evidence upon issues involved, necessary to render just compensation (St. 1917, p. 850, § 20 (d).

4. Master and servant ⇐417(9).

Supreme Court order on former review, ordering award annulled without specific directions as to further procedure by Industrial Commission, did not authorize rehearing before commission, where Supreme Court stated claimant was entitled to compensation (St. 1917, p. 850, § 20 (d).

5. Master and servant ⇐417(9).

General order of Supreme Court on former review of award, ordering award annulled, must be construed in light of statement in opinion that claimant was entitled to compensation (St. 1917, p. 850, § 20 (d).

ARCHBALD, Justice pro tem., dissenting.

Proceeding under the Workmen's Compensation Act by Fannette Winthrop, claimant for injuries, opposed by the Wetherby-Kayser Shoe Company, employer, and the Associated Indemnity Corporation, insurer. To review an award of the Industrial Accident Commission denying compensation, claimant brings certiorari.

Award annulled, with directions.

For prior opinion, see 19 P.(2d) 841.

Goldman & Lieberman, of Los Angeles, for petitioner.

A. I. Townsend, of San Francisco, for respondents.

H. C. Kelsey, of Oakland, amicus curiæ.

WORKS, Presiding Justice.

This proceeding is before us on rehearing. We now adhere to the opinion formerly filed by us. Its text, without quotation marks and exclusive of the judgment announced at its end, follows:

Petitioner in this proceeding, claiming that a physical disability under which she labored had arisen out of and in the course of her employment with respondent Wetherby-Kayser Shoe Company, applied to respondent Industrial Accident Commission for an adjustment of compensation for her alleged injury. The commission assumed jurisdiction of the application, heard evidence produced by petitioner in support thereof, and by her employer in opposition thereto, and finally determined that her disability was not caused by injury suffered in the course of her employment. Accordingly, the commission made its order denying her an adjustment of compensation. Thereafter she made application to the Supreme Court for the writ of review for the purpose of procuring an annulment of the order. The writ issued, the court, in finally disposing of the matter, rendered an opinion in which the evidence produced before the commission was reviewed, and in which the court declared, at the close of its discussion, "we are of the view that petitioner is entitled to industrial compensation." Winthrop v. Industrial Accident Commission, 213 Cal. 351, 2 P.(2d) 142, 144. The court issued no directions to the Industrial Accident Commission, and merely concluded its opinion with the order: "The order denying compensation to petitioner is annulled."

Thereafter, despite the opinion and order of the Supreme Court, the commission held a further hearing upon the application of petitioner for an adjustment of compensation, at which testimony was taken. This testimony consisted partially of a lengthy examination of a surgeon who, soon after the occurrence by which petitioner claimed she was injured, performed upon her person a surgical operation for the purpose of removing the disability from which she suffered. The surgeon gave it as his opinion that petitioner's disability was not occasioned by the occurrence in her employer's establishment, but that it arose from a pre-existing cause. The commission thereupon made a second order denying petitioner compensation. This order is now before us pursuant to writ of review issued upon application of petitioner.

[1] The evidence given by the surgeon was in no sense newly discovered, as was the case in Western Pipe & Steel Company v. Industrial Accident Commission (Cal. App.) 14 P.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 29 P.2d 850.

(2d) 530, 531, relied upon by respondent commission, among other cases, nor is it contended by respondents that any evidence taken was newly discovered. As to the surgeon, he simply was not called at the original hearing. The following is shown near the beginning of his examination, by the referee, at the second hearing:

"Q. Dr. Toland, in an earlier hearing in this case before another referee apparently, Mr. Goldman, attorney for the applicant, stated that you refused to give any report in this matter; is that true? A. Yes.

"Q. What was the reason for your refusal? A. For the reason I didn't want to get mixed up in it, that's all."

It is useless to quote further from the record. It is just to observe, however, that there is matter in the return to the writ which tends to show that the surgeon's "refusal" to make a report arose from his mistaken belief that the law as to privileged communications applied to him under the circumstances. But he was subject to call at the original hearing, as he was at the second, and, as we have observed, he simply was not called.

[2] The commission contends that it was empowered to hold its second hearing, after the decision of the Supreme Court, by virtue of the provisions of the well-known section 20 (d) of the Workmen's Compensation Act (St. 1917, p. 850), which is quoted in full in the opinion in the case above cited. We think this contention is ill-founded under circumstances such as those which appear here. It will be observed that in the Western Pipe & Steel Company Case it was said that "regardless of our preconceived notions" we must rule that the unearthing of newly discovered evidence was "good cause" for the holding of a second hearing by the commission under circumstances otherwise much like those present here. It will also be noted that in a concurring opinion in the case it was remarked that "any break in the rule of finality of decision is regrettable." We can see no just reason for allowing a sanction of the hearing in this instance which was held by the commission after the decision of the Supreme Court. We think section 20 (d) is not susceptible of so far-reaching a construction. If the hearing referred to was proper, the commission undoubtedly, after the order of annulment which we intend as a close to this proceeding, would have the power to hold a third hearing within the two hundred forty-five weeks prescribed by the statute, at that hearing take the testimony of some other person whose existence as a prospective witness was known at the time of the second hearing, and upon his testimony render a third award denying compensation to petitioner, and might similarly hold as many other hearings as the limit of the two hundred forty-five week period would permit. It will be understood, as a matter of course, that in what we have said we intend no reflections upon the good intentions of the Industrial Accident Commission. The excellent labors of that body for the general good we highly appreciate and indorse. In the present instance the commission has earnestly endeavored to exercise a jurisdiction it believes to exist under the terms of section 20 (d). We think, however, that the section was allowed the limit of its force, in the direction in which the commission now seeks to go, when it was held that newly discovered evidence is "good cause" for a continued exercise of jurisdiction under circumstances similar to those existing here. All litigation must end somewhere.

[3] The commission will make an award allowing compensation to petitioner under the evidence reviewed and declared to be sufficient by the Supreme Court. Something yet remains, however, to be said in order that a conclusion just to all parties may be attained. The second hearing held by the commission was convened pursuant to written request, made by petitioner's employer, in which it was stated that a "further hearing is essential to determine three important issues involved, namely: 1. The reasonableness of appellant's medical bills. 2. The proportionment of the disability due to aggravation and pre-existing disease. 3. Nature, extent and duration of disability." The return in this proceeding, very properly, shows only the activities of the commission since the decision of the Supreme Court, and we are therefore not informed what, if any, evidence was taken at the first hearing upon the three points stated in the petition for further hearing. Under these circumstances, and subject to review by the courts, the commission may take such evidence upon the three points, or any of them, as may be necessary and proper, in order to render just compensation to petitioner.

Here ends the former opinion to which we now allude, but more remains to be said. An opinion was prepared with a view to a denial of the rehearing, but the opinion was never filed and the rehearing was granted. We now adopt the opinion mentioned as a part of our present decision. It follows:

[4, 5] Respondents ask for a rehearing of this proceeding on the ground that because the Supreme Court, after the first hearing before the commission, merely ordered the award annulled and gave no specific directions as to further procedure by the commission, this irrespective of the provisions of section 20(d) of the Workmen's Compensation Act (St. 1917, p. 850). We think the contention is set at naught by the fact that the Supreme Court said in its opinion, "we are of the view that petitioner is entitled to industrial compensation." The general order with which the opinion closed must be con-

strued in the light of this direct and apparently final assertion.

In support of the petition for rehearing respondents cite Clapp's Parking Station v. Industrial Accident Commission, 51 Cal. App. 624, 197 P. 369, 371. We think the opinion there rendered by us is not helpful to respondents. The court first remarked (italics ours): "The statute expressly authorizes us to enter a judgment affirming or annulling the award *or* remanding the case for further proceedings before the Commission." A decision was then cited to the effect that, in connection with an order annulling an award, the court could make an order remanding. A little later we said, the italics again not being those of the opinion: "A new trial in a court of record follows as a matter of course when the judgment of such a tribunal is reversed by an appellate court on the ground that a material finding is not sustained by the evidence; and we can see no reason why a more rigorous rule should be applied to a judgment of the Industrial Accident Commission, annulled in a certiorari proceeding, *in view of the express grant of power to remand* the case for further proceedings by the Commission." The court then ordered an annulment and a remand with directions.

Respondents also cite California Casualty Indemnity Exchange v. Industrial Accident Commission, 190 Cal. 433, 213 P. 257, 259. It was there said, after an opinion concluding with the order, "The award is annulled" (italics ours): "The Industrial Accident Commission petitions for a rehearing or a modification of the judgment of this court, so that the commission can admit additional evidence. It is unnecessary to modify the judgment for this purpose. The effect of our decision is to vacate the judgment heretofore rendered by the Industrial Accident Commission and to set the matter at large, *for proceedings not inconsistent herewith.*"

The language employed by Presiding Justice Finlayson in Clapp's Parking Station v. Industrial Accident Commission, supra, was inspired by considerations arising from the very nature of the writ of review. The writ goes to the question of jurisdiction. When an order of an inferior tribunal is affirmed, under it the jurisdiction is allowed to go on, or is at least sanctified so far as it has proceeded. When the order is annulled, the exercise of the jurisdiction is determined to have been improper and there is no such thing as a further proceeding, hearing or new trial in an attempted further exercise of it. It must be because of this fact that the Legislature made the "express grant of power to remand" under writs of review issued pursuant to the Workmen's Compensation Act. For this reason, as it appeared from Clapp's Parking Station v. Industrial Accident Commission, there is no analogy between the reversal of a judgment on appeal and the annulment of an order under the writ of review in industrial accident cases, except because of the "express grant of power to remand."

It is somewhat difficult to determine from California Casualty Indemnity Exchange v. Industrial Accident Commission, supra, whether that case overrules the Parking Station Case. There is no overruling in express terms, and it is probable that the result has not arisen by implication; for while the Supreme Court said that by its order of annulment the matter before the commission was "set at large," it is also observed that further proceedings were not to be inconsistent with the opinion of the court. This general language may properly be considered as a determination that an order of annulment amounts also to a direction to proceed further in a manner not inconsistent with the opinion resulting in the order.

Certainly, we think that when the Supreme Court, in Winthrop v. Industrial Accident Commission, 213 Cal. 351, 2 P.(2d) 142, 144, decided that "petitioner is entitled to industrial compensation" and annulled the order denying compensation, the entire language employed by the tribunal amounted to a direction to the commission to proceed so far and no further, and in such manner as might be necessary to ascertain the amount proper to be awarded to petitioner, and then to make the award. The Casualty Indemnity Case seems to be direct authority for this view.

This is the close of the opinion once intended to end with an order denying the rehearing.

We think the above reasoning finds some support, on principle, in the case of Fogarty v. Department of Industrial Relations, 206 Cal. 102, 273 P. 791.

We now expressly issue the direction which the Supreme Court impliedly ordered when petitioner was before that tribunal:

The award denying compensation to petitioner is annulled. The Industrial Accident Commission will proceed further under petitioner's application for adjustment of compensation in accordance with the views expressed by the Supreme Court in Winthrop v. Industrial Accident Commission, 213 Cal. 351, 2 P.(2d) 142, and in this opinion.

I concur: STEPHENS, J.

ARCHBALD, Justice pro tem.

I dissent. I cannot ascribe to the opinion of the Supreme Court [213 Cal. 351, 2 P.(2d) 142] the finality seen in it by my associates. As I read it, such opinion merely decides that *under the evidence on which the commission acted* petitioner was entitled to industrial compensation. That the court realized that petitioner's fall might have been but a contributing cause of the injury by reason of a pre-existing condition clearly appears. The

court annulled the order denying compensation, and did nothing more. In other words, the state's highest tribunal, in my opinion, must have expected that further hearing would be necessary to determine whether under the evidence already before the commission petitioner's fall was the sole or merely the contributory cause of the injury, and to fix the disability due to the fall or to proportion such disability between the fall and the pre-existing disease, if any, and for that reason it set the matter at large by merely annulling the order. That the annulment of the order left the matter in the hands of the commission to take additional evidence would seem to be clear. California C. I. Exch. v. Ind. Acc. Com., 190 Cal. 433, 438, 213 P. 257.

The record shows that the commission notified the parties of the annulment of the order after remittitur came down following such decision, and of its intention to enter a decision consistent with the opinion unless good cause was shown to the contrary. The defendants petitioned for further hearing to consider the reasonableness of petitioner's medical bills, the proportionment of the disability due to aggravation and pre-existing disease, and the nature, extent, and duration of the disability. At this hearing, among other witnesses, the doctor who performed the operation testified. He did not testify at the prior hearing because he had an idea that his testimony was privileged and he did not care to be "mixed up in it." Any further hearing was strenuously objected to by petitioner, but in my opinion it was entirely within the discretion of the commission and appeared to be necessary to do justice to all parties. At this further hearing very persuasive evidence was given by the doctor who performed the operation to the effect that the fall could not have caused the disability, and this with evidence already before the commission evidently resulted in a finding that the fall neither caused nor aggravated the twisting of the pedicle which necessitated the operation.

I agree with the majority opinion that when an order is annulled the exercise of the jurisdiction challenged by certiorari "is determined to have been improper." No doubt in those cases where the decision of the body whose action is challenged is beyond the jurisdiction of such body in some other sense than that of drawing a conclusion which is against the evidence before it, there could be no further proceedings. I cannot agree, however, that where the order is annulled because against the evidence taken such result follows. By the annulment the matter is left pending and undecided with the body whose action is challenged. It is still within its jurisdiction to decide, and I see no reason why additional evidence, if it can be found, which is material to the decision of the question before the tribunal, should not be heard; and after being heard, the conclusion to be drawn from all the evidence must be left to the body to which it has been committed by law. Any other rule would substitute for the decision of a commission that of the court of review, and would result in preventing the fact-finding body from hearing evidence material to the decision and which might be necessary to do justice between the parties.

132 Cal.App. 283

STRAUSS et al. v. DUBUQUE FIRE & MARINE INS. CO. OF DUBUQUE, IOWA, et al.

Civ. 8885.

District Court of Appeal, First District, Division 2, California.

May 26, 1933.

1. Corporations ⇐1.

Corporate entity may be disregarded when necessary to avoid fraud or injustice.

2. Corporations ⇐1.

Owners of corporation's capital stock, named as insured in fire policy covering corporation's property, and requiring insured to be unconditional and sole owners, *held* not entitled to disregard corporate entity to recover on policy.

3. Insurance ⇐258.

Application for fire policy in name of nonexistent corporation, instead of correct corporate name, "Allied Box & Excelsior Company," *held* "concealment" and material misrepresentation, precluding recovery on policy, excelsior being on insurer's prohibited list.

[Ed. Note.—For other definitions of "Conceal; Concealment," see Words and Phrases.]

4. Fraud ⇐17.

It is "concealment" to neglect to communicate that which party knows and ought to communicate.

5. Insurance ⇐232.

Insurance policy is in effect canceled when another policy is substituted for it.

6. Appeal and error ⇐1011(1).

Conflict in evidence as to whether another fire policy was substituted for policy sued on *held* for trier of facts.

7. Appeal and error ⇐1008(1).

In action on fire policy, trial court's finding that plaintiff gave false testimony under oath, on examination by insurer's represen-

tative prior to commencement of action, making policy void under terms thereof, *held* conclusive.

8. Appeal and error ⇐1071(5).

Correctness of finding attacked *held* immaterial, where judgment was sustained by other supported findings.

9. Insurance ⇐392(6).

Fire insurer's retention of insured's check for premium, sent after fire, did not create waiver of, nor estoppel to assert, defenses to insured's recovery on policy.

10. Evidence ⇐471(26).

In action on fire policy, question asked witness regarding whether certain corporation owned property burned *held* not objectionable as calling for conclusion.

11. Appeal and error ⇐1056(1).

In action on fire policy for which insurer claimed another policy had been substituted, excluding testimony that, before fire, insured sought more insurance, offered to rebut claim of substitution, *held* not prejudicial error.

12. Appeal and error ⇐1071(6).

Failure to find on issues *held* not error, where finding for appellant on each of such issues would be immaterial.

Appeal from Superior Court, City and County of San Francisco; Michael J. Roche, Judge.

Action by D. Strauss and others, doing business under and by the corporate name of Allied Box & Excelsior Company, against the Dubuque Fire & Marine Insurance Company of Dubuque, Iowa, and another. Judgment for defendants, and plaintiffs appeal.

Affirmed.

Leon E. Prescott and H. B. M. Miller, both of San Francisco, for appellants.

Redman, Alexander & Bacon and A. B. Weiler, all of San Francisco, for respondents.

STURTEVANT, Justice.

The plaintiffs sued to recover on a fire insurance policy. The trial court made findings in favor of the defendants, and from the judgment entered thereon the plaintiffs have appealed. In some instances the court found certain paragraphs of the complaint to be true. Incorporating such paragraphs, in effect the findings were as follows:

"I.

"That at all the times herein referred to the said Allied Box & Excelsior Company was and now is a corporation duly organized and existing under and by virtue of the laws of the State of California, with a capital stock of $25,000.00 divided into 25,000 shares of the par value of $1.00 per share.

"That at the time of the formation of said corporation there was issued by it a total of 16,508 shares of said 25,000 shares for and in consideration of the sale, assignment and transfer to it by the plaintiff, D. Strauss, of the good will and all the property and assets of the business in which he then was and for a long time prior thereto had been engaged of buying, selling, manufacturing and generally dealing in and with wood and paper boxes and excelsior.

"That of said 16,508 shares of the capital stock of said corporation so issued and delivered by it as aforesaid, 16,506 shares thereof were, at the special instance and request of the said plaintiff, D. Strauss, issued and delivered to him, one share thereof, at his special instance and request, delivered to the plaintiff Leon Strauss, and one share thereof, at his special instance and request issued and delivered to the said plaintiff W. B. Jefferson.

"That the one share of the capital stock so issued and delivered to the plaintiff Leon Strauss as aforesaid, and the one share of said capital stock so issued and delivered to the plaintiff W. B. Jefferson, as aforesaid, were issued and delivered to them respectively to enable the said plaintiff D. Strauss to complete the organization of said corporation, and to enable the said Leon Strauss and the said W. B. Jefferson to qualify as directors of said corporation, and for no other purpose.

"That at all times herein stated the defendant, Dubuque Fire & Marine Insurance Company, was and now is a corporation organized and existing under and by virtue of the laws of the State of Iowa for the purpose of transacting a general insurance business, and at all of said times was and now is entitled to transact and transacting a general insurance business in the State of California by virtue of the laws of said state, with its principal place of business on the Pacific Coast in the City and County of San Francisco, State of California.

"That at all of said times the defendant, National Reserve Insurance Company of Illinois, was and now is a corporation duly organized and existing under and by virtue of the laws of the State of Illinois for the purpose of transacting a general insurance business, and at all of said times was and now is entitled to transact and transacting a general insurance business in the State of California, under and by virtue of the laws of said state, with its principal place of business on the Pacific Coast in the City and County of San Francisco, State of California.

"That at all the times herein referred to

the defendants above named in the transaction of their said business and with authority of the Insurance Commission of the State of California, have issued and are still continuing to issue policies of fire insurance under and by the name of The Reserve Underwriters, each of which policies is known and designated as 'The Reserve Underwriters Fire Insurance Policy Issued by Dubuque Fire & Marine Insurance Company, Dubuque, Iowa, and National Reserve Insurance Company of Illinois.'

"II.

"That upon the 21st day of February, 1931, the defendants made, executed and delivered that certain policy of fire insurance, a true and correct copy of which is attached to the amended complaint and marked 'Exhibit A,' wherein and whereby said defendants did insure 'D. Strauss and Leon Strauss and W. B. Jefferson, a corporation,' for the term of one year from the 21st day of February, 1931, at noon, to the 21st day of February, 1932, at noon, against all loss or damage by fire in an amount not exceeding $3,000.00 on the property described in said policy of insurance; and subject to the terms, conditions and provisions of said policy.

"That there never was any corporation by the name of 'D. Strauss and Leon Strauss and W. B. Jefferson,' but there was and still is a corporation by the name of 'Allied Box & Excelsior Company,' and said Allied Box & Excelsior Company was the owner of the property insured in the aforesaid policy of insurance, and said D. Strauss was the sole stockholder in said corporation of Allied Box & Excelsior Company, excepting qualifying shares held by the directors.

"III.

"That the plaintiffs herein did not, nor did either of them at the time of the application hereinbefore referred to, or at the time of the issuance and delivery of the policy of insurance involved in this action, or at any time whatever, or at all, make any statements or representations of any kind or character to the defendants herein, or to either of them, as to the nature or character or extent of their title or interest in and to the property in said policy described, or to the title or interest of any of them therein or thereto, or in or to any part thereof; and neither plaintiffs nor their agents, nor any other person informed the defendants or either of them of the fact that the Allied Box & Excelsior Company was the owner of the insured property, and defendants supposed that said property was owned by D. Strauss and Leon Strauss and W. B. Jefferson, a corporation, and assumed that there was such corporation. That if defendants had known that the Allied Box & Excelsior Company was the owner of said insured property said defendants would have declined to accept the insurance, as excelsior was on their prohibited list.

"IV.

"That at the time of the application for the aforesaid policy, and at the time of the issuance and delivery of said policy of insurance by the defendants, the defendants did not know, and by the exercise of ordinary care and caution could not have determined from block books in their possession that the business conducted and carried on at the place where the property was located, namely, at 650 Brannan Street, San Francisco, was then conducted and carried on under and by the name of Allied Box & Excelsior Company; and the words, 'a corporation,' following the names of the plaintiffs in said policy, were not intended to mean, and do not mean, and were not understood by the defendants or either of them to mean, the 'Allied Box & Excelsior Company, a corporation.'

"V.

"That the premium charge on said policy of insurance was never paid, but after the issuance of the policy of insurance, and subsequent to the fire referred to in the amended complaint, and prior to the commencement of this action, the plaintiffs sent to the defendants a certified check of the said Allied Box & Excelsior Company for the amount of the premium, but said defendants have never cashed the check, but have held and still hold said check for the benefit of whom it may concern, and for the benefit of whoever may be entitled to said check or its proceeds.

"VI.

"That thereafter on the 8th day of April, 1931, a fire occurred which injured and damaged the property in said policy described while located on the premises 650 Brannan Street, San Francisco, California, to the extent of $8,850.75; and the total insurance covering the property described in defendants' policy which at the time of the fire was in force and effect was as follows: Policy of Merchants Assurance Corporation for the sum of $3,000; policy of National Union Insurance Company for the sum of $1,745.88; policy of St. Paul Fire and Marine Insurance Company for the sum of $1,500.

"VII.

"That immediately after the fire aforesaid occurred the plaintiffs above named gave notice of said fire to the defendants above named, and thereafter, and on the 8th day of May, 1931, and within the time required by and in accordance with the terms and conditions of the policy of insurance so issued and delivered to plaintiffs by the defendants as aforesaid, furnished to said defendants a preliminary proof of loss duly verified, accompanied by an itemized statement show-

ing the amount and character of each article of property injured and damaged by said fire and covered by said policy, and the value thereof at the time of said fire, and in said preliminary proof of loss made claim against the said defendants for the sum of $2,612.23, as the amount of liability of said defendants to plaintiffs under said policy by reason of said fire; except that in the proof of loss it was stated by the plaintiffs that the defendant companies insured 'D. Strauss and Leon Strauss and W. B. Jefferson, a corporation,' and that the insured in said policy was the sole owner of said property and that no other person was interested therein.

"It is not a fact that at the time of the fire the policy of insurance issued by said defendants was in full force and effect, or in full or any force or effect, the fact being that prior to the fire said policy was canceled, and a policy in the Merchants Fire Assurance Corporation for the sum of $3,000 substituted in lieu thereof on the 1st day of April, 1931.

"VIII.

"That the amount of the alleged loss as claimed by the plaintiffs in their amendment to the proof of loss was the sum of $8,850.75.

"IX.

"That the plaintiffs did not prior to the commencement of this action perform all matters and things required to be done and performed by them under and by the terms of the policy of insurance involved in this action, the facts being as heretofore and hereinafter found.

"X.

"That more than 90 days elapsed between the time when the plaintiffs furnished their preliminary proof of loss and amendments thereto and the date of the commencement of this action, and the amount claimed by plaintiffs from defendants, to-wit: $2,612.23, has not been paid, but neither that sum, nor any sum, is due or owing or unpaid or payable from the defendants to the plaintiffs, or any of them.

"XI.

"That the policy of insurance issued by the defendants provided that it should become void if the insured concealed or misrepresented any material fact or circumstance concerning the insurance or the subject thereof; and the policy also provided that it would become void in case of any fraud or false swearing by the insured touching any matter relating to the insurance or the subject thereof, whether before or after a loss. And the court finds that pursuant to the provisions of the policy it become void when subsequent to the fire plaintiff D. Strauss gave false testimony under oath on examination by a representative of the defendants, which said false testimony was given prior to the commencement of this action.

"XII.

"And the court finds that on the 1st day of April, 1931, and prior to the occurrence of the fire referred to in the amended complaint, the policy issued by defendants was canceled, and at the time of the fire said policy was not in force or effect. And the court finds that prior to the time of the fire another insurance policy, to-wit: a policy of the Merchants Fire Assurance Corporation of New York, in the amount of $3,000, and on the same property described in the policy issued by defendants, was substituted for and accepted by the plaintiffs in lieu of the policy which had theretofore been issued by the defendants; and the policy of the defendants was canceled. And plaintiffs herein filed proofs of loss against said Merchants Fire Assurance Corporation of New York, and collected from said Assurance Corporation under the substituted policy. The court further finds that the policy of the defendants referred to in the amended complaint was canceled by consent of the parties prior to the time of the fire.

"XIII.

"The court finds that prior to the time of said fire the plaintiffs in the above entitled action were doing business under a fictitious name, and did not comply with the laws of the state of California in regard thereto, and neither filed the requisite certificate, nor made the publication required by the laws of California, and have never done so.

"XIV.

"The court finds that at the time the policy was issued the plaintiffs concealed from the defendants a material fact, namely, that they were doing business under the name of Allied Box & Excelsior Company, a corporation, and that they dealt in and carried excelsior on said premises.

"XV.

"It was provided in the policy issued by the defendants that it would be void if the interest of the assured was other than unconditional and sole ownership. The assured in said policy was 'D. Strauss and Leon Strauss and W. B. Jefferson, a corporation,' and the court finds that the assured named in said policy did not have an interest of unconditional or sole or any ownership in said property."

The plaintiffs claim that many different findings are not sustained by the evidence. They assert that the defendants herein intended to and did insure said plaintiffs by the policy of insurance which is the subject of this action against loss or damage by fire to the property in said policy described in a

sum not exceeding $3,000 for the period of one year from and after the 21st day of February, 1932. As to what the defendants intended was not made an issue and neither is there a finding. As to the identity of owner intended to be insured the policy named "D. Strauss and L. Strauss and W. B. Jefferson, a corporation." There was no allegation of mistake, and there is no finding of such an issue.

[1, 2] The plaintiffs assert that, at the time of the issuance and delivery to them of the policy which is the subject of this action, and at the time of the fire, they were the unconditional and sole owners of the property in said policy described within the meaning of the terms thereof. The trial court found that Allied Box & Excelsior Company was the sole owner. On that finding there was not even a conflict in the evidence. The assertion made by the plaintiffs is their conclusion of law based on the ownership of the capital stock. In making the above assertion, the plaintiffs claim the right to ignore the corporate entity. However, there was no evidence and there is no finding supporting the plaintiffs in this position. It is settled law in this state that the corporate entity may be disregarded when to do so is necessary to avoid fraud or injustice. Minifie v. Rowley, 187 Cal. 481, 487, 202 P. 673; 6a Cal. Jur. 75–81. No such record is before us. It follows that the plaintiffs were not the owners of the property described in the policy.

[3, 4] The plaintiffs assert that they were not guilty of any concealment of any kind or character in procuring the policy here involved or otherwise. The most that can be said is that there is a possible conflict in the evidence. The correct name of the owner, "Allied Box & Excelsior Company," would have shown that at 650 Brannan street the business conducted had something to do with excelsior. The trial court found that the defendants would not have entertained an application to insure excelsior. When the plaintiffs applied for insurance in the name of "D. Strauss and Leon Strauss and W. B. Jefferson, a corporation," they falsely named a corporation that in fact does not exist, and they suppressed the true name which, if it had been stated, would have resulted in their application being refused. Said act was at least some evidence of concealment. It is concealment to neglect to communicate that which a party knows and ought to communicate. One certainly knows his own name. These plaintiffs did not state their name. The name they did state was both a concealment and a material misrepresentation. McCormick v. Springfield F. & M. I. Co., 66 Cal. 361, 5 P. 617.

Again, it is asserted that the premium on the policy was fully paid by plaintiffs within the time allowed to them for the payment thereof by the defendants. A more exact expression would be that the plaintiffs tendered the premium. After the fire occurred, they called on the defendants and gave notice of the loss. They were at once told that they had no insurance in the defendant companies. Thereupon they left and consulted counsel who caused a certified check to be forwarded. That check was never cashed. The trial court found that defendants hold it for whom it may concern.

[5, 6] It is next asserted that the policy issued by the defendants was never canceled. If the plaintiffs mean that the policy was never indorsed in ink "canceled," then their contention conforms to the facts. However, an insurance policy is in effect canceled when another policy is substituted for it. Stevenson v. Sun Insurance Office, 17 Cal. App. 282, 288, 119 P. 529; New Zealand Ins. Co. v. Larson Lumber Co. (C. C. A.) 13 F.(2d) 374. That in the instant case there was a substitution is clearly supported by the evidence. It may be claimed that there was a conflict in the evidence, but that conflict was addressed to the trier of the facts.

It is again asserted that the policy was in full force and effect at the time of the fire. As we have just seen, in discussing the previous point that the finding of substitution must stand, it follows that the policy was not in force or effect at the time of the fire.

In their next point the plaintiffs assert that their loss exceeded the total of all insurance they had covering the property described in the policy. There was some evidence that the total loss was $11,989.31, however the plaintiffs tendered the evidence that that figure was incorrect, and that the total loss was $8,850.75, and the latter sum was adopted by the trial court in making its findings. Not including the policy sued on, the insurance collected was $6,245.80. From those figures it appears that the loss exceeded the insurance $2,604.95. Confining ourselves to those figures the statement made by the plaintiffs is correct. If by their point they mean to include the policy in suit, then their statement is neither sustained by the findings nor by the evidence.

[7] It is next asserted that the plaintiffs have done and performed all things by them to be done and performed. The trial court made a finding to the contrary. Under the terms of the policy, the plaintiffs in the event of a loss were bound to return proofs of loss that were true and correct. They did not do so. Their proofs of loss were made in the name of D. Strauss and Leon Strauss and W. B. Jefferson, a corporation. Each of those individuals executed an affidavit in the name of such claimant. Among other things, the affidavit recited "Interest of Insured Sole Owner." As shown above, that was a false statement and not a true statement. Pursuant to a provision contained in the policy, D.

Strauss was called and examined by the company. He appeared accompanied by his attorney and testified under oath. As to several matters, the defendants claim he testified falsely. The plaintiffs claim that he made innocent mistakes. The trial court made a finding against the plaintiffs. That finding may not be disturbed.

In this same connection the plaintiffs claim that they were not guilty of any false swearing within the meaning of their policy. As shown above, that argument might properly be addressed to the trial court, but under the facts it has no standing in a court of review.

[8] Again, it is asserted that the plaintiffs did not do business under and by a fictitious name, but did do business solely and only under the name of Allied Box & Excelsior Company. If the latter portion of that contention is sound, then the plaintiffs fraudulently imposed on the defendants in taking out insurance in the name of a corporation that did not exist and failing to give the correct name of the owner. If by their contention it is claimed that the plaintiffs did not violate Civil Code, § 2466, the claim is immaterial, because, as we have shown above, the findings that were fully supported by the evidence sustain the judgment, and the finding under attack is immaterial.

[9] The plaintiffs call attention to the mailing of the check, its retention by the defendants, and the examination of the plaintiffs on the request of the defendants. Thereupon they assert that the defendants are estopped from making any defense. Regarding the examination of the plaintiffs under oath, that subject is covered by the language of the policy, which distinctly provides that the procedure mentioned will not constitute a waiver. Regarding the transmission and retention of the check, it will be remembered that those incidents occurred after the fire. They did not create a waiver nor an estoppel. McCormick v. Orient Insurance Co., 86 Cal. 260, 262, 24 P. 1003; Goorberg v. Western Assurance Co., 150 Cal. 510, 518, 89 P. 130, 10 L. R. A. (N. S.) 876, 119 Am. St. Rep. 246, 11 Ann. Cas. 801.

[10] When D. Strauss was on the stand as a witness, the defendants asked: "Q. And that corporation owned the property that was destroyed in the fire, didn't it?

"Mr. Miller: I object to that as calling for the conclusion of the witness.

"The Court: I am going to allow the question. A. Yes."

The ruling was clearly correct. Nolan v. Nolan, 155 Cal. 476, 480, 101 P. 520, 132 Am. St. Rep. 99, 17 Ann. Cas. 1056; Perkins v. Sunset Tel. & Tel. Co., 155 Cal. 712, 718, 103 P. 190.

[11] The plaintiffs called a witness and sought to show by the witness that before the fire a representative of the plaintiff corporation sought to obtain more insurance. To that evidence objections were sustained, and the plaintiffs complain of error. It is claimed the testimony would rebut the contention of the defendants that the Merchants policy was a substitute for the policy in suit. It is sufficient to state that we see no prejudicial error in the ruling.

[12] The plaintiffs claim that certain issues were made by the pleadings, but on which no finding was made. We have examined each one with care. If a finding in favor of the plaintiffs had been made on each of such issues, such findings would be immaterial. It follows that it was not error to fail to make findings thereon. 20 Cal. Jur. 127.

The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

PEOPLE v. TALBOT et al.*

Cr. 2235.

District Court of Appeal, Second District, Division 2, California.

May 23, 1933.

Hearing Granted by Supreme Court June 22, 1933.

1. Embezzlement ⇨5.
Fraudulent intent is essential element of embezzlement (Pen. Code, §§ 484, 503, 504).

2. Embezzlement ⇨44(2).
Secrecy or concealment is evidence of criminal intent, but there may be embezzlement where appropriation is openly made (Pen. Code, §§ 484, 503, 504).

3. Criminal law ⇨568.
Felonious intent must be determined from facts and circumstances of case.

4. Embezzlement ⇨23.
Officer or agent taking corporation's money intrusted to him, and using it even temporarily for his personal benefit, cannot avoid criminal responsibility by calling it loan (Pen. Code, §§ 484, 503, 504).

5. Embezzlement ⇨1.
Embezzlement is purely statutory crime (Pen. Code, §§ 484, 503, 504).

6. Embezzlement ⇨4.
Statutory definition of embezzlement as "fraudulent appropriation" shows that gist of offense is immediate breach of trust in fiduciary's appropriation for personal uses of money intrusted him for trust uses, rather than permanent deprivation of owner of his

property (Pen. Code, §§ 484, 503, 504, 512, 513).

"Fraudulent," in the phrase "fraudulent appropriation," is intended to distinguish an "appropriation" by an agent under circumstances that might be merely tinged with suspicion as to the agent's intent, from an appropriation for purely personal uses of the agent, as contrasted with the purpose for which the money or property appropriated was intrusted to him; thus where officers of the corporation, who are necessarily intrusted with the money and property of the concern, use it, knowingly and intentionally, for their own purposes there is a "fraudulent appropriation" thereof, which is termed "embezzlement." "Fraud" is defined as any act that involves a breach of duty, trust, or confidence, and which is injurious to another, or by which an undue advantage is taken of another, and an act is "fraudulent" that is characterized by "fraud."

[Ed. Note.—For other definitions of "Embezzle; Embezzlement," "Fraud," "Fraudulent; Fraudulently" and "Fraudulent Appropriation," see Words and Phrases.]

7. Embezzlement ⇐44(2).

Evidence sustained finding that officer appropriated corporation's money with fraudulent intent, though officer intended or was able to repay money taken or had been accustomed to using corporate funds for personal needs, eventually returning money, with directors' knowledge (Pen. Code, §§ 484, 503, 504, 512, 513).

8. Embezzlement ⇐47.

Whether officer used corporation's money which he appropriated to stabilize price of corporation's stock for benefit of corporation and stockholders, and not to make his own holdings more valuable, *held* for trier of facts (Pen. Code, §§ 484, 503, 504).

9. Criminal law ⇐877.

Where evidence affects both defendants jointly charged alike, conviction of one cannot be sustained, where other is acquitted.

10. Criminal law ⇐877.

Slightest difference in effect of testimony on defendants jointly charged obviates rule precluding conviction of one and acquittal of other on evidence affecting both alike.

11. Criminal law ⇐877.

Evidence in prosecution of joint defendants for grand theft by embezzlement *held* to affect defendants with sufficient difference to authorize conviction of one, despite acquittal of other (Pen. Code, §§ 484, 503, 504).

12. Criminal law ⇐371(2).

In prosecution of chairman of corporation's directors for grand theft by embezzlement, evidence of acts showing chairman's continuous practice of using corporation's funds for personal purposes *held* competent to prove felonious intent, although some of acts were before and some after acts on which conviction resulted (Pen. Code, §§ 484, 503, 504).

13. Criminal law ⇐673(4).

In prosecution of joint defendants for conspiracy to commit grand theft and for grand theft by embezzlement, denial of motion that evidence of all witnesses called by particular defendant be limited to that defendant *held* not error where there was no motion for separate trial of conspiracy charge (Pen. Code, §§ 484, 503, 504).

14. Criminal law ⇐878(3).

Conviction on count charging grand theft *held* not precluded by not guilty verdict on count for conspiracy to commit grand theft (Pen. Code, § 484).

15. Embezzlement ⇐44(4).

In prosecution for grand theft by embezzlement of corporation's funds, it was not essential to prove existence of corporation as corporation (Pen. Code, §§ 484, 503, 504).

16. Embezzlement ⇐44(1).

In prosecution of corporation president for grand theft by embezzlement, evidence of president's appropriations of corporate funds *held* not to show establishment of relation of debtor and creditor (Pen. Code, §§ 484, 503, 504).

17. Embezzlement ⇐44(2).

Evidence of felonious intent *held* sufficient to sustain conviction of corporation president for grand theft by embezzlement (Pen. Code, §§ 484, 503, 504).

18. Embezzlement ⇐44(2).

Evidence sustained conviction of vice president of corporation for grand theft by embezzlement, although showing intent to repay money appropriated (Pen. Code, §§ 484, 503, 504, 512, 513).

19. Criminal law ⇐1169(1).

In prosecution of vice president of corporation for conspiracy to commit grand theft and for grand theft by embezzlement, admission of purported resolutions of corporation's directors, authorizing guarantee of loans made to certain of corporation's employees, including accused, and of guarantees, *held* not prejudicial (Pen. Code, §§ 484, 503, 504).

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

James A. Talbot, Clarence M. Fuller, and Raymond W. McKee were convicted of grand theft, and they appeal.

Affirmed.

Eugene D. Williams, Forrest F. Murray, and James T. Boyle, all of Los Angeles, for appellant Talbot.

Leonard Wilson, of Los Angeles (Bourke Jones, of Los Angeles, of counsel), for appellant Fuller.

Monroe B. Kulberg and Clare Woolwine, both of Los Angeles (Bourke Jones, of Los Angeles, of counsel), for appellant McKee.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

ARCHBALD, Justice pro tem.

James A. Talbot, Clarence M. Fuller, and Raymond W. McKee were charged in count I of an indictment with conspiracy to commit the crime of grand theft, and in the remaining nine counts thereof they were charged with nine separate offenses of the same nature. The defendants were tried jointly on all counts before the court without a jury, the trial resulting in an acquittal of all three on the charge of conspiracy. Talbot was found guilty on counts II and VI, Fuller guilty as to counts III, IV, V, VII, VIII, and IX, and McKee guilty under count X. Each defendant was found not guilty as to all counts other than the ones upon which he was convicted. From the judgments of conviction entered upon such findings, and from the orders denying their respective motions for a new trial, defendants have separately appealed.

At the time the nine alleged acts of grand theft were committed, Talbot was chairman of the board of directors of the Richfield Oil Company of California, Fuller was president, and McKee a vice president and assistant to Talbot. As chairman of the board, Talbot had charge of financing and production, Fuller of refining and marketing, and McKee of accounting. The amount which the defendants are charged in the first count with having conspired to take from the company is $245,325, which is the sum total of the nine overt acts of taking set out in said count. The amounts charged in counts II to X, inclusive, as having been taken by defendants, and the dates on which they were respectively taken, are the same as alleged in count I with reference to the nine overt acts, and each is the amount of a check drawn against the funds of said company.

Prior to becoming chairman of the board of directors of the Richfield Oil Company, Talbot was the president of that corporation, the by-laws providing that the president should have "general and active management of the business of the corporation." When the office of chairman of the board of directors was created, an amendment to the by-laws was adopted providing that such chairman should "share with the president in the general management of the business of the company and the direction of all other officers of the corporation." The transcript of testimony herein impresses the reader with the fact that the very general powers thus delegated were used to their utmost by Talbot, when president of the company, and by Talbot and Fuller later. As one witness expressed it, "it was more or less a two man company," and apparently the directors reposed "absolute confidence" in them. Counsel in their briefs agree that the head of the company exercised "almost autocratic powers" in handling its affairs, from the beginning to the calamitous end. In fact, the only limit that seems to have been imposed on such autocratic powers by the board of directors was in July of 1929, when an amendment to the by-laws was adopted providing that "no single item of capital expenditure shall be made by the company in excess of $50,000" without the approval of one of the two representatives of certain investment bankers on the finance committee of the institution.

With this preamble we shall discuss the case of each appellant separately.

Appeal of J. A. Talbot.

Count II of the indictment, on which this appellant was found guilty, involves a check of the Richfield Oil Company in the sum of $50,000 dated October 2, 1929, payable to the order of Ingoldsby-Giles & Co., a stock brokerage firm in Los Angeles. There is testimony to the effect that this check was issued at the request of Talbot, through McKee, and that Talbot directed that it be charged to his account on the books of the company, but also to charge Fuller's account with $25,000 of it, crediting his, Talbot's, account with a like amount. Talbot testified that he ordered his secretary to send a check for $50,000 to the brokerage firm but that he did not know until later that a Richfield check was sent. His secretary, however, testified that Talbot called her from San Francisco and told her that a Richfield check had been sent to Ingoldsby-Giles & Co., to charge it to his account and to advise the brokerage concern to credit him with $25,000 and Fuller with $25,000. Appellant Talbot had an account with the brokerage firm called "J. A. Talbot No. 7 Account," in which one Newberger, also a director of the Richfield Oil Company, was jointly interested, and also a private account. The brokerage house also carried an account called "Richfield Employees' Account," in which was kept the stock transactions of several officers and employees of the company. Prior to October 2d, money was requested by the brokers "principally for the adjustment of said No. 7 account." Talbot owed said firm on his personal account, on September 30, 1929, $74,024.10, and was short 360 shares of common stock of the Richfield Company of the then approximate market value of $40 per share. Appellant Fuller owed the same firm on October 1, 1929, the

sum of $306,709.73, and apparently the brokerage office was holding at the time, to protect such balance, 8,000 shares of Richfield and 1,000 shares of so-called Fokker stock. Fuller knew nothing of the credit of $25,000 to his account until later, when Talbot told him that it was necessary to advance it to the brokerage firm to keep the stock from being sold.

Count VI, under which, also, Talbot was convicted, involves a check of the Richfield Oil Company dated October 24, 1929, in the sum of $50,000, payable to Fuller and indorsed by him, and signed by Talbot and McKee. Fuller told Talbot a day or so before the check was issued that the brokerage firm had about 17,000 shares of Richfield stock, apparently deposited to cover the account of the "Richfield Employees," carried in the name of their New York correspondent; that margins were being demanded on such account; and that the stock would be sold if the brokers did not get $100,000 immediately. Talbot arranged to have a loan made to Fuller of $50,000 by a certain bank and had the check for $50,000 issued which is the basis of count VI. Fuller then issued his check for $100,000 in favor of the brokerage firm. The $100,000 was not paid in time, however, to stop the sale in New York, but was apportioned to the "Employees' Account" with Ingoldsby-Giles & Co., $59,000 of it going to the credit of Fuller in such account and the balance being apportioned between other names therein. There is evidence which indicates that appellant Talbot knew at the time Fuller's check was delivered by him to the brokerage firm that the 17,000 shares had been sold in the east and that he gave it to the firm because he had promised them $100,000.

For the purpose of proving "felonious intent" evidence was introduced of fourteen Richfield company checks ordered by Talbot aggregating the sum of $186,886.10, which apparently went entirely for the personal use of said appellant and not for any company expense. One of the checks was for $80,000, the balance of the purchase price of his private yacht, and others aggregating approximately $15,000 were for insurance thereon. The evidence also shows that such withdrawals were not authorized by the board of directors and were without the personal knowledge of the directors, with the possible exception of one of the $50,000 checks which was brought to the attention of director Newberger after it reached the hands of the brokerage firm above mentioned. It likewise appears that the withdrawals made were charged in the personal accounts of the respective officers, which were kept under the heading, "Due from officers and employees. Account 418 A." Up to 1927 it was apparently the practice of Peat, Merrick, Mitchell & Co., who audited the books of the Richfield company semiannually, to submit a detailed report of such account to the board of directors, but after that year the practice was changed and two types of balance sheets were made, one "a detailed report supporting the certified statements and giving in greater detail all of the assets and liabilities and discussing them," and the other a "condensed balance sheet," which did not contain the details of the officers' accounts. This "condensed balance sheet usually goes to the stockholders and is printed, published." The detailed report "is a sort of confidential balance sheet for the executives of the company" or "for reference."

As bearing on the question of fraudulent intent and showing his good faith and lack of motive for wrongdoing as charged, appellant Talbot introduced evidence of his financial condition. Such evidence tended to show that his net worth on August 31, 1929, was approximately $5,439,000, consisting of real estate, accounts receivable, secured and unsecured, life insurance, and stocks. Among the latter was an equity in Richfield stocks amounting to $937,697 of the common stock and $24,440 of the preferred. His books showed $20,686.69 in cash in bank at that time. The dividends on his Richfield stock for the year 1929, in excess of $100,000, were left with the brokerage houses holding such stock. It was also shown that during the year 1929 Talbot paid into the market for the purpose of supporting the price of Richfield stock $1,577,571.18, and that $50,000 additional was paid to banks for the reduction of loans secured by Richfield stock, the market price of which had depreciated. Approximately $600,000 of this amount was borrowed from banks during the month of October alone, which went "into the Richfield stock in the market." The evidence further shows that at the end of 1929 the following real estate, as valued on this appellant's personal books, was unincumbered: His home, $350,000; Albany (¼ interest), $20,000; Long Lake, $5,000; and Bakersfield, $15,000, and that by October of 1930 the last of this real estate was encumbered. In January, 1931, Talbot filed a voluntary petition in bankruptcy, due, as he states, "almost exclusively" to his efforts to "stabilize" Richfield stock on the market. On October 1, 1929, he held 58,736 shares of Richfield common stock, but sold about 18,000 shares during the month and bought 14,810 more. He was sold out of the difference by Plunkett & Lillienthal, certain of the brokers he was dealing with. Space forbids detailing anything except the most important points of the evidence.

Appellant urges: (1) That the evidence does not show any criminal or fraudulent intent but on the contrary affirmatively excludes such intent; that the court erred: (2) In finding him guilty as to count VI, whereas appellant Fuller was found not guilty there-

on; (3) in admitting in evidence the "disavowal" resolution of December 8, 1930; (4) in admitting evidence of other acts dissimilar in character and too remote as to time and conditions; (5) in permitting the introduction into evidence of the New York accounts without sufficient foundation laid; (6) in admitting into evidence certain inventories and testimony relating thereto; and (7) in not limiting evidence on behalf of a particular defendant to such defendant.

[1] (1) Appellant contends that it had been his custom, not only in the Richfield Company but in other companies of which he had been an executive, to have drawing accounts against which were charged advances made to officers and employees; that both sums of money he is charged with taking were taken openly and without concealment or any of the other usual indicia of fraudulent acts.

The taking charged as grand theft was on the theory of embezzlement. Section 484 of the Penal Code, so far as material to such theory, provides: "Every person * * * who shall fraudulently appropriate property which has been entrusted to him * * * is guilty of theft." Section 503 of the same Code defines embezzlement as "the fraudulent appropriation of property by a person to whom it has been entrusted." Section 504 provides that "every officer, director, trustee, clerk, servant or agent of any * * * corporation (public or private), who fraudulently appropriates to any use or purpose not in the due and lawful execution of his trust, any property which he has in his possession or under his control by virtue of his trust * * * is guilty of embezzlement." From these sections it clearly appears that fraudulent intent is an essential element of the offense of embezzlement, and such is the ruling of our courts. People v. Mitchell, 74 Cal. App. 164, 240 P. 36; People v. Morley, 89 Cal. App. 451, 265 P. 276. Appellant says that the element of concealment is lacking, and points to the case of People v. O'Brien, 106 Cal. 104, 39 P. 325, as one emphasizing the necessity of concealment as a fact from which fraudulent intent may be inferred. We do not read the case that way. The court decided in effect that the evidence showed simply a case of disputed mutual accounts, which might have been embezzlement if the defendant had not acted openly and without any attempt at concealment.

[2] While secrecy or concealment is evidence of a criminal or felonious intent, nevertheless there may be embezzlement where the appropriation is openly made and consequently without concealment. People v. Connelly, 4 Cal. Unrep. 858, 38 P. 42; Gurley v. State, 157 Ark. 413, 248 S. W. 902; Russell v. State, 112 Ark. 282, 166 S. W. 540.

It is urged that such fraudulent intent must be shown by facts or circumstances independent of and in addition to the act of conversion, and among other cases cited in support of the contention is People v. Royce, 106 Cal. 173, 37 P. 630, 39 P. 524. In that case the treasurer of a corporation received a draft for $10,350 and deposited it in his personal account at a bank, notifying the bookkeeper of that fact. No depository bank had ever been named by the directors of the corporation. Three days after the deposit was made the company received from him the sum of $8,310.35. He was charged with embezzlement. The evidence apparently did not show what became of the balance or that defendant did not have it ready to be produced when called for, and there was no evidence that a demand to produce was made upon him. Under such circumstances no felonious intent was shown.

[3, 4] The element of felonious intent in every contested criminal case must necessarily be determined from the facts and circumstances of the case. People v. Kirk, 94 Cal. App. 378, 271 P. 347. In our opinion the law is well expressed in the case of Mangham v. State, 11 Ga. App. 427, 75 S. E. 512, 516, where the court says: "An officer or agent of a corporation cannot take the money of the corporation which is intrusted to him, or which comes into his possession by virtue of his office or agency, and use it even temporarily for his personal benefit and avoid criminal responsibility by calling it a loan. The law calls such a transaction a wrongful conversion, from which a fraudulent intent can be inferred." See, also, People v. Lyon, 33 Hun [N. Y.] 623, 637; People v. Schrager, 315 Ill. 169, 146 N. E. 151, 154; Orr v. State, 6 Ga. App. 628, 65 S. E. 582; Com. v. Tenney, 97 Mass. 50, 58; State v. Leicham, 41 Wis. 565; People v. Butts, 128 Mich. 208, 87 N. W. 224; State v. Merkel, 189 Mo. 315, 319, 87 S. W. 1186; State v. Kortgaard, 62 Minn. 7, 16, 64 N. W. 51, 55; National Life, etc., Ins. Co. v. Gibson, 31 Ky. Law Rep. 101, 101 S. W. 895, 897 [12 L. R. A. (N. S.) 717]; Gurley v. State, supra; Patterson v. U. S., 39 App. D. C. 84, 90.

[5] The crime of embezzlement is purely statutory, and legislation with reference thereto resulted from the failure of prosecutions under the common-law crime of larceny to reach a case where the possession of property was obtained by consent, and the resulting breach of trust by the agent, officer, or bailee, although it as effectually deprived the owner of his property as though it had been taken out of his possession by stealth, was not punishable at common law. In the case of People v. Gordon, 133 Cal. 328, 65 P. 746, 747, 85 Am. St. Rep. 174, speaking of our Code definition of embezzlement, the court says: "The essential elements of embezzlement are the fiduciary relation arising where one intrusts property to another, and the fraudulent appropriation of the property

by the latter." There would seem to be no hidden meaning in the use of the word fraudulent in such definition. It is true that where, as in the cases of People v. Royce, 106 Cal. 173, 37 P. 630, 39 P. 524, and People v. Page, 116 Cal. 386, 48 P. 326, the money is deposited in the personal account of the defendant but no evidence is introduced showing that it was ever converted to his own use, no "fraudulent appropriation" is shown. But we are sure that if the evidence in such cases showed, without question, an appropriation of the money to the personal use of the defendants, and contrary to the purposes of the trusts, the fraudulent intent would have been imputed to them.

[6] One of the definitions of "fraud" given by the Standard Dictionary is: "Any act * * * that involves a breach of duty, trust, or confidence, and which is injurious to another, or by which an undue advantage is taken of another," and an act is declared to be fraudulent that is characterized by fraud. We think the Legislature used the word "fraudulent," in its definition of embezzlement, to distinguish an "appropriation" by an agent of money or property under circumstances that might be merely tinged with suspicion as to the agent's intent, from an appropriation for purely personal uses of the agent, as contrasted with the purpose for which the money or property was intrusted to him. In other words, in every case where the officers of a corporation who are necessarily intrusted with the money and property of the concern use it, knowingly and intentionally, for their own purposes, there is a "fraudulent appropriation" thereof which is termed embezzlement by the statute, and the fact that such officers intended to restore the money or property is of no avail to them if it has not been restored before information laid or indictment found charging them with embezzlement (Pen. Code, § 512); and even if prior to the bringing of such charges the officers voluntarily and actually restore the property, such fact does not constitute a defense but merely authorizes the court in its discretion to mitigate the offense (section 513). It would seem that the Legislature here has shown in very clear terms that it is the immediate breach of trust that makes the offense, rather than the permanent deprivation of the owner of his property.

[7, 8] In the recent case of People v. Gordon, 206 Cal. 29, 273 P. 568, 571, the defendant, an attorney, was intrusted with the collection of amounts due on certain bonds. The money was collected but only about half of it was paid over to his client by the defendant. When the balance was demanded, the attorney claimed that he was to receive one-half as his fee for collection. The court there said: "Defendant claims there is no showing of fraudulent intent on his part, as his actions were unconcealed and were based upon his understanding that he was to receive half of the sum collected. In our opinion, however, the evidence was amply sufficient to establish the fraud. Defendant's testimony at most raised a conflict, which was resolved by the verdict of the jury in favor of the people. The jury was properly instructed on the subject of the element of specific intent, and its determination of the matter is final." We think the reasoning of that case applies with great force to the one before us. Under the evidence produced by the prosecution serious misappropriations of funds of the corporation are shown, contrary to all authority given and in violation of the trust imposed. The fact that this appellant intended to repay the money taken, or was amply able to do so, is of no avail in the face of the fact that the money was not replaced prior to indictment found. The claim that he used the money in an honest effort to stabilize the price of stock on the market, for the benefit of the corporation and its stockholders and not for the selfish purpose of making his own holdings more valuable, created but a conflict in the evidence which the court, trier of the facts, decided against him, and that determination is final so far as an appellate court is concerned. Neither does the claim that appellant had been accustomed to drawing and using the funds of the corporation for his personal needs, having such withdrawals charged to his personal account and eventually paying the money back by credits due him or payments made by him, relieve the acts from the stain of criminality. Nor can we subscribe to the doctrine that long-continued wrongdoing sanctifies or purifies such conduct. Even if all of the directors of the corporation knew of such custom, the wrong was not made right. They were each charged with the trust to use the funds of the company for company needs, and it might be seriously questioned whether an authorization or ratification by the board of such acts would not have resulted in involving the directors rather than in excusing the officers. That the trial judge understood the law as to intent clearly appears from the record, and in our opinion the evidence amply sustains the conclusion he must have reached thereon.

[9-11] (2) The evidence shows that appellant Talbot signed the check on the Richfield Company for $50,000, which was given to appellant Fuller and went into the $100,000 check given by the latter and which there is evidence to show was finally turned over to Ingoldsby-Giles & Co. by Talbot himself, in accordance with his promise to give them that sum. It is to be remembered, also, that appellant Talbot arranged for the loan to Fuller which made up the balance of the $100,000. If the evidence under the point

now under consideration affects the parties jointly charged alike, the rule invoked by this appellant applies. However, where there is the slightest difference in the testimony as between two jointly tried, the jury or the judge, as the trier of facts, may weigh such testimony and make such difference (Davis v. State, 75 Miss. 637, 23 So. 770, 941); and when that is done, the fact that the evidence also involves the other to some extent will not relieve the one of culpability. We think such rule applies here. People v. Edwards, 72 Cal. App. 102, 117, 236 P. 944.

(3) We see no error in admitting the so-called "disavowal" resolution in evidence. It is true it was passed some time after the acts charged were committed, but it had some bearing on the question of whether they were done with the consent of the board of directors, and this in turn might have had some bearing on the question of the intent of appellant. In addition, each director had also testified that no consent was given.

[12] (4) We have heretofore indicated that in our opinion evidence of the several acts, introduced to show intent, under the circumstances of this case had a direct bearing on the question of fraudulent intent. The fact that some of them were of a later date would not seem to make the admission of testimony concerning them erroneous. Bearing on intent as they do, they showed a continuous practice of the same nature both before and after the acts on which convictions resulted. Widely separated acts might not exclude the idea of inadvertence, but happening as they did here, they bear, in our opinion, even more directly on the question of intent.

(5) We agree with appellant that the statement of the New York accounts should not have been admitted in evidence. While there is evidence showing that both appellants Talbot and McKee knew there was a discrepancy of some kind existing between the accounts of the Richfield Oil Corporation of New York, a subsidiary of the California corporation, and the parent organization, which resulted in the showing of certain expenses as assets and which inflated the profits of the company for the year 1929 as shown by the books, which in turn increased the bonus money divided among the executives, there seems to be no evidence connecting any of appellants with the making of the entries which resulted in such discrepancy. We therefore fail to see how the books themselves could have been properly used against them, much less a summary taken therefrom, the books not being present. But after an examination of the entire cause, including the evidence, we are forced to the conclusion that the judgment of the court would have been the same regardless of such error.

(6) Over the objection of appellant evidence of certain changes made in the inventories on the direction of appellant McKee, which resulted in inflating the showing of profits of the company for the year 1929 and hence increased to a certain extent the bonuses paid on the profits shown for that year, was introduced. The only connection shown with such changes, so far as appellant Talbot is concerned, is that his office was in close proximity to McKee's, probably across the corridor, at the time they were made. The trial judge permitted the evidence to go in, although, as he stated, it would have to be connected up with all defendants and its materiality as bearing on intent shown, otherwise he would entertain a motion to strike. While such changes in the inventories and consequent taking of increased bonus money might be the subject of a separate conspiracy, it could hardly be a part of the conspiracy pleaded, as that was limited to a definite sum, viz., the total of the amount taken by the several overt acts pleaded, none of which included any sums received by way of fictitious bonus payments. Possibly a conspiracy to take money by a different method might have some bearing on the intent with which the takings in the alleged conspiracy were consummated, but on that point we express no opinion. The fact remains, however, that apparently no motion to strike was made when all the evidence as to the changing of the inventories was concluded. Assuming that one had been properly presented and overruled—which ruling, however, so far as appellants Talbot and McKee are concerned, we are compelled to conclude the court would not have made—still we are of the opinion that such evidence did not in any way affect the judgment rendered by the court.

[13] (7) Appellant complains because his motion that the evidence of all witnesses called by a particular defendant be limited to that defendant was denied. Such motion was made almost at the close of this appellant's defense and prior to the introduction of evidence on behalf of his codefendants. The same motion was also made by appellants Fuller and McKee and the same ruling followed. Appellant Talbot cites as an example of the harm done him by the court's ruling the testimony of his codefendant McKee as to the issuance of the check involved in count II, stating that up to that time there had been no direct evidence to show that he, Talbot, personally requested the check to be issued. Prior to McKee's testimony both Talbot and his secretary had testified concerning such check, which testimony we have heretofore referred to. From such evidence the conclusion could readily be drawn that Talbot ordered the Richfield check to be issued and directed its application. The testimony of McKee was corroborative only, and we fail to see how Talbot could have been prejudiced thereby. Nor was he prejudiced by the testi-

mony of McKee regarding the check for $100,000, which was admitted in evidence as against McKee only and which was rejected by Talbot who told McKee he had made other arrangements, viz., the arrangements by which the $100,000 payment was made through the $50,000 check which is involved in count VI and the $50,000 bank loan to McKee arranged by Talbot. The trial court was faced with a delicate situation, in view of the fact that a conspiracy charge was joined with several other joint charges. No motion was made for a separate trial of the conspiracy charge. In our opinion the court did the best it could under the circumstances, and we see no error in the ruling complained of.

Appeal of C. M. Fuller.

Counts III, IV, V, VII, VIII, and IX, upon which this appellant was found guilty, involve checks of the Richfield Oil Company which were charged to the account of Fuller on the books of the company as follows: Count III: Check for $50,325 dated October 2, 1929, used to pay personal obligation of Fuller and Talbot and to release 3,500 shares of Richfield stock so that a larger personal loan could be obtained thereon. Count IV: Check for $5,000 dated October 4, 1929, used for personal expenses of Fuller. Count V: Check for $25,000 dated October 4, 1929, used to protect margin account of Fuller with stock brokers. Counts VII, VIII, and IX involve three checks all dated October 29, 1929, one for $25,000, issued to Fuller, one for $10,000, issued to his secretary, and one for $15,000 issued to his assistant, Randall. The last two were deposited in the accounts of the payees, who gave Fuller their individual checks for the amount of those deposited by them, appellant depositing such individual checks in his own account. Fuller's explanation was that he did not want to deposit in his own account more than the $25,000 check of the company on the same day. He admits the use of the checks as stated.

Appellant Fuller contends: (1) That inasmuch as the conspiracy count upon which he was found not guilty involves as overt acts the same checks for the misappropriation of which he was found guilty, it follows that he should have been found not guilty of the substantive offenses; (2) that there was no proof of the existence of the Richfield Oil Company as a corporation; (3) that subsequent acts were improperly admitted to show prior guilty intent; (4) that the prosecution is estopped to deny the right of appellant to withdraw such sums from the treasury of the company; (5) that the district attorney, "as a representative of the stockholders," is denied the right to accuse appellant of any criminal intent, as the monetary advances received established the relation of debtor and creditor; (6) that verdicts on several counts must not be inconsistent; and (7) that the evidence is insufficient to justify the verdict, as no criminal intent was shown, but good intent was proven.

[14] (1) An essential element of the first count was the criminal conspiracy, which was not included in the nine substantive offenses pleaded, so there was no jeopardy by reason of the verdict of not guilty on such count. People v. Clensey, 97 Cal. App. 71, 274 P. 1018.

[15] (2) We see no merit in this contention. It would hardly lie in the mouth of one profiting by funds unlawfully taken from an entity even pretending to act as a corporation to deny its corporate existence. Appellant could not have been misled under the circumstances, and it would seem to be immaterial whether the Richfield Oil Company was a corporation de jure or de facto, as it clearly appears it was the money of such company that was taken. However, the certificate of incorporation of such company was introduced in evidence without objection.

(3) The contention raised under this numeral is answered in our discussion of the fourth point in the Talbot appeal.

(4) There could be no estoppel on the part of the prosecution to deny the right of appellant to make withdrawals under the facts of this case.

[16] (5) We fail to see how the relation of debtor and creditor is established by the facts and circumstances presented, or how the district attorney could be prevented from prosecuting a criminal charge based on such acts. It is not shown that the stockholders were advised as to what was going on. The evidence is to the effect that since 1927, after which date the large withdrawals for private purposes were made, the details of account 418-A were not sent to the stockholders. Even such details as were sent them before would not put them on notice of the use being put to the withdrawals.

(6) We see no inconsistency in the verdicts.

[17] (7) We have discussed this contention under the appeal of Talbot, and in our opinion the same conclusion must be reached here.

In his reply brief appellant Fuller assigns as additional error the introduction in evidence of the statement taken from the books of the Richfield Oil Company of New York, and also the "disavowal resolution." We have discussed these both under the Talbot appeal, and in our opinion the conclusions there reached are applicable here.

Appeal of R. W. McKee.

It is conceded by this appellant that he was an employee of the Richfield Oil Company of California and that the $15,000 mentioned in count X of the indictment belonged to such company; that such sum was technically or constructively in his possession; and that it

was applied by him to his personal use. On October 24, 1929, one G. A. Smith loaned McKee $15,000, which the latter gave to his stock broker in payment of margins demanded. A few days later Smith was arrested and charged with conspiracy to evade the gasoline tax, his bail being fixed in the sum of $15,000. Some one in Smith's office telephoned these facts to McKee and wanted to know if "we" would furnish the bond. McKee then called the insurance department of the Richfield Company and asked them to arrange it. He was informed that a check had to be posted for the amount of the bond, whereupon appellant ordered a check issued, on November 7, 1929, payable to the Fidelity & Deposit Company of Maryland. This money was later paid to Smith in satisfaction of McKee's loan. Apparently neither appellants Talbot nor Fuller knew of the issuing of the check or of the deposit of the bond until after it was done.

Appellant McKee contends: (1) That the evidence is insufficient to support the judgment; that the court erred (2) in admitting evidence of subsequent withdrawals, (3) in admitting evidence of a mutilated check of the Richfield Company for $100,000, (4) in admitting in evidence certain resolutions guaranteeing loans made by the Bank of Italy to certain groups of officers and employees and testimony concerning same, (5) in admitting in evidence the "disavowal resolution" and (6) the New York statement.

[18] (1) The evidence shows that McKee was also convicted on a later indictment containing three counts charging withdrawals of $1,000, on September 28, 1929; $2,000, on October 4, 1929; and $2,000, on October 22, 1929. Appellant's testimony shows withdrawals in 1929 of $33,450.13 and credits of $15,843.67, of which latter amount $11,045.07 is a bonus credit of date December 31, 1929. He was also credited with an additional bonus in February of 1930, which it is said was due him in 1929, and appellant urges that there was then paid back in 1929 an amount in excess of all withdrawals made, in view of the fact that the account had a debit balance in December of 1928 of $16,873.21. His debit balance on September 30, 1929, two days after the first withdrawal involved here, was $22,532.14, after receiving credits in September for an item of "expense" of $494. The only other credits to the account in 1929 are as follows: October 31st, "Expense," $875; November 30th, "Expense," $426; December 31st, "Expense," $57.10, and the bonus of $11,045.07. In other words, the best that can be said of such showing is that appellant McKee intended to repay, which is no defense. Nor is actual restoration to be considered except in mitigation. Section 513, Pen. Code. We have considered this contention in the appeal of Talbot and see nothing in the facts with respect to this appellant that would change our opinion in that regard. McKee, as an officer of the company, was under Talbot, and made the withdrawal of $15,000 without even the latter's consent, although that could have availed nothing.

(2) There was no error in admitting evidence of subsequent withdrawals.

(3) The check mentioned on this point was issued at McKee's request, thinking Talbot intended to use it in connection with the $100,000 payment to Ingoldsby-Giles & Co. It was rejected by Talbot and a $50,000 check of the company used. Appellant was acquitted on the count to which such testimony relates, and we fail to see how any prejudice could possibly have resulted.

[19] (4) During the first week in November of 1929 appellant Talbot informed the treasurer of the Richfield Oil Company that he wanted to do something for certain employees in the purchase of stock, as a reward for faithful services and also because they had suffered rather heavily in loss of stock, and told him to see McKee and get the details of the plan. The treasurer interviewed McKee, who gave him a list of names of employees, among which was McKee's. The latter then either asked him to go to the Bank of Italy and arrange for a loan of $50,000 or told him that arrangement had already been made. At any rate, the treasurer went to the bank and received a note for $50,000, which he had the several employees so to be helped sign. Subsequently the bank asked for a guarantee of the note and the request was conveyed to McKee, who later gave the treasurer a copy of what purported to be a resolution of the board of directors authorizing the execution of a guarantee of the instrument by the company and a guarantee purporting to have been executed pursuant thereto. The resolution was dated May 7, 1930, and the guarantee May 12th, the treasurer delivering them to the bank. Later, the bank being dissatisfied with such resolution and guarantee, it was presented with others satisfactory to it. Certain checks of the company making interest payments on the note, issued at the request of McKee, were introduced in evidence. Later the bank demanded a payment on said loan, which demand the treasurer communicated to McKee, and a Richfield company check for $20,000 was drawn and sent to him for delivery to the bank. There was no renewal clause in the first guarantee, and the bank asked for another. This request was communicated to McKee by the treasurer, appellant saying, "we will give it to them." Shortly thereafter a purported resolution authorizing the guaranteeing by the company of the $30,000 balance due on said note and a guarantee thereof issued by the company were delivered to the treasurer, who gave them to the bank. Appellant asked the company's attorney to draw up the first resolution, and the latter

advised him that in his opinion the board of directors had no power to make such a guarantee. McKee then told the attorney "that was our instructions" and that he was not asked for advice. It was the introduction in evidence of these three sets of resolutions and guarantees of which this appellant complains.

The money obtained on the $50,000 loan was added to the sum of $26,237.50 obtained by the same employees on another loan, and forwarded to the Bank of Italy in San Francisco to cover a draft drawn by appellant McKee for $76,237.50, with 2,500 shares of Richfield stock attached. A loan of $100,000 was made by the same bank to this group of employees on November 15, 1929, out of which the $26,237.50 loaned was paid, and on April 3, 1930, a check of the Richfield Oil Company for $25,000 was issued and applied on the $100,000 loan. Various other checks of the company were issued at the request of McKee and applied on said loan in payment of either interest or principal. Several of the directors of the company testified that at no time were the resolutions above referred to passed upon or approved by the board. Appellant urges that such guarantees and resolutions were not material to the conspiracy charge because of a date later than the completion of the conspiracy; that his connection with the procuring thereof was open and aboveboard and that, not being on the directorate, he knew nothing of whatever action was taken.

The evidence is almost inextricably interwoven with the payment of interest and principal made with the company's checks of which this appellant had knowledge and which the trial court evidently considered the material part of the transaction. It would seem that, even though subsequent to the conspiracy, there was some evidence connecting joint action by Talbot and McKee in their issuance. It was brought to McKee's knowledge that in the opinion of the attorney for the company the directors had no power to make the resolutions or guarantees referred to. They were apparently executed without any actual meeting of the board of directors, which must have been known by McKee from his connection with their procurement, and, as the court said, might be evidence of other joint offenses indicating intent. In view of the finding of not guilty on count I the court certainly gave no weight to them on any joint charge, and we fail to see how they could have affected the individual charges on which appellant was found guilty.

(5) In view of the testimony of each director that no consent was given to the withdrawals made, we fail to see where any prejudice resulted in admitting in evidence the so-called "disavowal resolution."

(6) We have discussed this point as well as the preceding one in the appeal of Talbot, and the conclusions there reached, in our opinion, apply here.

Judgments and orders affirmed as to each appellant.

We concur: WORKS, P. J.; CRAIG, J.

PEOPLE of the State of California, Plaintiff and Respondent, v. Raymond W. McKEE, Defendant and Appellant.*

Cr. 2236.

District Court of Appeal, Second District, Division 2, California.

May 23, 1933.

Hearing Granted by Supreme Court June 22, 1933.

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Monroe B. Kulberg, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

ARCHBALD, Justice pro tem.

Defendant was charged with grand theft in an indictment containing eighty-nine counts. He was tried jointly with J. A. Talbot and C. M. Fuller before the court sitting without a jury, and at the conclusion thereof it was stipulated that the evidence in such case should be the evidence herein as to counts XVII, XIX, and XX, all other counts being ordered off calendar, also by stipulation. The court found him guilty as to such counts, and from the judgments entered thereon and the orders denying his motions for a new trial defendant has appealed.

Count XVII involves the withdrawal of $1,000 from the funds of the Richfield Oil Company of California on September 28, 1929, and their use by appellant for his own personal purposes, count XIX a similar withdrawal and use of the sum of $2,000 on October 4, 1929, and count XX, the same as to $2,000 on October 22, 1929, the withdrawals, personal use, and the fact that such sums were technically or constructively in appellant's possession being admitted by him.

The contentions of appellant here are raised by the briefs filed in the appeal of McKee in People v. Talbot, Fuller & McKee, 22 P. (2d) 587, files of this court, and such contentions are discussed and decided in the opinion this day filed therein.

Judgments and orders affirmed.

We concur: WORKS, P. J.; CRAIG, J.

*For subsequent opinion see 28 P.2d 1066.

RUSSELL v. RUFFCORN et al.*

Civ. 4731.

District Court of Appeal, Third District, California.

May 23, 1933.

Hearing Denied by Supreme Court July 21, 1933.

1. Corporations ⇐121(1).

Where persons owned none of stock sold, but were made parties to contract of sale merely to collect from purchase price antecedent debts of seller, buyer could obtain no relief against them for seller's alleged wrongful acts in connection with contract.

2. Licenses ⇐39.

Revocation of permit to sell corporate treasury stock automatically released personal shares of stockholder, placed in escrow as condition of permit, and shareholder's promise not to sell such shares without consent of corporation commissioner, so that sale made after release was valid (Gen. Laws 1931, Act 3814, § 4).

3. Licenses ⇐39.

That buyer of corporate shares was not a promoter or organizer, but was member of general public, did not bring him within purview of Corporate Securities Act or relieve him from bad bargain deliberately entered into (Gen. Laws 1931, Act 3814, § 4).

4. Appeal and error ⇐1011(1).

Appellate court cannot interfere with judgment of trial court upon conflicting evidence.

5. Corporations ⇐118.

Physical delivery of corporate shares was waived where buyer knew they were in escrow and closed purchase on basis that he was to procure their release (Civ. Code, § 1754).

6. Corporations ⇐118.

Where corporate shares were in escrow at time of sale to purchaser who knew the facts, there was sufficient "delivery" of them (Civ. Code, § 1754).

[Ed. Note.—For other definitions of "Deliver; Delivery," see Words and Phrases.]

7. Judgment ⇐948(1).

In buyer's action involving contract for purchase of corporate shares, prior foreign judgment for buyer against seller *held* entitled to consideration only as authority on questions of law, and not res judicata, absent pleading or proof (Code Civ. Proc. § 456).

Appeal from Superior Court, Los Angeles County; Elias V. Rosenkranz, Judge.

Action by John L. Russell against Oren Ruffcorn and others. From judgment for defendants, plaintiff appeals.

Affirmed.

Edwin J. Miller and Wier Casady, both of Los Angeles, for appellant.

Lorrin Andrews and Farrand & Slosson, all of Los Angeles, Geo. W. Padgham, of Pasadena, and E. B. Evans, of Monrovia, for respondents.

BURROUGHS, Justice pro tem., delivered the opinion of the court.

This is an appeal by the plaintiff from a judgment in favor of the defendants. The complaint is in four counts, and in so far as it is material to a decision of this appeal, is as follows:

The first count alleges that the plaintiff agreed to purchase from the defendants 3,350 shares of the capital stock of the National Land Value Guaranty Company, a Nevada corporation, at a total price of $167,000, and that he paid thereon the sum of $19,750; that the contract of purchase was made through the defendant Oren Ruffcorn, who was acting for himself, and also as the agent of his codefendants; that at the time of the execution of the above-mentioned agreement, all of said stock was deposited with the Bank of America in Los Angeles, in an escrow proceeding and under the control of the commissioner of corporations, of California, and the defendants were not permitted to sell said stock or to offer the same for sale without the written consent of said commissioner, and they did not have possession of said stock and could not, and did not deliver the same to the plaintiff, and were prohibited by the laws of California from making such delivery, and plaintiff has never received anything of value for the money paid by him to the defendants for said stock; that at the time of the sale and the payment of the money by plaintiff to the defendants, the latter, through their agent, Oren Ruffcorn, represented to plaintiff that they had a right to sell the same, and plaintiff relied thereon and paid the money therefor, and did not learn, until after such payments were made, that the defendants did not have the stock nor the right to sell or deliver the same.

The second cause of action alleges that the defendants, through their agent, Oren Ruffcorn, represented to plaintiff that they owned 3,350 shares of said stock, and also that the corporation owned a large amount of property of great value, and was doing a profitable business, and was earning large sums of money from its business; that the said corporation then had business already on hand which would profit it a million dollars in the near future; that the said corporation was solvent

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*Hearing denied 23 P.2d 1014.

and in good condition and a going concern, and its stock was worth more than its face value; that the plaintiff, not knowing otherwise, believed and relied upon said representations and entered into said contract and paid $18,750 on the purchase price of said stock; that, after he had made said contract of purchase, and after the payment of said moneys, he learned that all of said representations were false and fraudulent; that said corporation had no assets; that its stock was worthless; that it was in debt $190,000 and was insolvent; that the stock which they proposed to sell to plaintiff was impounded in an escrow proceeding in the Bank of America in Los Angeles under the terms of a permit by the commissioner of corporations of California, authorizing the sale of treasury stock of the corporation, and which permit prohibited the sale of said impounded stock without the written consent of the said commissioner, and that such written consent was never obtained; that had he known of the condition of said corporation and the falsity of the representations and the condition of said stock in escrow, he would not have entered into said contract of purchase or paid said money or any part thereof; that shortly before the bringing of this suit, the said corporation was adjudged bankrupt, and that said money paid for said stock became lost to plaintiff, and that he never received anything of value therefor.

The third count is for money had and received by the defendants for the use and benefit of plaintiff in the sum of $19,750.

The fourth count sets out the written contract between the plaintiff and defendants and the proportionate share which each defendant received from the $19,750. It also sets out another written agreement, referred to as the trust agreement, whereby one Emil Nybery was named as a trustee for the purpose of taking title to the escrowed stock of the corporation, and upon performance of the conditions relating to the sale conveying the same to plaintiff, and also for the distribution of the proceeds of the sale of the stock herein referred to between the defendants. Said count of the complaint follows in line with count No. 1 above referred to.

A joint answer to the foregoing complaint was filed by Max B. Ruffcorn, Ola Ruffcorn, and Georgia Ruffcorn, in which they deny that Oren Ruffcorn was acting as their agent, or that they owned said stock, or any interest therein, or that they received from the plaintiff, John L. Russell, any money whatsoever; and further deny any false or fraudulent representations to the plaintiff.

The defendant E. B. Evans also filed a separate answer in which he denies the alleged agency of Oren Ruffcorn or any false or fraudulent representations, or that he is indebted to the plaintiff.

The separate answer of Oren Ruffcorn also denies that in making the agreement he was the agent of the several defendants, or that he was guilty of any fraud, and alleges that the stock sold to plaintiff was his own property and that plaintiff purchased it with full knowledge of all the circumstances surrounding the transaction.

The court found that on February 5, 1926, the plaintiff and the defendant Oren Ruffcorn (but not the other defendants) entered into an agreement whereby the said defendant Oren Ruffcorn agreed to sell and the plaintiff agreed to buy 3,350 shares of the capital stock of the National Land Value Guaranty Company, the corporation above referred to of a par value of $100 per share, for $50 per share; that defendant Oren Ruffcorn was not acting in the making of said contract as the agent of any of the defendants, and that the defendants Max B. Ruffcorn, Ola Ruffcorn, and Georgia Ruffcorn were not the owners of any of said shares of stock; that 3,000 of said shares of stock were the personal property of said Oren Ruffcorn, and that the other 350 shares belonged to the defendant E. B. Evans; that the Evans stock was included in the agreement made by Oren Ruffcorn; that prior to February 16, 1926, the defendant E. B. Evans and the plaintiff herein made an oral agreement whereby Evans agreed to sell to plaintiff and plaintiff agreed to buy said 350 shares of stock at the same price and upon the same terms as set forth in the agreement above referred to; that on February 16, 1926, all of the defendants entered into an agreement among themselves and with one Emil Nybery, as trustee, that the proceeds from the sale of said stock, pursuant to said agreement above referred to, should be distributed when and as received by the said Emil Nybery, acting as trustee, in specified proportions; that the percentage of the proceeds of the sale of said stock to be paid to each of the defendants by said agreement dated February 16, 1926, was made to them in settlement of certain advances of money made by them severally to said Oren Ruffcorn from time to time, covering a period of years prior thereto; that pursuant to said agreement dated February 5, 1926, the plaintiff paid to the defendant Oren Ruffcorn a total of $19,000, which money was distributed to the several defendants, according to their respective percentages as set forth in said agreement, dated February 16, 1926.

It is further found that none of the defendants had possession of the certificates evidencing said stock which was the subject of the agreement of February 16, 1926, at the time of the making thereof or thereafter. And, further, that it is true that the same had been, prior to the making of said agreements, deposited, and was, at the time of the making of the said agreements, in escrow in the Bank of America at Los Angeles, which

deposit in escrow was made pursuant to the terms of a permit issued by the commissioner of corporations of California to the said National Land Value Guaranty Company, by the terms of which permit it was provided that certain shares of the common capital stock of said corporation theretofore issued and then owned by the defendant Oren Ruffcorn and others, in the total number of 6,500 shares, should be deposited in escrow and retained therein until the further order of the commissioner, and that pending the further order of the commissioner, the same should not be sold or offered for sale or agreed to be sold, without the consent of the commissioner; that the permit issued to said corporation for the sale of its stock was prior to the making of the contract hereinbefore first mentioned, revoked, and was not thereafter renewed.

The court also found that it was true that none of the defendants, prior to the commencement of this action, delivered any of the certificates of the stock which was the subject of said agreement between plaintiff and defendants of date February 5, 1926, but it was not true that the defendants refused to deliver the same, or that they were prohibited by law from so doing, but it was the agreement between plaintiff and defendant Oren Ruffcorn and E. B. Evans that plaintiff accepted said shares of stock, although the same were in escrow, and plaintiff accepted from Oren Ruffcorn the transfer of the shares of stock for which he paid, in escrow and expressly agreed with said defendant Oren Ruffcorn and the said E. B. Evans that he (plaintiff) would obtain consent of the commissioner of corporations to the transfer of the stock to himself and that defendants Oren Ruffcorn and E. B. Evans need not secure such consent.

It was also found that it was not true at the time of the sale and the payment of the moneys by the plaintiff to the defendant Oren Ruffcorn that the latter represented to plaintiff that he, or the defendants or any of them, had full right and authority to sell said stock or deliver the same or that plaintiff believed or relied upon any such representations or that plaintiff paid said money on account of such representations. It was also found that the plaintiff knew at the time the contract was entered into that the stock was deposited in said bank pursuant to the said permit of the commissioner of corporations, and knew that the defendants did not have and none of them had, the certificates representing said stock in their possession, and he knew such certificates were actually in said escrow in said bank; that plaintiff had full knowledge of the terms and conditions of said permit and escrow, and made said agreement with such knowledge, and expressly made the same subject thereto.

It was also found that it was not true that the defendants, or any of them, on or about the 5th day of February, 1926, when the contract in controversy was made, or at any other time, by Oren Ruffcorn, or otherwise, represented to plaintiff that they owned 3,350 shares of stock of said corporation, but it was found that defendant Oren Ruffcorn did own 3,000 shares of said capital stock and E. B. Evans owned the other 350 shares of stock, and that on the day last named, Oren Ruffcorn was an officer of said corporation; that prior to said date Max B. Ruffcorn and E. B. Evans had been officers thereof; that neither of the last-named defendants was at the time of the making of the said contract of February 5, 1926, an officer thereof; that it was not true that the last-named defendants knew the condition of said corporation at said time, but it was true that the defendant Oren Ruffcorn knew generally the condition of the corporation at said time, but it is not true that the defendants or any of them represented to plaintiff that the corporation owned a large amount of property of great value or that it was doing a profitable business or making or earning large sums of money from its business or that it already had business on its books which would bring it an income amounting to more than a million dollars within the near future, or that said corporation was solvent or in a healthy financial condition, or that it was a going concern or that its stock was very valuable or worth more than its face value or that if the plaintiff did purchase the same it would from its earnings make him a large income or profit or that they would deliver the said stock to the plaintiff otherwise than as specified in the contract. The court found it to be true that none of the defendants made any representations to the plaintiff as to the conditions of said company or its prospects whereby plaintiff was induced to make said agreement; that the 3,350 shares of capital stock of the National Land Value Guaranty Company, agreed to be sold to plaintiff were issued in the state of Nevada; that the corporation received a valuable consideration for said shares which consisted of certain actuarial tables which were delivered to the corporation in consideration of the issue of said shares of stock of which the 3,350 shares agreed to be sold to plaintiff were a part; that the said stock belonged to Oren Ruffcorn, and on application to the commissioner of corporations of California for a permit to sell treasury stock in the National Land Value Guaranty Company, said commissioner required said stock belonging to Oren Ruffcorn to be deposited in escrow and not to be sold without his consent.

The court further found that the plaintiff was familiar with the conditions of said company, and had for a long time prior to the making of the contract had access to its books and records and knew at the time the contract was entered into as well as the defendants, its prospects for business, and it is

not true that plaintiff did not learn until after the payment of the moneys by him that each and all of the representations alleged in his complaint to have been made to him were falsely and fraudulently made; that it was not true that plaintiff learned after the payment of said moneys that the corporation did not own any property of any considerable value or that it was in debt approximately $190,000, or that it was insolvent, or that it always had been insolvent since its organization, or that its capital stock had no value at all or that the defendants did not have said stock or that the same was impounded in escrow in the Bank of America under a permit of the commissioner of corporations prohibiting its sale or offer for sale; that it is not true that the plaintiff did not know the condition of the said corporation when he entered into said contract.

The court also found that it was not true that on August 1, 1926, or at any other time the defendants or either of them were indebted to the plaintiff in any sum whatever.

Appellant contends that there was a conspiracy by the defendants and that he was entitled to a judgment for the full amount claimed against all of the defendants. This contention is based upon the following admissions and evidence. It was admitted that the stock standing in the name of Oren Ruffcorn was impounded in the Bank of America under the direction of the commissioner of corporations in pursuance of the terms of the permit issued for the sale of the treasury stock of the corporation, which permit forbade such escrowed stock being sold or offered for sale without the written consent of the commissioner. That said written consent of the commissioner was never obtained for the sale of the stock or for the transfer thereof provided for in the contract of February 5, 1926. It was stipulated that the plaintiff paid in actual cash to Oren Ruffcorn $18,750; that the evidence shows that the 3,350 shares of stock were never delivered to plaintiff and no part of them was ever delivered or offered to be delivered or ever transferred on the books of the corporation to him. It is claimed that these admitted and proven facts establish a clear case entitling the plaintiff to a recovery. But, there is certain other evidence which has a material bearing upon the above question as follows: On May 1, 1922, all of the above stock was issued by the corporation in Las Vegas, Nev., and became the property of Oren Ruffcorn. The stock was brought by him to California. Thereafter, and prior to February 5, 1926, the day upon which the contract in controversy was entered into, the National Land Value Guaranty Company desired to sell stock from its treasury and applied to the corporation commissioner of California for a permit to sell certain of its shares of stock in the state of California. Such permit was granted, but as a condition thereof it was ordered that the personal shares of stock owned by Oren Ruffcorn be deposited in escrow in the Bank of America in Los Angeles and as a condition of the permit to sell stock by the corporation, the stock of Ruffcorn was not to be sold nor any contract of sale thereof made without the written consent of the commissioner. Subsequent to the last transaction, but prior to February 5, 1926, the permit to sell treasury stock was, at the request of the corporation, canceled and annulled by the corporation commissioner. That revocation was written upon a blank form in which appears in printed words: "Insofar as said permit authorized or permitted the sale of the shares of said company." Thereafter and on February 5, 1926, Oren Ruffcorn entered into the agreement with the appellant to sell to him the 3,350 shares of stock in said company, and appellant agreed to buy the same under the terms and condition of the written contract and subject to the terms of the escrow. At the time the said contract was entered into, Oren Ruffcorn was indebted to the respondents Max B. Ruffcorn, Ola Ruffcorn, and Georgia Ruffcorn in varying sums of money but none of the Ruffcorns other than Oren Ruffcorn had any ownership or interest in the stock sold. Between the date of making the contract and February 16, 1926, an agreement was reached among the Ruffcorns as to the percentage of the proceeds of the sale of said stock to be paid to each one of them by Oren Ruffcorn in settlement of his obligations to them, which obligations had accrued from time to time, over a period of years prior thereto. Included in the sale of the 3,350 shares of stock by Oren Ruffcorn to plaintiff were 350 shares owned by the respondent E. B. Evans, which the latter had agreed to sell to the appellant at the same price and upon the same terms as set forth in the agreement between appellant and defendant Oren Ruffcorn, and the same were included in the agreement of February 5, 1926, and said Evans was therefore included as a party to the agreement of February 16, 1926, which agreement provided that the stock, subject to the escrow should be conveyed to one Emil Nybery, as trustee, and as the sums of money due under the agreement of February 5, 1926, fell due, plaintiff should pay the same to said trustee, and upon such payments, the number of shares of stock should be transferred by the trustee to appellant, and the trustee should distribute said sums of money to the parties in the proportions named in the agreement of February 16, 1926. In accordance with the provisions of said trust agreement, Oren Ruffcorn did convey all of said stock except 800 shares, which he conveyed directly to appellant, to the trustee. The evidence discloses also that one of the paragraphs of the contract of February 5, 1926, between Oren Ruffcorn and appellant reads as follows: "This agreement is subject to the es-

crow under which said 3350 shares of stock are held by the Corporation Commissioner of California and delivery of certificates representing said stock shall be made as rapidly as permitted by said escrow, and otherwise by the terms of this instrument." On February 16, 1926, Oren Ruffcorn executed his written request to the commissioner of corporations to transfer 716 shares of stock in said company from respondent Oren Ruffcorn, to the appellant John L. Russell, herein. As a part of said transaction and attached to and as a part of the said request, the appellant Russell wrote upon said request the following: "I hereby state that I am familiar with the affairs of the National Land Value Guaranty Company and wish to accept from Oren Ruffcorn the transfer in escrow of 716 shares of the capital stock from the shares now held in escrow in the Bank of America, in his name and which I understand are held subject to your further order. (Signed John L. Russell.)" It further appears from the evidence that for over a year prior to the making of the contract the appellant visited ranchers and landowners in and in the vicinity of Las Vegas, Nev., with one Gifford and talked in favor of mortgages being given by such landowners to the National Land Value Guaranty Company for its stock; that appellant introduced his friends as prospects for the company. In fact, the evidence discloses that the appellant took an active part in the business affairs of the corporation, and on February 9, 1926, four days after the making of the contract of sale, appellant was elected a director of the corporation and its assistant secretary and that on February 23, 1926, he was a member of the executive committee of said company and continued in those official positions both before and long after the payments involved were made by him to the respondent Oren Ruffcorn, and during such time and prior to the payment of the sums involved had his office in the office of said company. The moneys paid under the contract were paid between the 26th day of April, 1926, and July of the same year. As late as October 11, 1926, appellant, as secretary of the company, addressed a letter to the stockholders advocating a consolidation with the Florida Title Insurance Company and one other, in which letter he stated, among other things: "Both of these companies show an excellent financial statement, as you will note by the prospective consolidated statement of these three companies. It is our opinion that in making this contract we have financed your interest for all time, and we believe you will be well pleased with your 1927 dividend."

[1, 2] From the foregoing evidence does it appear as stated by appellant that the defendants joined together in a common enterprise to violate the Corporate Securities Act? The court has found, and the evidence sustains the findings, that Oren Ruffcorn was the owner of 3,000 shares of the stock described in the contract between him and the appellant; that it was his individual stock and that the other Ruffcorns did not own it or any part of it, but that the contract of February 16, 1926, was merely an agreement among all of the Ruffcorns that the antecedent debts of Oren Ruffcorn should be paid to them in certain proportions from the sale of said stock. Such being the case, certainly no judgment could be entered against Max B., Ola or Georgia Ruffcorn, because they were not parties to the contract of February 5, 1926, and the court especially found upon substantial evidence that they did not own any of the stock and that Oren Ruffcorn was not acting for them. We think this disposes of the appeal, as far as they are concerned. The court also found upon substantial evidence that of the 3,350 shares of said corporation, which were included in the contract of February 5, 1926, 350 shares were owned by the defendant E. B. Evans. That the said stock was included in the agreement between Oren Ruffcorn and the appellant upon the same terms and conditions as the stock of Oren Ruffcorn. The court further found upon substantial evidence that none of the defendants were guilty of false or fraudulent representations; that the plaintiff in entering into the agreement of purchase with Oren Ruffcorn, did so with full knowledge of the condition of the affairs of the company, and also with the full knowledge of the terms of the escrow agreement, and that the stock was deposited in escrow. Such being the case, we think that the first question for solution is whether the defendant Oren Ruffcorn was entitled to sell the 3,350 shares of stock and conveyed good title to the plaintiff. This question must be determined from the effect of the order of the commissioner of corporations impounding the individual stock of the defendant Oren Ruffcorn and defendant E. B. Evans, as a condition precedent to the issuance of a permit to the National Land Value Guaranty Company to sell its treasury stock in the state of California. Also the effect of the order of revocation of said permit. It is clear from what has been heretofore said that the stock in controversy belonged to Oren Ruffcorn and E. B. Evans and unless they were restrained by the permit above referred to they had an absolute right to sell the same. People, etc., v. Pace, 73 Cal. App. 548, 238 P. 1089. Conceding for the purpose of this decision, but without deciding that the corporation commissioner was authorized under the provisions of section 4 of the Corporate Securities Act (Deering's Gen. Laws 1931, vol. 2, pp. 1924, 1929, Act 3814), to impose as a condition for the sale by the National Land Value Guaranty Company of its stock, the right to impound the stock owned by Oren Ruffcorn and Evans,

did the revocation of the permit to sell, restore to the owners of the stock the right to sell? The revocation of the permit itself was written upon a blank form which contained the printed words, "In so far as said permit authorized or permitted the sale of shares of said company." It is claimed by the appellant that this revocation only affected the permit to sell the stock of the company, but left the stock owned by Ruffcorn still bound by the permit and that therefore the agreement of sale thereafter made with the appellant was void. We cannot agree with this contention. The permit which was issued to the corporation had for its sole object the sale of a certain amount of treasury stock of the National Land Value Guaranty Company; as a condition to the exercise of that privilege the personal stock belonging to Ruffcorn and Evans was impounded and withdrawn from sale, and the only logical construction to be given to the permit is that when it was revoked, no possible reason or right could exist in still withholding their stock from the owners and we think the following notice to the corporation of the revocation of the permit to sell, shows that it was the intent to make a complete revocation: "Please take notice that the permit * * * and amended permit * * * have been revoked, rescinded and set aside by an order of the commissioner, of which the foregoing is a true copy. Edwin M. Daugherty, Commissioner of Corporations by Earl C. Adams, Deputy." Therefore, on February 5, 1926, when Ruffcorn entered into the agreement with the appellant to sell the stock there was no legal restriction upon his right to do so, it being his own stock. This conclusion is supported by the case of Abbott v. Louisiana Securities Commission, 149 La. 354, 89 So. 211, which is correctly epitomized in the brief filed by counsel for Oren Ruffcorn on January 2, 1931, as follows:

This case "is one wherein, before the passage of the act creating the Securities Commission, a part of the stock of the company which applied for permit, had been disposed of to directors of the company, and after the passage of the act an application was made to the commission for a permit to sell the remainder of the stock amounting to $71,000.00 The plaintiffs (individual owners of the stock) entered into a contract with the commission under the terms of which a temporary permit for the sale of the remainder of the stock was to be granted to the company in consideration of the plaintiffs placing their personal stock in escrow pending determination of the question as to whether permanent permit would be granted or refused. The $71,000.00 in stock of the corporation was sold under the temporary permit after which the commission refused to grant the permanent permit and in its order directed that the stock in escrow should be held until the individual owners thereof should reimburse the purchasers of the $71,000.00 worth of company stock. The suit is brought to recover the escrowed stock and the court held that it should be returned to the owners. It is further stated in said brief, referring to the case last cited:

"That case is quite parallel to the case at bar, the principal difference being that in that case the commission orders that the escrowed stock shall be held, and yet the judgment requires that it be returned, while in the case at bar it is obvious that the California commission had no thought of retaining the stock in escrow after the revocation of the permit.

"If the stock was ever legally impounded, the revocation automatically released it and a suit by Ruffcorn to recover it (as in the Louisiana case) could not add to the potency of the release by the revocation."

In principle, we consider the case of People, etc., v. Pace, supra, as sustaining the point that the revocation of the permit by the corporation commissioner to sell the corporation stock released from the escrow the individual stock of Oren Ruffcorn and E. B. Evans.

We therefore hold that irrespective of whether or not the commissioner of corporations had a right to impound the individual stock of Oren Ruffcorn as a condition precedent to the sale of the treasury stock by the corporation, the revocation of the permit operated to remove the restriction placed upon Ruffcorn and Evans to sell their individual stock.

[3] In answer to the objection that the plaintiff was not a promoter and organizer, but was a member of the general public, such fact does not relieve him from a bad bargain. He knew he was buying the private stock of Ruffcorn; he admitted over his own signature that he was familiar with the affairs of the corporation and the court found upon substantial evidence that there was no fraud practiced upon him. Therefore he could not come within the purview of the Corporate Securities Act, supra.

[4] Under the assignment of error that the stock was owned by the defendants and that Oren Ruffcorn was their agent, it is sufficient to say that the court found that Oren Ruffcorn was the owner of the stock and not the agent of his codefendants. Appellant argues that certain expressions and statements contained in the contract of February 16, 1926, which is signed by all of the defendants, conclusively establishes the joint ownership of all the defendants in and to said stock. But there is other evidence which is direct and positive that said defendants did not own any interest therein but that Oren Ruffcorn was the sole owner and that the trust agreement of February 16, 1926, for the distribu-

tion of the proceeds of the sale of the stock was to pay antecedent debts which Oren Ruffcorn owed to the other defendants; that in so far as defendant Evans was concerned, he was the actual owner of 350 shares of the stock. At best, such a state of the evidence merely raised a conflict as to the ownership of the stock, and upon well-settled principles of law, we cannot disturb the findings of the court. Wilson v. Fitch, 41 Cal. 363; Mah See v. North American Acc. Ins. Co., 190 Cal. 421, 213 P. 42, 26 A. L. R. 123.

[5, 6] Further, concerning the claim that the stock was not delivered to appellant, it is clear from what has already been said that the latter had full knowledge of the condition of the corporation, and as shown by the contract itself, accepted the stock subject to the escrow. It also appears that in a conversation between defendant E. B. Evans, the appellant Russell, and others, concerning the prospective sale of this stock to Russell, that Evans said the stock was in escrow under the direction of the commissioner of corporations, and that he had no right to sell it without the commissioner's consent, and Evans was told that had been taken care of; that he then turned to appellant and asked him if that would be looked after, and he replied that it would. There is other evidence, but we believe the foregoing shows that appellant waived actual physical delivery. Furthermore, under the following authorities, we think there was in fact a sufficient delivery. Section 1754 of the Civil Code, as it stood at the time of the transaction involved, read as follows: "Personal property sold is deliverable at the place where it is at the time of the sale, or agreement to sell. * * *" The rule thus stated has been held to be applicable to a sale of corporate stock in Mattingly v. Roach, 84 Cal. 207, 23 P. 1117. See, also, Driscoll v. Driscoll, 143 Cal. 528, 77 P. 471; Visher v. Webster, 13 Cal. 58. There was a sufficient delivery of the stock.

Plaintiff made a motion for the entry of a different judgment under the provision of section 663 of the Code of Civil Procedure but, from what we have already said, such a motion was properly denied.

[7] Appellant also calls our attention to a decision of the Supreme Court of the state of Nevada, entitled John L. Russell and Another v. Oren Ruffcorn and Another, reported in 10 P.(2d) 632, which he claims is res judicata of the questions involved on this appeal. But an examination of the record before us shows that such claim is unsupported by pleading or proof. This was necessary in this character of action. Section 456, Code Civ. Proc.; Meredith v. Santa Clara Mining Ass'n, 56 Cal. 178; Ex parte Von Vetsera, 7 Cal. App. 136, 93 P. 1036; Simmons v. Threshour, 118 Cal. 100, 50 P. 312. All that we have before us on this subject is a supplemental brief by appellant referring to the cited case, and also a third amended complaint in that action, and a certified copy of the judgment offered ex parte, and also offering to furnish us such additional records of the Nevada case as we may desire to consider the subject. We are of the opinion that in the absence of a proper record presented to the trial court, such decision is only entitled to consideration as an authority on questions of law. A careful reading of the cited case discloses that the action was brought for the purpose of canceling the deed to the real estate which was conveyed by appellant Russell to the respondent Oren Ruffcorn, as a part consideration for the stock sold by said Ruffcorn to Russell under the terms of the contract of February 5, 1926. The relief was granted upon the ground that in making the sale the agreement was void because it violated the terms of the permit issued by the corporation commissioner of California to the corporation to sell its treasury stock in California. However, in reaching such conclusion no mention is made in the decision of the revocation of the permit above referred to, and in that respect, as heretofore set out, there is a vital distinction.

In the case at bar the trial court also found upon the evidence that appellant not only waived delivery of the certificates of stock, but we have held that under the evidence adduced in this case there was a sufficient delivery, while in the cited case the court held that it was the duty of Oren Ruffcorn to have made delivery, and which he failed to do, and therefore there was no consideration passed to appellant. Under such circumstances we do not consider the case as authority here. We have examined the entire record with care and have been unable to discover any error which under the law would warrant us in disturbing the judgment.

The judgment is affirmed.

We concur: PLUMMER, Acting P. J.; R. L. THOMPSON, J.

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PEOPLE v. DRAPER.

Cr. A. 913.

Appellate Department, Superior Court, Los Angeles County, California.

May 20, 1933.

1. Constitutional law ⇐22.

Constitutional amendment effective upon repeal of Wright Act and Eighteenth Amendment *held* without effect upon prosecution for violation of city ordinance forbidding sale of any spirituous, vinous, malt, or other alcoholic liquor, though Wright Act has been repealed (Const. art. 20, § 22; St. 1921, p. 79; Const. art. 11, § 11).

2. Intoxicating liquors ⇐17.

Ordinance forbidding sale of any "spirituous, vinous, malt or other alcoholic liquor" *held* not invalid for uncertainty for failure to specify alcoholic content of "liquor" denounced by ordinance.

"Liquor" means any alcoholic or intoxicating liquid; specifically, one of spirituous character as distinguished from beer, wine; alcoholic or spirituous fluid, either distilled or fermented, as brandy, wine, whisky, beer, etc.

[Ed. Note.—For other definitions of "Alcoholic Liquors," "Liquor," "Malt Liquor," "Spirituous Liquors," and "Vinous Liquor," see Words and Phrases.]

3. Intoxicating liquors ⇐17.

Fact that no state decisions had discussed meaning of "spirituous, vinous, malt, or other alcoholic liquor" disclosed that there was no uncertainty as to its meaning.

4. Intoxicating liquors ⇐17.

Ordinance forbidding sale of any spirituous, vinous, malt, or other alcoholic liquor *held* lawful exercise of police power where ordinance was adopted prior to effective date of Wright Act (St. 1921, p. 79).

5. Intoxicating liquors ⇐17.

Where ordinance forbidding sale of spirituous, vinous, malt, or other alcoholic liquor was valid when adopted, any conflict between it and Wright Act was removed by repeal of Wright Act, so that ordinance thereupon became effective again (St. 1921, p. 79).

6. Intoxicating liquors ⇐11.

Wright Act does not show intention to repeal by implication ordinances existing at time of its adoption (St. 1921, p. 79).

7. Intoxicating liquors ⇐215.

Complaint charging that defendant willfully and unlawfully sold alcoholic liquor contrary to ordinance forbidding sale of spirituous, vinous, malt, or other alcoholic liquor, stated public offense.

8. Municipal corporations ⇐642(1).

Order sustaining demurrer to complaint charging violation of ordinance is in effect a "judgment," as respects appeal, since it is a final adjudication of case against prosecution (Pen. Code, §§ 1238, 1425 et seq., 1466).

[Ed. Note.—For other definitions of "Judgment," see Words and Phrases.]

9. Criminal law ⇐1024(1).

Because of inapt language adopted by cross-reference in Penal Code authorizing appeals by the people, liberal interpretation of terms should be followed (Pen. Code, §§ 1238, 1425 et seq., 1466).

10. Municipal corporations ⇐642(2).

People could appeal from order sustaining defendant's demurrer to complaint charging violation of ordinance forbidding sale of spirituous, vinous, malt, or other alcoholic liquor (Pen. Code, §§ 1238, 1425 et seq., 1466).

Appeal from Police Court of City of Pasadena, Los Angeles County; Kenneth C. Newell, Judge.

Proceeding by the People of the State of California against Anna Draper. From order sustaining defendant's demurrer to plaintiff's complaint, plaintiff appeals.

Reversed, with directions.

J. W. Joslyn, City Prosecutor, Harold P. Huls, City Atty., and W. B. Etheridge, Deputy City Atty., all of Pasadena, for the People.

George Friend, of Pasadena, for respondent.

BISHOP, Judge.

We are required to consider the provisions of Ordinance 1971 of the City of Pasadena as applied in a complaint charging respondent with its violation. So far as pertinent to the questions raised, the ordinance, adopted in 1922, reads as follows: "It shall be unlawful for any person * * * to sell * * * any spirituous, vinous, malt or other alcoholic liquor within the city of Pasadena." To the complaint, charging that respondent, on April 13, 1933, "did wilfully and unlawfully sell alcoholic liquor" in the city of Pasadena, she interposed a demurrer. An order was made sustaining the demurrer; from this order the people appealed. We are of the opinion that the complaint stated a public offense and that it was error to sustain the demurrer.

[1] Section 22, recently added to article 20 of our State Constitution, does not influence this case. Assuming without deciding that when that section becomes operative the ordinance may no longer be enforced, because all control will be in the state as distinguished from its political subdivisions, it is plain that the section is not yet operative. By its

own terms two conditions must concur before it becomes effective: "In the event" the Wright Act (St. 1921, p. 79) is repealed; "and if and when it shall become lawful under the constitution and laws of the United States to manufacture, sell, purchase, possess or transport intoxicating liquor for beverage purposes within the United States." The first event has taken place, but until the repeal of the Eighteenth amendment to the Federal Constitution, the second condition will not be satisfied, for by that amendment the manufacture, etc., of intoxicating liquor for beverage purposes is prohibited. For the present, then, section 22, art. 20 of the State Constitution has no effect whatever, and a city may still without its limitations "make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws." Section 11, Art. 11, State Const.

[2] Respondent contends that the ordinance is invalid because it fails to define what is meant by "any * * * alcoholic liquor," with the result that it prohibits entirely any alcoholic content, even though harmless, or else it is too uncertain to be enforceable. No one, we venture, would have thought of making such contentions when this ordinance was adopted. More immediate familiarity with the Wright Act and kindred statutes which define "intoxicating liquor" by its alcoholic content, measured in fractions of a per cent., must not make us blind to the fact that for years our various legislative bodies and courts knew the meaning of "spirituous, vinous and malt liquor" and "spirituous, vinous and malt alcoholic liquor," without a statutory definition, for they were words in common use and needed no defining.

The first definition of the word "liquor" as given in the Standard Dictionary in 1911 was: "Any alcoholic or intoxicating liquid." In the 1924 edition of the same work we find added: "Specif., one of a spirituous character as distinguished from beer, wine, etc." In Webster's International Dictionary (1892) "liquor" is first defined as any liquid substance, etc., then: "Specifically, alcoholic or spirituous fluid, either distilled or fermented, as brandy, wine, whisky, beer, etc." But little uncertainty, then, would have resulted if the ordinance had prohibited the sale of "liquor," using the word without qualifying terms; no uncertainty at all is to be found in the words which were used; "spirituous, vinous, malt or other alcoholic liquor."

[3] Our attention has been called to no California case, and our research has uncovered none, where the meaning of such a group of words is discussed. The absence of discussion is itself a forceful argument that there is no uncertainty in their meaning, for we find an abundance of cases discussing the validity and application of ordinances and statutes employing them. In Ex parte Campbell (1887) 74 Cal. 20, 15 P. 318, 5 Am. St. Rep. 418, an early ordinance of the city of Pasadena was held valid which made it a misdemeanor to maintain a place "where spirituous, vinous, malt, or mixed liquors are sold or given away." For other cases where similar provisions were discussed (the adjective "alcoholic" not being used) as though the courts knew what the words meant, see: In re Stuart (1882) 61 Cal. 374; Ex parte Benninger (1883) 64 Cal. 291, 30 P. 846; In re Guerrero (1886) 69 Cal. 88, 10 P. 261; In re Lawrence (1886) 69 Cal. 608, 11 P. 217; County of Amador v. Kennedy (1886) 70 Cal. 458, 11 P. 757; Ex parte McNally (1887) 73 Cal. 632, 15 P. 368; Ex parte Mansfield (1895) 106 Cal. 400, 39 P. 775; Ex parte Seube (1897) 115 Cal. 629, 47 P. 596; Ex parte Fedderwitz (1900) 6 Cal. Unrep. Cas. 562, 62 P. 935; John Rapp & Son v. Kiel (1911) 159 Cal. 702, 115 P. 651; Guzzi v. McAlister (1913) 21 Cal. App. 276, 131 P. 336. No more difficulty was encountered when the adjective "alcoholic" was inserted before the word "liquors." For example, in Ex parte McClain (1882) 61 Cal. 436, 44 Am. Rep. 554, our Supreme Court held section 172, Penal Code, constitutional, which prohibited the sale, in the neighborhood of certain state institutions, of "any vinous or alcoholic liquors." In Golden & Co. v. Justice's Court (1914) 23 Cal. App. 802, 140 P. 60, full effect was given to a county ordinance prescribing a penalty for soliciting orders for the sale or delivery of "alcoholic liquors." A similar freedom from doubt as to the meaning of alcoholic liquor appears in Ex parte Sweetman (1907) 5 Cal. App. 577, 90 P. 1069; Golden & Co. v. Justice's Court, supra; Ex parte Ellsworth (1913) 165 Cal. 677, 133 P. 272; Giddings v. Board of Trustees (1913) 165 Cal. 695, 133 P. 479; In re Pappas (1922) 57 Cal. App. 432, 207 P. 483.

In addition to the various ordinances and statutes reviewed in the cases listed, we find that it was quite common for city charters to employ the words "alcoholic liquors," without definition, as descriptive of that which they wished to prohibit or regulate. Note the following: City of Long Beach, St. 1907, p. 1237; City of Palo Alto, St. 1909, p. 1193; City of Pomona, St. 1911, p. 1940 (and 1955); City of Pasadena, St. 1913, p. 1469; City of Alhambra, St. 1915, p. 1776 (and 1798); City of Alameda, St. 1917, p. 1780. If the ordinance under review is too indefinite to be valid legislation, then these charter provisions have had no validity. We are of the opinion that the ordinance was not, because of the uncertainty of its meaning, invalid when adopted, nor do we believe that the words "spirituous, vinous, malt or other alcoholic liquor" have become so obsolete during the years since the passage of the ordinance that its provisions have become uncertain.

[4-7] Respondent also attacks the ordi-

nance on the ground that it was in conflict with the Wright Act, a general state law which prohibited all that the ordinance frowns upon. Respondent is in error in stating that the Wright Act was in effect when the ordinance was adopted. While it is true that the Wright Act was passed by the Legislature in its 1921 session, before the adoption of the ordinance in March, 1922, a referendum held up the state law so that it did not become effective until December, 1922. See In re Brambini (1923) 192 Cal. 19, 22, 218 P. 569. When adopted, therefore, the city ordinance was a lawful exercise of the city's police power. Ex parte Campbell, supra; In re Hixson (1923) 61 Cal. App. 200, 214 P. 677. Conceding that during the life of the Wright Act the ordinance in question could not have been enforced, because in conflict with that general law [People v. De Ferrari (1923) 63 Cal. App. 671, 219 P. 1048], this conflict has been removed by the repeal of the state statute, and there is no reason why the ordinance is not now fully effective. It cannot be said that the ordinance was repealed. It is at least doubtful if the Legislature could repeal a city ordinance. Moreover, as was stated in In re Iverson (1926) 199 Cal. 582, 588, 250 P. 681, 683, "There is nothing in the act [Wright Act] from which an intention can be inferred to repeal by implication any ordinance in existence at the time of its adoption." If, as we have noted, the ordinance was valid when passed and has not been repealed, then the removal of the general law which suspended its enforcement operated to revive the ordinance.

Analogous situations are not unknown; cases dealing with them are instructive. In Byrne v. Drain (1900) 127 Cal. 663, 60 P. 433, the court was considering the contention that certain provisions of a city charter were without effect. It was admitted by all parties that, when adopted, the charter provisions were good. It was also conceded that thereafter the passage of a general law on the subject covered by the charter provisions rendered them inoperative. This was so because of the constitutional declaration that "all charters * * * shall be subject to and controlled by general laws." (Const. 1879, art. 11, § 6.) The problem under discussion arose from the fact that the Constitution was amended in 1896 by inserting before the words "shall be subject to" this expression, "except in municipal affairs." It was held that while the provisions under review (dealing with municipal affairs) had been suspended by the general law with which they conflicted, they became effective with the 1896 amendment removing the controlling influence of the general law. In its discussion our Supreme Court called attention to Seattle Coal & Transportation Co. v. Thomas (1881) 57 Cal. 197, where it was held that the state's insolvency statute, without force while the federal bankruptcy laws were on the books, became effective with the repeal of the federal law. Also it was pointed out that in the case of treaties between the United States and foreign countries, state laws in conflict therewith are not abrogated or repealed, but suspended during the life of the treaties. See, also, City of Santa Barbara v. Eldred (1892) 95 Cal. 378, 30 P. 562.

[8] We have considered this case, as it was presented to us, on the merits. We believe we were warranted in doing this in spite of the uncertainty that exists with reference to the right of the people to appeal, due to the fact that that right is given by a cross-reference (section 1466, Pen. Code) to sections fitted to superior court and not justice court practice. Section 1238, Penal Code. There is no provision made in justice court procedure for a demurrer to the complaint. See sections 1425 et seq., Penal Code; Brown v. Superior Court (1887) 72 Cal. 14, 13 P. 70; People v. Rosenbloom (1931) 119 Cal. App. (Supp.) 759, 2 P.(2d) 228. However, it was stated in Brown v. Superior Court, supra, that where a demurrer is presented and erroneously sustained, in a justice's court, on appeal the order should be reversed with directions to overrule the demurrer. An order sustaining a demurrer, whether it is properly filed or not, is, in effect, a judgment, for it is a final adjudication of the case against the prosecution. People v. Ah Own (1870) 39 Cal. 604; People v. Jordan (1884) 65 Cal. 644, 4 P. 683. People v. Apple (1922) 57 Cal. App. 110, 206 P. 487, does not disturb this conclusion, for there the court was dealing with such an order in the superior court where further proceedings are authorized before the determination becomes final. See, also, People v. Garcia (1931) 120 Cal. App. (Supp.) 767, 7 P.(2d) 401.

[9, 10] Because of the inapt language adopted by the cross-reference authorizing appeals [section 1466, Penal Code], a liberal interpretation of the terms of section 1238, Penal Code, to which reference is made, should be followed [People v. Yates (1931) 114 Cal. App. (Supp.) 782, 790, 298 P. 961], as has been the policy in cases involving cross-reference to sections referring to the manner of taking appeals and the record on appeals. Garrett v. Superior Court (1926) 79 Cal. App. 273, 249 P. 871; Lillywhite v. Superior Court (1926) 80 Cal. App. 533, 251 P. 945. We are of the opinion, therefore, that the present appeal by the people from the order sustaining respondent's demurrer to the complaint presents the merits of the ruling to us.

It is ordered, therefore, that the order appealed from be reversed, with directions that the demurrer be overruled.

McLUCAS, P. J., and FOX, J., concur.

133 Cal.App.Supp. 791

JOB v. EQUITABLE LIFE INS. CO. OF IOWA.

Civ. No. 292.

Appellate Department, Superior Court, City and County of San Francisco, California.

May 10, 1933.

Insurance ⇐516.

In action on life policy providing for payment for "permanent disability," insured was not entitled to recover benefits for five months where insured's total disability had terminated before bringing of action, since insured did not sustain "permanent disability" within meaning of policy.

Policy provided that insurer would pay benefits on proof that insured became totally disabled by bodily injury or disease so that he will thereby be permanently, wholly, and continuously prevented from engaging in any occupation, and that such disability then existed for at least 60 days. Insured was totally disabled for five months only.

[Ed. Note.—For other definitions of "Permanent Disability," see Words and Phrases.]

Appeal from Municipal Court, City and County of San Francisco; Alden Ames, Judge.

Action by John V. Job against the Equitable Life Insurance Company of Iowa. Judgment for defendant, and plaintiff appeals.

Affirmed.

Samuel M. Samter, of San Francisco, for appellant.

Knight, Boland & Riordan, of San Francisco, for respondent.

GOODELL, Judge.

The action was brought by plaintiff as the holder of a life insurance policy issued by the defendant, containing a provision for disability benefits under which plaintiff made claim for $250 on account of disability for a period of five months at the rate of $50 per month.

The paragraph of the policy upon which plaintiff's claim is based is as follows:

"Whenever the Company shall receive due proof * * * that the insured has become totally disabled by bodily injury or disease * * * so that he will thereby be permanently, wholly and continuously prevented from engaging in any occupation whatsoever for remuneration or profit, and that such disability has then existed for not less than 60 days, the Company will thereupon grant the following benefits" (naming them).

The agreed statement shows that at all the times in question the plaintiff was in good standing; that on August 10, 1931, he became totally disabled by a serious tubercular ailment, which disability continued for five months. During that time plaintiff was operated upon and was "wholly and continuously prevented from engaging in any occupation whatsoever for remuneration or profit." After sixty days of disability, plaintiff gave notice and proof to the company. The form upon which this proof was made contained the question, "7. Is disability likely to increase? If not, what is the prognosis?" This was answered by plaintiff's physician as follows "Should be a guarded prognosis." To the question "8 (b) When is he likely to be able to perform work of some kind?" plaintiff's physician answered "Not for some months." The claim was for a disability lasting from August 19, 1931, to January 20, 1932, and this suit was brought thereon on April 6, 1932.

There is no case in this state construing a clause such as that quoted or telling what "permanent" means in such a policy. The appellant relies upon Bagnall v. Travelers' Ins. Co., 111 Cal. App. 714, 296 P. 106, 107, and upon Penn Mutual Life Ins. Co. v. Milton, 160 Ga. 168, 127 S. E. 140, 141, 40 A. L. R. 1382.

The Bagnall Case is not in point. In that case there was a provision in the policy that "pending due proof of a claim * * * that an existing total disability will be permanent and continue for life," certain payments would be made to the insured. It was to collect those payments that that suit was brought. The case does not bear upon the question before us.

The case at bar was commenced after the period of disability, claimed to be permanent, had ended. In Penn Mutual Life Ins. Co. v. Milton, supra, the question presented was thus stated by the court: "Could a disability which had lasted for only 16 months, and from which the insured then recovered, be a 'permanent disability' within the meaning of these clauses of the policy?" The Supreme Court of Georgia in answering that question in the affirmative conceded that "'Permanent' is the antithesis of 'temporary,'" but held that "the fair construction of these words is, not that the total disability shall last or exist forever, but that a disability which existed continuously for no less than 60 days prior to the furnishing of proof is, within the meaning of the policy, a 'permanent disability.'" The disability clauses in the Penn Mutual policy and in the policy now in question are substantially the same.

There can be no doubt that Penn Mutual Life Ins. Co. v. Milton holds that the sixty-day provision modifies and changes the ordi-

218 Cal. 252

LA MAR v. BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N.

JOHNSON v. LA MAR et al.

S. F. 14676.

Supreme Court of California.

June 1, 1933.

1. Appeal and error ⇐1071(5).

Finding on material issue, supported by evidence, against plaintiff claiming gift causa mortis, rendered other issues affecting such question immaterial.

2. Appeal and error ⇐1011(1), 1012(1).

Findings are not reviewable to extent that they rest on preponderance of evidence or consideration of conflicting evidence.

3. Appeal and error ⇐931(1).

Findings must be construed to support judgment if reasonably possible.

4. Gifts ⇐82(2).

Evidence *held* to support finding of want of mental capacity of decedent to make gift of bank book causa mortis as claimed.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Michael J. Roche, Judge.

Action in interpleader by James LaMar, also known as Jim LaMar, against the Bank of America National Trust & Savings Association, formerly known as Bank of Italy National Savings & Trust Association, in which Raymond B. Johnson, as administrator of the estate of Caterina Barbero, also and sometimes known as Rina Barbero, intervened, the action being brought to determine title to money on deposit with defendant. From an adverse judgment, plaintiff appeals.

Affirmed.

Will S. Robenson, of Richmond, and Royle A. Carter, of San Francisco, for appellant.

J. E. Rodgers and A. F. Bray, both of Martinez, and Sylvester Andriano and William R. Lowery, both of San Francisco (W. L. Wollitz, of Oakland, of counsel), for respondent.

Tobias J. Bricca, C. H. White, and S. J. Tosi, all of San Francisco, for Bank of America Nat. Trust & Savings Ass'n.

SEAWELL, Justice.

Caterina Barbero, also known as Rina Barbero, died intestate at Richmond, county of Contra Costa, this state, on January 19, 1931. She was a widow, having been divorced from her former husband, and at the time of her death was, apparently, under middle age. She left no issue of her body. She was a native of Italy and left a father and mother, and other relatives surviving her, but none in this country. She visited her relatives in Italy less than two years before her death. At the time of her death she had on deposit with the savings department of the Columbus branch of the Bank of America National Trust & Savings Association, formerly known as the Bank of Italy National Savings & Trust Association, at San Francisco, the sum of $11,153.88, and with the savings department of the North Beach branch of the same corporation, at San Francisco, the sum of $11,736.74, totaling the sum of $22,890.62.

By proceedings had in the superior court of the county of Contra Costa, Raymond B. Johnson, public administrator, was appointed administrator of decedent's estate.

James LaMar, also known as Jim LaMar, claiming that the decedent had made gifts causa mortis of said savings accounts to him three days prior to her death, demanded of said branch banks that they deliver to him the respective amounts so deposited in the name of Caterina Barbero. Appellant not being able to accompany his demand with any authorization for payment of said accounts or deposits to him, except the presentation of the two deposit or passbooks issued by the branch banks to Caterina Barbero, they refused to acknowledge appellant as the owner of or entitled to receive said deposits. He thereupon commenced suit in the superior court to compel the payment of the deposits to himself.

The administrator of the Caterina Barbero estate intervened and alleged that no valid gifts had been made by decedent to appellant; that undue influence had been exerted by appellant upon the decedent to obtain a manual delivery of said bank books to him; that said alleged donor was mentally incompetent by reason of the dosages of morphine and other drugs administered to relieve her from pain and prevent convulsions, and, also, by reason of a disordered and oedemic condition of the brain which usually attends the disease from which decedent was suffering in its terminal stages. That she was rapidly passing into a state of coma at the time the alleged gifts were made, from which she did not thereafter rally, admits of no serious doubt.

Defendant bank asserted no right or claim to said savings account deposits other than as depositary.

The case was tried by the court without the aid of a jury. The court found that it was untrue that said alleged gift of said two savings accounts or deposits, or either, was made by decedent in contemplation of approaching death and that she did not intend or desire to make a gift thereof to plaintiff;

that plaintiff came into possession of said savings deposit or passbooks by and through undue influence exercised by him upon decedent at a time when she had become mentally and physically weakened by a long period of serious illness, aided by a confidential relation which existed between appellant and decedent; that at the time appellant came into the possession of said savings account or passbooks decedent was entirely without understanding and was unable to appreciate the importance or effect of the transaction by which appellant asserts the delivery and the passing of title to him of said funds in the manner herein related by him and his two principal witnesses. Judgment went accordingly for the intervener, and plaintiff has taken this appeal.

[1] It is well settled that a finding supported by evidence in favor of respondent upon any one of the above material issues, as, for example, a finding of want of mental capacity to make a valid gift, renders other issues affecting that question immaterial. Sherman v. Sandell, 106 Cal. 373, 39 P. 797, 798. It will be sufficient therefore to consider the alleged incapacity of the decedent to appreciate or understand the nature or effect of the act by which appellant claims to be entitled to receive and enjoy said savings deposits as gifts causa mortis. We are of the view that intervener's claims as to the mental incompetency of the decedent are fully sustained, and we will not therefore devote extended consideration to other issues going to the validity of the transaction.

[2, 3] We may in the outset repeat what was said in Sherman v. Sandell, supra, and which has been repeated hundreds of times since: "This issue is purely one of fact, and is to be determined by the trial court; and to the extent that its determination rests upon the mere preponderance of evidence, or upon the consideration of conflicting or contradictory evidence, the finding of the trial court is not open to review in this court. Brison v. Brison, 90 Cal. 334, 27 P. 186." See, also, Coyle v. Coyle, 212 Cal. 715, 300 P. 5.

The rule that the findings of the trial court must be construed to support the judgment, if it is reasonably possible to do so, is so familiar to the practice as not to require any citation of authority to support it.

[4] The record furnishes practically no information as to the personal history of the principals or witnesses. Jim or James LaMar, it appears, was not of Italian blood, but he spoke the language. Neither his age, place of birth, antecedents, or occupation is given. It does not appear whether he was a married man, single, or a widower, or that he was eligible to marry. He alleged in his complaint and testified to meretricious relations having existing between himself and Caterina Barbero for a period of eighteen months prior to her death. By their few acquaintances residing in the neighborhood in which decedent's home was located, she and appellant were presumed to be husband and wife. He testified that he came to her home four or five nights a week. The decedent, it appears, fell ill about December 20, 1931. She did not leave her bed for any appreciable period thereafter. Appellant and Mrs. Mary DeGeorgis, an Italian friend and neighbor, attended her during her illness. Her condition grew gradually worse and on January 4, 1932, Dr. William E. Cunningham, a practicing physician of Richmond, was called to attend her. He diagnosed her condition as acute Bright's disease and found her to be desperately ill. He visited her three times daily. She was taken by ambulance to the hospital on January 17, 1932, in a state of semicoma. The attending physician had upon several occasions insisted that she should go to the hospital, but she did not give her consent to the removal until the third day preceding her death. Upon his first visit he found her to be suffering great pain which required opiates throughout the day to quiet her.

On the morning of January 16th, the day on which the gifts are alleged to have been made, the doctor found the muscles of her body twitching, which is a symptom of uremia and indicative of convulsions or coma. These symptoms usually mark the terminal stage of the patient's life. He administered hypodermically a half grain of morphine and one-hundredth of a grain of hyoscine to quiet the patient, who was very restless. The patient was then apathetic due to toxemia, and her mind was not clear. The doctor visited her again at noon and she was very low and growing rapidly worse. He repeated the hypodermics in the same quantities as were given on the morning visit. The doctor again visited her between 6 and 7 o'clock p. m. of the same day. He urged upon appellant the necessity of taking the patient to a hospital. Her condition was worse than it was in the morning. She was not definitely delirious at that immediate moment, but she was bordering on delirium and was in a restless stage, tossing about and moaning, which usually terminates in delirium. Her mind was not clear. She could answer questions as to suffering pain, but it was the doctor's opinion that she was not capable of understanding or transacting ordinary business. She was suffering great pain and the drugs were administered for the stupefying effect they have upon the brain. The same quantity of morphine and hyoscine were again administered and about one-half hour thereafter, at the time when the opiates should have their deepest effect upon the senses, the alleged gifts were made and the words of donation

which are necessary to the validity of a gift are alleged by appellant to have been spoken.

The deceased was taken to the hospital on the following morning in a state of semicoma and never rallied from halmaturic nephritis and bled freely from both extremities, as shown by the nurse's chart. She was seized with convulsions and suffered from delirium, the usual symptoms of the terminal stages of Bright's disease. The attending physician, who saw the patient three times a day over a period of fifteen days, testified that the brain cells must have been oedemic —dropsical—on January 16, 1932, and in his opinion she was not competent to make a transfer of her property by gift, or to have rationally performed any other business act. Her condition was too advanced to admit of lucid intervals.

Dr. A. W. Hebert, with world war experience in the use of morphine and hyoscine, was called as an expert witness and in answer to a hypothetical question framed upon the condition of decedent on January 16, 1932, including the administration of the opiates and the progressive symptoms of the disease with which decedent was suffering to the time of her death, stated that in his opinion decedent was not able to understand or carry in her mind the nature of her property and the relation in which she stood to the objects of her bounty, free from all delusions or effect of said disease. He was of the opinion that she could not have understood, nor could she have concentrated her mind upon or appreciated the nature or effect of the alleged gift transaction.

Appellant testified that his relations with the decedent were that of husband and wife. This relationship had existed for a period of two years and they intended to enter into the state of marriage in March, 1933. He informed no one of their engagement to marry, which was entered into some six months before Caterina Barbero died. Nothing had been said about marriage during the last few months of their relationship. The home place stood in the name of the decedent, who had built a new house upon the lot purchased by her several months before her death. Appellant, it would seem, made some kind of a claim, or was threatening to make a claim, against the estate in the sum of approximately $2,500 which, after the death of the decedent, he claimed to have put into the new home. No written evidence of his interest in said property was produced.

We now turn to the testimony upon which appellant relies for a reversal of the judgment, which is in conflict with the evidence upon which the trial court based its judgment.

LaMar testified that at about the hour of 6 o'clock on the evening of January 16, 1932, he was at the side of decedent when Mrs. DeGeorgis, who was assisting him in nursing decedent, and her son Pete, entered the room. The doctor had then departed. That Mrs. DeGeorgis asked her how she felt and she replied that she felt better, but a little bit tired. She then "took a sick spell." She told Pete she had to go to a hospital and all present agreed that it would be better for her to receive hospital care. When she had this sick spell she said to appellant, "Jim, I think I am a goner, I will have to go to the hospital," and "I am afraid that I do not come back. In the top drawer of the bureau is where I keep all my things. In my purse there is two bank books, and the keys to the safe deposit box. Get it, I want to give them to you. You have been treating me all right and I know you will do the right thing by my folks and I want you to have everything." He went to the drawer and took out the bank books and key to the safe deposit box and said to her: "This is what you want to give me, and she says 'yes, yes, you can take those, those are for you, and everything they contain.' * * * I started to help her up—I says 'don't worry * * * you are not going to die, we want to help you', and I held her up and tried to comfort her as much as I could, and I took the bank books and put them in my pocket and kept them ever since." On cross-examination he amplified his testimony slightly. He testified that she felt she was pretty sick and thought she was "going." She said she was going to the hospital and she might never come back. He assured her that she was not going to die. She then instructed him to take the bank books. He went to the bureau drawer, took them out, showed them to her, and asked her if they were what she meant him to have. She replied, "Yes, they are for you. You have treated me all right and I know you will do the right thing by my folks. I want you to have everything, you can help them out."

Mrs. DeGeorgis, called as a corroborative witness by appellant, testified that Caterina Barbero protested against going to the hospital, stating that if she went she would never come back. She testified substantially as LaMar did except she said that LaMar placed the books and key in decedent's hands and she handed them back to him. LaMar said to her, "You glad to give this to me, and Rina Barbero say yes, because you do the best you can do for me." LaMar then took the books and put them in his pocket and assured her that she would come back from the hospital well. This witness said that nothing was said by decedent about appellant taking care of decedent's folks. She made no such request. Upon cross-examination Mrs. DeGeorgis identified the color of the bank books as dark brown, when as a matter of fact they were of a light yellow.

The testimony of Pete DeGeorgis was substantially identical with that of LaMar and Mrs. DeGeorgis as to the delivery of the

bank books and the accompanying words of donation. No other persons were present. The following morning the decedent was taken to the hospital in a semicomatose state, where she grew progressively worse. When she arrived at the hospital, she had passed answering questions and no doubt was entering the stage of coma.

As stated in the beginning, this case is purely one of fact and its determination rests upon conflicting and contradictory evidence. The trial court in weighing the physical and mental state which the decedent unquestionably was in on January 16th undoubtedly discredited the testimony of the three witnesses which, if credited, would have been sufficient to have established a lucid interval in her generally clouded mental condition and brought about a different judgment. It may be that the close adherence of said three witnesses as to the exact language used by the parties in relating the delivery of the bank books and the meticulous order in which events were described and the timely acts of the sick woman in complying with the statutory requirements necessary to constitute a gift causa mortis, a procedure with which the best informed laymen are not usually familiar, had a legitimate influence upon the court's mind in arriving at its conclusions. The fact that the attending physician testified that the appellant called upon him a few days after the death of the decedent and complained that he had not given him timely warning that decedent was approaching death, to the end that property matters might have been attended to, would at least create some doubt as to whether the claim of ownership by gift was not an afterthought. Certainly it is the duty of the trial court to scrutinize the evidence offered to establish gifts causa mortis in the circumstances shown by the record in the instant case with great care.

There was no evidence in the case except such as came from the three witnesses who gave testimony as to what transpired at the time the bank books are alleged to have changed hands, that the decedent ever thought she was going to die. The attending physician never told her that she was in a critical condition and surely the appellant, as evidenced by his subsequent exhibition of displeasure at the physician because of his failure to notify him of decedent's serious condition, did not inform her that she was suffering from an incurable malady. The court found that she did not deliver said bank books prompted by a sense of impending death. This finding cannot be disturbed by us.

We are of the view that the court's finding as to a want of mental capacity of the decedent to make the gifts in question is decisive of the case and is sustained by the evidence. This being so, all other issues bearing on the validity of the gifts are rendered immaterial.

The judgment is affirmed.

We concur: WASTE, C. J.; IRA F. THOMPSON, J.; SHENK, J.; CURTIS, J.; PRESTON, J.

218 Cal. 179

Ex parte MARRIOTT.

Cr. 3626.

Supreme Court of California.

May 24, 1933.

1. Automobiles ⇐351.

Complaint charging named individual with misdemeanor for violating Public Utilities Act by willfully operating motor vehicle over public highway without certificate of public convenience and necessity *held* to charge criminal offense punishable by imprisonment, against named individual as individual, and not in capacity of passenger stage corporation which is subject only to fine (Gen. Laws 1931, Act 6386, §§ 2 (dd), 2¼ (b, d), 50¼, 76–78, 80).

2. Habeas corpus ⇐92(1).

Whether one charged with violating Public Utilities Act is private carrier is question of fact for trial court, and not for Supreme Court in habeas corpus proceeding (Gen. Laws 1931, Act 6386, § 50¼).

3. Automobiles ⇐73.
Constitutional law ⇐205(5).

Section of Public Utilities Act which prohibits passenger stage corporation from operating passenger stage over state highway without certificate of public convenience and necessity *held* constitutional, and not discriminatory (Gen. Laws 1931, Act 6386, § 50¼; Const. art. 1, § 21).

4. Statutes ⇐118(1).

Motor Carrier Transportation Agent Act *held* not unconstitutional because act regulates private carriage of passengers for hire by motor stage, which subject is not expressed in title (Gen. Laws 1931, Act 5130b; Const. art. 4, § 24).

Motor Carrier Transportation Agent Act, Gen. Laws 1931, Act 5130b, is not unconstitutional because such regulated subject is not expressed in title, which recites that act is one to define motor carrier transportation agent, and to provide for regulation, supervision, and licensing thereof, and to provide for enforcement of act and penalties for its violation, in view of section 1, which defines a motor carrier transportation agent as a person,

firm, or corporation who, for compensation, sells or offers for sale, or negotiates for, and/or holds himself out as one who sells, furnishes, or provides, as principal or agent, transportation for persons over the public highways of the state, other than a carrier holding a valid certificate of public convenience and necessity.

In Bank.

Application by Charles Marriott for a writ of habeas corpus to secure the release of petitioner from custody on complaints charging violation of the Public Utilities Act and the Motor Transportation Agent Act.

Writ discharged, and petitioner remanded.

Walter H. Robinson, of Los Angeles, and Herbert N. DeWolfe, of San Francisco, for petitioner.

Matthew Brady, Dist. Atty., and August L. Fourtner, Asst. Dist. Atty., both of San Francisco (Orla St. Clair, of San Francisco, of counsel), for respondent.

R. R. Commissioner, Arthur T. George, Ira H. Rowell, and Roderick B. Cassidy, all of San Francisco, amici curiæ.

PRESTON, Justice.

Proceeding in habeas corpus. Petitioner, Charles Marriott, alleges that he is confined upon two criminal complaints, one filed in the San Francisco municipal court, the other in the Fresno police court, both charging a violation of section 50¼ of the Public Utilities Act (Deering's Gen. Laws, vol. 2, Act 6386, title 464, p. 3522 et seq.), which provides that no passenger stage corporation shall operate any passenger stage over any public highway in this state without first having obtained from the railroad commission a certificate declaring that public convenience and necessity require such operation. Petitioner also alleges that he is further deprived of his liberty by a complaint filed in the Los Angeles municipal court charging him with violation of the Motor Carrier Transportation Agent Act (Deering's Gen. Laws, vol. 2, Act 5130b, p. 2545 et seq., Stats. 1931, chap. 638, p. 1362, effective August 14, 1931), section 2 of which provides that it shall be unlawful for any person, firm, or corporation to engage in the business, or act in the capacity of a motor carrier transportation agent within the meaning of the act without first obtaining a license therefor.

We shall first discuss the two charges of violation of section 50¼ of the Public Utilities Act, supra. Conceding, for argument, that he was a common carrier, petitioner urges that the alleged offense was civil and not criminal for the following reasons: section 2 (dd) defines the term "public utility" as including "every common carrier," etc.; section 2¼ (d) defines "common carrier" as including "every 'passenger stage corporation,'" etc.; section 2¼ (b) defines "passenger stage corporation" as including "every corporation, or person * * * engaged as a common carrier, for compensation, in the * * * operation * * * of any passenger stage over any public highway in this state between fixed termini or over a regular route. * * *" Conceding he was engaged in the business last mentioned, petitioner claims he was a "passenger stage corporation" (section 2¼ (b); hence a "common carrier" (section 2¼ (d), and therefore a "public utility" (section 2 (dd), as such subject only to the penalty of a fine (section 76 (a) collectible in a civil action (section 80) conducted by the railroad commission in the exercise of its exclusive jurisdiction of the regulation of public utilities.

[1] There is no merit in this contention. The commission has jurisdiction to issue, cease, and desist orders, institute contempt proceedings, collect fines pursuant to section 80, and to otherwise exercise the authority conferred upon it by said act. But, in addition, the express terms of respective sections make the violation thereof a criminal offense, such as a misdemeanor (section 28 (d) or a felony (section 52 (f). The concluding sections of the act, general in scope, provide penalties in all cases not covered by prior provisions (section 76 et seq.). Thus the sections relied upon by petitioner furnish the procedure for penalizing a public utility through imposition of a fine (section 76), which may be collected in a civil action by the attorney for the commission in the name of the people of the state (section 80). Similarly, section 78 applies to corporations other than public utilities. Section 77, however, applies to individuals and provides: "Every officer, agent or employee of any public utility, who violates * * * this act * * * is guilty of a misdemeanor * * punishable by * * * fine * * * or * * * imprisonment * * * or * * both. * * *" We see no reason why the complaints here in question do not properly state a criminal offense punishable under the above section. Nothing appears in the record to sustain petitioner's claim that they do not charge him as an individual, but that his violation of the act, if any, was committed in his capacity of "passenger stage corporation" (a corporation or a person, section 2¼ (b)—hence a public utility subject only to said sections 76 and 80. The record before us contains a copy of the complaint lodged in the San Francisco municipal court, which shows that the violation is charged against "Charles Marriott," petitioner, in general terms, as follows: "Misdemeanor, to-wit: a violation of the Public Utilities

Act * * *" in that he did "wilfully and unlawfully operate, and cause to be operated, a certain motor vehicle over a public highway * * * without having first obtained * * * a certificate * * *" as aforesaid. No charge is made against the passenger stage corporation as an entity, and the acts charged could only have been committed by petitioner as an "officer, agent or employee" (section 77) of the passenger stage.

[2] But, secondly, petitioner claims that he was, as a matter of fact, a private carrier of passengers, hence not subject to regulation, and that he is entitled in this proceeding to show such fact by evidence dehors the record. Again we cannot agree. This is purely a question of fact for the court below; if it is resolved in favor of petitioner, it will constitute a complete defense to the said two charges against him. Ex parte Meyers, 7 Cal. App. 528, 94 P. 870.

[3] Next, petitioner urges that said section 50¼ is unconstitutional in granting to one class of citizens privileges not granted to all. Section 21, art. 1, of the Const. of Calif. The statute is not discriminatory; it is a valid exercise of the regulatory power conferred by the state upon the railroad commission. Finn v. Railroad Commission, 2 F. Supp. 891, decided March 7, 1933, by the United States District Court, Southern Division of the Northern District of California, and cases there cited.

This brings us to a discussion of the third charge against petitioner, to wit, that of violation of the Motor Carrier Transportation Agent Act, supra, in that he willfully engaged in the business and acted in the capacity of motor carrier transportation agent without first obtaining a license therefor. We may dismiss in short order the several attacks made upon the constitutionality of the act. All of the questions raised, save the one hereinafter mentioned, are thoroughly reviewed in the recent case of People v. Henry (Cal. App.) 21 P.(2d) 672 (decided April 7, 1933, petition for hearing by this court denied), wherein the validity of the statute as a whole is upheld.

[4] The remaining claim of petitioner is that the title to said act is defective, rendering the statute unconstitutional. Section 24, art. 4, Const. of Calif. In other words, petitioner claims that the body of the act regulates three distinct subjects, to wit: First the business of motor carrier transportation agent; second, the private carriage of passengers for hire by motor stage; and third, interstate commerce, but that only the first subject is expressed in the title. This contention is also without merit. The act is entitled: "An act to define motor carrier transportation agent; to provide for the regulation, supervision and licensing thereof, and to provide for the enforcement of said act and penalties for the violation thereof." Section 1 defines such agent as a "person, firm or corporation who, for compensation, sells or offers for sale, or negotiates for, and/or holds himself out as one who sells, furnishes or provides as principal or agent, transportation for persons over the public highways of this state * * * other than a carrier holding a valid certificate of public convenience and necessity." The act regulates no more than the title implies and plainly relates only to regulation and licensing in connection with the negotiation, sale or furnishing of transportation by other certificated carriers. In view of the precise and complete definition given by section 1 to the term "motor carrier transportation agent," it is immaterial that the phrase "private carrier of passengers for hire by motor stage" is not used in either the title or body of the act. No question of interstate commerce is here involved.

The writ is discharged, and the petitioner is remanded.

We concur: SHENK, J.; CURTIS, J.; IRA F. THOMPSON, J.; LANGDON, J.; SEAWELL, J.

218 Cal. 184

In re PITTS' ESTATE.

JANSSEN v. WEIL et al.

S. F. 14383.

Supreme Court of California.

May 24, 1933.

1. Vendor and purchaser ⇐254(1).

Corporation maintaining apartment house in which members of corporation hold apartments *held* to have retained lien on property "leased" as regards right to purchase property from tenant's executrix and offset amount of its claim against purchase price (Code Civ. Proc. § 1570; Probate Code, § 791).

2. Landlord and tenant ⇐70.

In determining nature of estate or interest owned by occupant of apartment house maintained by corporation, each member of which occupied apartment therein, court will look to substance of agreement, not being concerned with designation given it.

3. Executors and administrators ⇐368.

Where corporation maintained apartment house in which each member of corporation held apartment, interest of occupant of apartment was "real property" within statute respecting right to offset lien claim against

purchase price of real property (Code Civ. Proc. § 1570; Probate Code, § 791).

[Ed. Note.—For other definitions of "Real Property," see Words and Phrases.]

In Bank.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

In the matter of the estate of Mae Purdie Pitts, deceased. From an order confirming a sale of real state, Rosina M. D. Janssen, a creditor, appeals, opposed by Dorothy Mae Weil, executrix, etc., and Union Terrace.

Affirmed.

For prior opinion, see 17 P.(2d) 193.

Dunne, Dunne & Cook, of San Francisco, for appellant.

Arnold C. Lackenbach, of San Francisco (Lauder W. Hodges, of San Francisco, of counsel), for respondent executrix.

Hartley F. Peart and Gus L. Baraty, both of San Francisco (Russel Shearer, of San Francisco, of counsel), for respondent Union Terrace.

IRA F. THOMPSON, Justice.

This is an appeal from an order confirming a sale of property by the executrix of the last will and testament of Mae Purdie Pitts, and is prosecuted by Rosina M. D. Janssen, as creditor of the estate, which estate is insolvent. In order that we may understand the question involved, we shall proceed at this point to set down the facts which give rise to the controversy. Union Terrace is a nonprofit, co-operative corporation, organized for the purpose of creating and maintaining an apartment house in which each member of the corporation holds, under an agreement to be described later, an apartment. The articles of incorporation recite, among other purposes, as follows: "* * * each of said members to hold an apartment therein under a written instrument denominated a lease to be executed by said corporation upon the payment by each member of such corporation of the cost of said project as the value of his apartment bears thereto, to be held by him as long as his interest in said apartment is vested in him, but not beyond the term of the existence of the corporation, *conditioned upon his paying periodically such portion of the cost of maintaining said premises as the value of his apartment bears to the value of said premises, and performing such other covenants as may be prescribed in said lease reasonably necessary to protect each member in the enjoyment of his apartment, and of the portions of said premises for the common use of all members.*" No person can become a member of the corporation except the owner of an apartment, and then only upon vote of a majority of the board of directors, which board is comprised of the members. In the by-laws of the corporation a distinction is drawn between a member and an owner in this, that the latter is described as "the person or persons, other than a member, in whom the interest of a former member in an apartment has become vested by the voluntary act of such former member or by operation of law." On April 1, 1922, Fred W. Pitts and Mae Purdie Pitts, as joint tenants, executed one of the instruments denominated a lease, whereby they became entitled to apartment No. 26. There was a mortgage against the apartment house representing a portion of the purchase price, the proportionate share of which for the apartment taken by them was $5,100. The lease recited that they should and Pitts and his wife did sign three notes of $1,700 each, bearing like interest as the mortgage, payable in one, two, and three years, and they also agreed to pay on the first day of each quarter during the term their proportion of the expense of maintaining and operating the apartment house. Subsequently, Fred Pitts died and Mrs. Pitts, as survivor, became the sole owner of the apartment. She signed a new note for $5,100 covering the principal sum of the three notes previously given, and on March 16, 1928, a further note of $2,000, evidencing the balance of her share of the expenses to that date. These two notes comprise the major portion of the claim of $7,760.99, which was presented by the corporation to the executrix with a statement that it was secured by decedent's interest in the apartment, which claim so presented was allowed and approved. The appellant herein is also a claimant, her claim in the sum of $10,102.87 having been presented, allowed, and approved. The apartment was appraised in the sum of $12,500. The executrix proceeded under the provisions of law relating to the sale of real property as they then stood, and the respondent Union Terrace bid the sum of $12,500 for the property, claiming the right under section 1570 of the Code of Civil Procedure to offset the amount of its claim against the purchase price. The appellant objected to the confirmation of the sale upon the ultimate ground that the corporation had no lien upon the property involved. The sale was confirmed.

We must now set out another portion of the instrument denominated a lease in order to correctly present the problem. The parties described as lessee therein covenanted with the lessor as follows: "First: To pay to the lessor during the term hereby granted the rent as above provided, *and any other sums payable by the lessee to the lessor pursuant to any provision of this lease, and perform all the covenants of this lease on the lessee's part* to be performed and in case of the non-payment of any money so payable when due, punctual payment being hereby declared to

be of the essence of this lease, or for breach of any of the lessee's covenants, the lessor may declare the lessee in default thereof, forfeit his membership in the lessor, whereupon all rights of the lessee hereunder shall cease and determine, and sell said apartment as agent of the lessee and out of the proceeds thereof pay the cost of said sale, including a reasonable charge for making said sale, and any money payable as aforesaid by the lessee to the lessor, and render the balance to the lessee; or the lessor may purchase the interest of the lessee by paying to the lessee the value of said apartment as established pursuant to the terms of this lease, after deducting any money payable as aforesaid by the lessee; or the lessor may at its option enter said apartment and let the same as agent of the lessee and after deducting the money payable as aforesaid by the lessee, including a reasonable charge for renting said apartment, render the excess to the lessee; or if while any rent or other sum for which the lessee is obligated by the terms of this lease remains due and unpaid, there shall be under-tenants of the lessee occupying said apartment, or any part thereof, the lessor shall be entitled to demand and receive from such under-tenants the amount of any money payable as aforesaid by the lessee, or so much thereof as the sum or sums due from time to time, or falling due by the lessee from such under-tenant will suffice to pay, and any such payment to the lessor by such under-tenants shall be reckoned a full and sufficient discharge of such under-tenant as between him and the lessee to the extent of the amount so paid to the lessor as aforesaid."

Section 1570 of the Code of Civil Procedure as it stood at the time of the order here in question read as follows:

"At any sale of lands upon which there is a mortgage or lien, the holder thereof may become the purchaser, and his receipt for the amount due him from the proceeds of the sale is a payment pro tanto.

"If the amount for which he purchased the property is insufficient to defray the expenses and discharge his mortgage or lien, he must pay the court, or the clerk thereof, an amount sufficient to pay such expenses."

It is interesting and perhaps somewhat helpful to note that when this section was carried over into section 791 of the Probate Code, the word "lands" was changed to "real property." The general question with which we are concerned is whether the respondent corporation had a lien on the property within the meaning of the quoted section.

It is somewhat difficult to correctly and equitably designate the interest of the decedent in the apartment. However, we can readily understand the purpose and intent of the twofold arrangement. In order to effect a co-operative plan whereby each member might, in effect, own his own apartment and yet be subject to such rules and regulations as a majority should deem wise and expedient, and also be subject to a sale of the entire property when two-thirds of the members should so vote, it was apparently deemed necessary to lodge title in an artificial person, the corporation. But in order to pay common taxes, expenses, and upkeep it was thought desirable to have an instrument which should bind each person to that covenant for the common good and protection of all members, and for the nonpayment of which the lease (or the instrument denominated a lease) was subject to forfeiture by the corporation, i. e., the other members. We entertain no doubt that the members as a corporation intended that the apartment of each other member should stand as security for the faithful performance of the covenants by such member, nor do we entertain any doubt that each member thought his apartment was so encumbered. But we are still confronted by the question of whether their intent is to be given effect and, if so, whether the property is of such a character that it was properly sold as real property. Assuming the propriety of the latter for the time being, let us call to our aid for the purpose of interpretation, the doctrine of the vendor's lien. It finds expression in this state in section 3046 of the Civil Code, which reads as follows: "One who sells real property has a vendor's lien thereon, independent of possession, for so much of the price as remains unpaid and unsecured otherwise than by the personal obligation of the buyer." As so codified the rule is unenlightening; but when we recall that the doctrine is much older than the code and had its origin in the principle of equity that a person who secures the estate of another ought not in conscience to be allowed to keep it and not pay the full purchase price (Martin v. Becker, 169 Cal. 301–315, 146 P. 665, Ann Cas. 1916D, 171), we appreciate perhaps more clearly the justice of respondent's position in the instant case. True it is that some courts have criticized the vendor's lien, on account of its possible secret character; but the original equitable reason remains as vigorous today as it was in the days of the Roman civil law, from which source the doctrine has descended to us by way of the chancery courts of the English system. Not entirely removed from the ancient doctrine is the following excerpt from the case of Beckwith v. Sheldon, 168 Cal. 742–747, 145 P. 97, 99, Ann. Cas. 1916A, 963: "With regard to that part of the judgment which declares a lien on the property of the company, we need only say that, under the well-established principle of equity that that which ought to have been done will be deemed to have been done, it is held that where a party agrees to give a mortgage or lien on property, or imperfectly attempts to execute such

mortgage or lien, upon a valuable consideration received, a court of equity, upon a proper showing, will create a specific lien on the property intended to be hypothecated, and enforce the same. Daggett v. Rankin, 31 Cal. 327; Racouillat v. Sansevain, 32 Cal. 389; Love v. Sierra, etc., Co., 32 Cal. 653, 91 Am. Dec. 602; Remington v. Higgins, 54 Cal. 623; Peers v. McLaughlin, 88 Cal. 297, 22 Am. St. Rep. 306, 26 P. 119; Higgins v. Manson, 126 Cal. 470, 77 Am. St. Rep. 192, 58 P. 907; Hall v. Cayot, 141 Cal. 18, 74 P. 299; Kreling v. Kreling, 118 Cal. 413, 419, 50 P. 546."

[1] With these thoughts as a background we are compelled by a careful examination of the language of the lease to conclude that the corporation retained a lien upon the property. The first alternative granted to the respondent lessor is that in case of the failure of the lessee to pay any sum "pursuant to any provision of" the lease, it "may declare the lessee in default thereof, forfeit his membership in the lessor, whereupon all rights of the lessee hereunder shall cease and determine and sell said apartment as agent of the lessee and out of the proceeds thereof pay the cost of said sale, including a reasonable charge for making said sale, and any money payable as aforesaid by the lessee to the lessor, and render the balance to the lessee." This is an unmistakable provision conferring a power of sale upon respondent in order that it may realize out of the property sufficient to make it—the other members of the corporation—whole. Any other result would be manifestly unjust to the other members, who would not only be compelled to pay decedent's share of the expense, but also to make up her share of the mortgage in order to protect their own apartments.

But appellant says the respondent is not seeking to follow the procedure or any of the alternatives specified in the agreement; that it is limited to one of the four ways there stated and should not be permitted to realize on its lien, if it has one, in the manner here attempted. The argument involves a fallacy in this: That respondent is not attempting and has not attempted to foreclose its lien. Let us assume an ordinary trust deed where the power of sale in the event of default is conferred upon the trustee, or a mortgage with power of sale, could it be seriously argued that the beneficiary in the one case, or the mortgagee in the other, would not be entitled to set off the amount of the note against the purchase price? The manner of foreclosure is not involved in the present action, but rather the question, which we have already answered, whether the respondent had a lien upon the property. It was held as long ago as 1873, in Meyers v. Farquharson, 46 Cal. 190, that a sale by a probate court was not in effect a foreclosure of the mortgage.

[2, 3] Passing now to the nature of the estate or interest of the decedent in the apartment, let us turn to another clause in the lease. It is there said: "In case at any time hereafter the lessor shall determine by the affirmative vote of its board of directors expressed at a meeting duly called for the purpose, to sell the entire property of the lessor above described, then and in such event this lease shall become null and void at the time fixed by the lessor for the consummation of the sale of said property so as to enable the lessor to deliver good title to any purchaser thereof free, clear and discharged of any estate or interest therein. The interest of the lessee in the net proceeds of said sale shall be in the proportion that the value of his apartment bears to the value of the entire property of the lessor established pursuant to the terms of this lease." It will be remembered that the "owner" was designated as one who had acquired an apartment from a member by voluntary conveyance or by operation of law, but who had not been elected a member of the governing board of the corporation. It follows, therefore, both from the expressions of the lease as well as from the general situation, that the right to a proportional part of the sales price attached to the ownership of the interest created by the written instrument, and not to a membership in the corporation. Therefore the lessee not only had a leasehold interest, conditioned upon his payment of his proportion of the expenses of maintenance, but he had a right to have distributed to him upon the sale of the property his proper share of the sales price in such an event, and if a member as well as an owner, to a voice in the general management of the property. We are not concerned with the designation given to the instrument by which his rights were defined, but must look to the substance thereof. City and County of San Francisco v. Boyle, 195 Cal. 426, 233 P. 965; Mahoney v. City and County of San Francisco, 201 Cal. 248–258, 257 P. 49. When we do it is quite apparent that the respondent was vested with a valuable interest in real property. While the corporation held the legal title, yet, to all intents and purposes, the entire equitable estate was distributed proportionately among the owners of the apartments. It is unnecessary to assign a name to the interest thus created. It is sufficient for the purposes of this case to conclude that the ownership of the apartment constituted an interest in real property.

We have already called attention to the fact that the word "lands" in section 1570 of the Code of Civil Procedure was changed to "real property" when the section was incorporated in the Probate Code (section 791). This change more clearly expressed the meaning of the section as it existed before. It is said in Brown v. Sweet, 95 Cal. App. 117, 272 P. 614, 617: "It may be regarded as ele-

mentary that the word 'land' may and does include an estate or interest in the land. Indeed, as stated in Fish v. Fowlie, 58 Cal. 373, it 'embraces all titles, legal or equitable, perfect or imperfect (Leese v. Clark, 20 Cal. 387), including such rights as lie in contract—those which are executory as well as those which are executed.'" See, also, Austin v. American Surety Co., 118 Cal. App. 68, 4 P.(2d) 577. It is manifest that the interest of decedent was real property within the intent of the section of the Code.

Order affirmed.

We concur: LANGDON, J.; PRESTON, J.; SHENK, J.; CURTIS, J.; SEAWELL, J.; SPENCE, Justice pro tem.

218 Cal. 206

DEPARTMENT OF WATER AND POWER OF CITY OF LOS ANGELES v. VROMAN.

S. F. 14899.

Supreme Court of California.

May 26, 1933.

1. **Municipal corporations** ⇐867(2).

Indebtedness created by exercise of power granted board of water and power commissioners of Los Angeles, upon determining that emergency exists, to borrow money payable only out of revenue fund pertaining to municipal works for or on account of which indebtedness was created, is not "indebtedness" of city within constitutional provision requiring vote of people (St. 1925, pp. 1094, 1099, §§ 218 et seq., 225; p. 1098, § 223, as amended by St. 1927, p. 2026; p. 1024, § 224½, as added by Act Jan., 1933; St. 1901, p. 27; Const. art. 11, § 18).

[Ed. Note.—For other definitions of "Indebted; Indebtedness," see Words and Phrases.]

2. **Electricity** ⇐1½.

Board of water and power commissioners of Los Angeles has power to borrow money from Reconstruction Finance Corporation for purpose of constructing transmission line in connection with Boulder Canyon project (St. 1925, p. 1024, § 224½, as added by Act Jan., 1933; 15 USCA §§ 601–617; Boulder Canyon Project Act [43 USCA §§ 617–617t]).

3. **Municipal corporations** ⇐867(2).

Board of water and power commissioners of Los Angeles has power to borrow money and contract for repayment thereof from power revenue fund independent of constitutional provision requiring vote of the people (St. 1925, pp. 1094, 1099, §§ 218 et seq., 225; p. 1098, § 223, as amended by St. 1927, p. 2026; p. 1024, § 224½, as added by Act Jan., 1933; St. 1901, p. 27; Const. art. 11, § 18).

4. **Municipal corporations** ⇐867(2).

Proposed loan and notes evidencing it between Reconstruction Finance Corporation and board of water and power commissioners of Los Angeles for construction of transmission line in connection with Boulder Canyon project, to be repaid from power revenue funds, *held* not to create "indebtedness" of city, within Constitution requiring vote of people, notwithstanding city council's approval by ordinance of establishment of such funds, or other provisions of loan agreement, and agreement to approve rates for electric current sufficient to provide revenue to repay loan (St. 1925, pp. 1094, 1099, §§ 218 et seq., 225; p. 1098, § 223, as amended by St. 1927, p. 2026; p. 1024, § 224½, as added by Act Jan., 1933; St. 1901, p. 27; Const. art. 11, § 18; 15 USCA §§ 601–617; Boulder Canyon Project Act [43 USCA §§ 617–617t]).

5. **Electricity** ⇐1½.

Creation of power revenue funds with approval of city council for repayment of proposed loan from Reconstruction Finance Corporation to board of water and power commissioners of Los Angeles for construction of transmission line in connection with Boulder Canyon project *held* authorized by city charter as matter of internal fiscal arrangements, without making city liable for repayment of loan (St. 1925, pp. 1094, 1099, §§ 218 et seq., 225; p. 1098, § 223, as amended by St. 1927, p. 2026; p. 1024, § 224½, as added by Act Jan., 1933; St. 1901, p. 27; Const. art. 11, § 18; 15 USCA §§ 601–617; Boulder Canyon Project Act [43 USCA §§ 617–617t]).

6. **Electricity** ⇐1½.

Agreement by ordinance of city council to approve rates fixed by board of water and power commissioners of Los Angeles sufficient to provide revenues for repayment of loan to be made to such board by Reconstruction Finance Corporation *held* not unlawful suspension or surrender of legislative power (St. 1925, pp. 1094, 1099, §§ 218 et seq., 225; p. 1098, § 223, as amended by St. 1927, p. 2026; p. 1024, § 224½, as added by Act Jan., 1933; St. 1901, p. 27; Const. art. 11, § 18; 15 USCA §§ 601–617; Boulder Canyon Project Act [43 USCA §§ 617–617t]).

7. **Municipal corporations** ⇐867(2).

That loan agreement between board of water and power commissioners of Los Angeles and Reconstruction Finance Corporation for construction of transmission line in connection with Boulder Canyon project provides for repayment of moneys out of reve-

nues from existing electric system and from revenues from transmission system to be constructed *held* not imposition of "indebtedness" upon city within Constitution requiring vote of people, where it appeared that revenues would be sufficient to repay all obligations (St. 1925, pp. 1094, 1099, §§ 218 et seq., 225; p. 1098, § 223, as amended by St. 1927, p. 2026; p. 1024, § 224½, as added by Act Jan., 1933; St. 1901, p. 27; Const. art. 11, § 18; 15 USCA §§ 601–617; Boulder Canyon Project Act [43 USCA §§ 617–617t]).

In Bank.

Petition by the Department of Water and Power of the City of Los Angeles for a writ of mandate to be directed to James P. Vroman, Secretary of the Board of Water and Power Commissioners of the City of Los Angeles, to compel respondent to sign a contract between the Department of Water and Power of the City of Los Angeles and the Reconstruction Finance Corporation. On general demurrer to petition.

Peremptory writ granted.

Erwin P. Werner, City Atty., Loren A. Butts, Asst. City Atty., Fred M. Bottorff, Deputy City Atty., and Joseph Scott, all of Los Angeles, and Brice Clagett, of Washington, D. C. (S. B. Robinson, of Los Angeles, of counsel), for petitioner.

Guy Richards Crump and W. H. Anderson, both of Los Angeles, for respondent.

SHENK, Justice.

This is an application for a writ of mandate to compel the respondent, as secretary of the board of water and power commissioners of the city of Los Angeles, to sign a proposed contract between the department of water and power of said city and the Reconstruction Finance Corporation. The matter is submitted on a general demurrer to the petition.

From the petition the following facts appear:

The department of water and power is an established charter department of the city of Los Angeles (Stats. 1925, p. 1094, § 218 et seq.), and has charge, superintendence, and control of works for providing and supplying said city and its inhabitants with electric energy for light, heat, power, and other purposes. This department is the successor of the board of public service commissioners of said city (Stats. 1925, p. 1099, § 225), which in turn was the successor of the board of water commissioners created by charter amendment in 1903 (Stats. 1903, p. 555). The department is under the management and control of the board of water and power commissioners, of which the respondent is the secretary. The said works consist of hydroelectric generating plants, transmission lines, and other facilities located partly within and partly without the city.

Prior to May 16, 1922, the distributing lines of said system were of limited extent and supplied approximately 20,000 consumers, or about one-tenth of all the consumers then served with electricity within said city. On May 16, 1922, the department came into possession, by purchase, of the distributing system and business within the city of the Southern California Edison Company, and has since operated the combined systems, serving thereby at this time approximately 269,000 consumers, or about two-thirds of all of the consumers of electricity within the city.

Pursuant to an Act of Congress known as the "Boulder Canyon Project Act," approved December 21, 1928 (43 USCA §§ 617–617t), and under certain contracts entered into by the Secretary of the Interior thereunder, the United States is engaged in the construction of a dam on the Colorado river in the states of Arizona and Nevada for the purpose of erecting a reservoir having a capacity of about 29,500,000 acre-feet of water for the storage of the waters of said river, and in connection therewith it is intended to construct certain outlet works, pressure tunnels, penstocks, and power plant buildings, and to install certain power plant machinery. The power plants and machinery thus to be installed have been leased to certain lessees. Pursuant thereto the petitioner herein will operate a large portion of said electrical machinery. When said dam and electrical works have been completed, 4,240,000,000 kilowatt hours per year of firm electric energy will be available therefrom.

Pursuant to said act of Congress and said contracts the Secretary of the Interior has allocated to the states of Arizona and Nevada and to certain municipalities a public district, and certain private corporations in California, said quantity of firm electric energy to be generated. Under said contracts the petitioner has the privilege of using the falling water from said dam to operate the portion of said electric generating works which are to be operated by it for the purpose of supplying the city and its inhabitants with electric energy, and the petitioner is obligated to pay large sums of money for the privilege of taking the energy so generated. It is intended that the generating works to be constructed by the United States will be ready to deliver electric energy to the petitioner on or about September 1, 1935, and during the first year thereafter the petitioner will be obligated to take an approximate maximum of 767,354,000 kilowatt hours of said electric energy so generated, and this maximum possible obligation will increase from year to year until in the fifth year the maximum possible obligation will require the taking of 1,482,307,000 kilowatt hours at the generating plants.

Included in the municipalities to which electric energy has been allocated under the contracts with the Secretary of the Interior are the cities of Pasadena, Glendale, and Burbank in Los Angeles county, and those cities will be served by means of the transmission lines which the petitioner is required by contract to construct in order to transmit electric energy from the power plants at the dam to the city of Los Angeles, and it is necessary that the construction of said transmission lines and receiving lines and switching facilities be commenced at the earliest possible moment in order that the same may be in readiness to take said electric energy as soon as the same is available at the generating plants.

For the purpose of supplying the funds for the construction of said transmission lines and facilities in connection therewith the petitioner has heretofore made application to the Reconstruction Finance Corporation (hereinafter called the corporation), a public corporation organized and existing under the laws of the United States, and being an agency of the federal government for financial aid, among other things, in constructing certain electrical works. On February 1, 1933, the board of directors of the corporation adopted certain resolutions agreeing to advance to the petitioner the sum of $22,800,000 as a loan to be used in paying the cost of said transmission lines and facilities. Thereafter on April 22, 1933, the executive committee of the corporation, by resolution, authorized the execution of a contract providing for said loan on certain terms and conditions, and on that day said contract was executed by the treasurer of the corporation on its behalf.

On April 25, 1933, the board of water and power commissioners (hereinafter called the board), adopted certain resolutions declaring the necessity for the immediate construction of said transmission lines and facilities; that the revenues from the electrical system now operated by the petitioner and from the works to be constructed will be sufficient to pay the expenses of the contemplated work and to pay the principal and interest on all of the outstanding general bonds of the city heretofore issued for the construction and acquisition of electrical works by the city and to pay the principal and interest on the proposed loan from the corporation; that said loan be authorized; that notes of the department of water and power be executed to evidence said loan in installments as made; that a reserve fund be established to insure the application of the proceeds of said loan to the purposes for which they are to be made; that the city council be requested to approve by ordinance that portion of the contract which provides for the fixing of rates and charges for electric service to consumers sufficient to pay the principal and interest of said loan and other obligations of or on behalf of the board, payable out of the power revenue fund; that the city council be requested to express by ordinance its intention with respect to the issuance within the period during which any portion of said loan remains unpaid of bonds or other evidence of indebtedness payable out of the power revenue fund, and that a reserve fund be established to insure the payment when due and payable of the principal and interest on said loan.

The pertinent sections of the proposed contract or loan agreement between the corporation and the petitioner provide: In section 1, for the loan of $22,800,000 in installments commencing as soon as practicable after compliance by the department with the conditions imposed, the obligations to be evidenced by nonnegotiable notes of the department. In section 2 (f) that the notes "shall provide that the department shall not be obligated to make any payment thereunder as to principal or interest except out of the power revenue fund provided for by and established pursuant to the provisions of the charter of the city of Los Angeles * * * or out of the reserve fund to be created out of the power revenue fund as provided in section 10 hereof." Section 3 provides that the money loaned shall be used only for the purposes named, and that the department will by resolution of the board establish, subject to the approval of the city council by ordinance, a reserve fund to be known as the "Power Transmission Construction Reserve Fund" to insure the application of the proceeds of the loan to the designated purposes. In section 5 the department agrees that, subject to the approval of the city council by ordinance, it will fix rates and collect charges for electric energy distributed by it for use within or without the city, in such amounts as will provide revenues at least sufficient to pay, as the same shall become due, (a) the necessary expenses of conducting the business of the department pertaining to the power system; (b) the principal of and interest on said notes; (c) the principal and interest on all other obligations of the department or of the city payable out of the power revenue fund at any time having priority over or being on a parity with said notes; and (d) all other obligations and indebtednesses payable out of the power revenue fund. In section 7 the department agrees that, at least thirty days prior to any recommendation or other action by it with respect to the issue hereafter of any bonds, notes, or other obligations payable out of the power revenue fund (with an exception not necessary to be noted), it will notify the corporation of the amount of the proposed issue and the terms, conditions, and purposes thereof. The department then expresses its intention, without incurring any legal obligation or lia-

bility, not to recommend or take any other action, except with the written consent of the corporation, in favor of the issue, hereafter, of any bonds, notes, or other obligations issued as evidences of indebtedness payable out of the power revenue fund, unless it shall simultaneously take like action in favor of the issue of at least an equal principal amount of general bonds of the city or other evidence of indebtedness payable out of the power revenue fund for the purposes of retiring said notes, and to cause the proceeds of said general bonds to be applied to the retirement of said notes, in so far as the department may lawfully do so; and in this connection the department expresses its intention, without incurring any legal obligation or liability, not to recommend or take any other action in favor of the issuance, hereafter, of any bonds, notes, or other obligations payable out of the power revenue fund, which would increase beyond $62,000,000 the principal amount of their outstanding obligations (including the notes here in question), payable out of the power revenue fund, having priority over or being on a parity with said notes, if the corporation shall have notified the department within fifteen days after the aforesaid thirty days' notice that it considers that such proposed additional issue would adversely affect the interests of the holders of said notes.

In section 10 the department agrees that it will, by resolution of the board, subject to the approval of the city council, by ordinance, establish a reserve fund, to be known as the "Power Notes (Reconstruction Finance Corporation) Reserve Fund," to insure the payment when due and payable of the principal and interest on said notes; such fund to be created and maintained by apportioning and setting apart moneys out of the power revenue fund to said reserve fund periodically so that the moneys so set apart shall be available for the payment of the maturing principal of said notes at least two months before the same matures. The department further agrees that, pursuant to the provisions of section 223 of the city charter (St. 1925, p. 1098, as amended by St. 1927, p. 2026), it will apportion and set apart out of the power revenue fund each year, so long as any of the notes remains unpaid, an amount sufficient to pay at maturity all sums coming due in said year for principal and interest upon all general bonds of the city issued for the purposes of the power system, and that it will comply with all requirements of law relating to the payment of principal of or interest on such bonds out of the power revenue fund.

In section 17 it is provided that the corporation shall not be under any obligation to make said loan unless ordinances of the city council shall have been duly enacted in manner and form satisfactory to it (a) approving the creation of the reserve fund provided for in section 3, (b) approving the agreement of the department with reference to the fixing of rates and charges contained in section 5, (c) approving the creation of the reserve fund provided for in section 10, and (d) expressing the council's intention to the same effect as the intention of the department expressed in section 7.

Additional facts set forth in the petition should be stated in order to understand the objections interposed by the respondent. At the close of the fiscal year on June 30, 1932, the department had under its management and control assets pertaining to electrical works, after provision for current outstanding liabilities, of the approximate value of $86,000,000. At various times from April 19, 1910, to August 31, 1926, bonds of the city of Los Angeles were authorized for purposes of electrical works, in the aggregate amount of $50,500,000. All of these bonds were authorized by a vote of the people of the city pursuant to section 18 of article 11 of the Constitution and the Bond Act of 1901 (Stats. 1901, p. 27); and said bonds have been issued and sold except $3,000,000 of the $11,000,000 authorized on August 31, 1926. By the charter of the city a certain fund was created designated as the power revenue fund. Into this fund have been deposited the proceeds of the $47,500,000 of bonds heretofore issued and sold and all revenue from other sources, including that derived from the sale or use of electric energy in connection with the electrical works of the city. From this fund all payments of principal and interest on said outstanding bonds have been made when due without resort to general taxation to meet the same to the extent of $10,966,000 on principal and $18,054,467 on account of interest. General funds of the city have heretofore contributed to said power revenue fund the sum of $5,867,495, more than one-half of which has, from time to time, been returned to the general funds of the city. The board has by resolution declared its intention to return the balance thereof to the general funds of the city from time to time until the same is fully paid at the close of the fiscal year 1934–35.

On March 20, 1933, the chief electrical engineer and general manager of the bureau of power and light in said department submitted a report to the board, which is set forth in full in the petition, from which it appears that the anticipated revenues from the electric works of the city for each fiscal year during the period provided in said loan agreement for the repayment of said loan will be more than sufficient to pay all the expenses of maintenance and operation of said works during each fiscal year, including all sums coming due during such fiscal year under said contract with said corporation, and to pay all sums coming due during such fiscal year

for principal and interest upon all outstanding bonds of the city and obligations issued for the purposes of said works, including the obligations to be issued to evidence the loan of $22,800,000 from said corporation, and to leave large sums still available from said revenues for extensions and betterments. Also, that such revenues will be sufficient for all of said purposes without increasing the rates for service to consumers of electric energy; that the rates now charged for such service are only about two-thirds of the average of the rates charged in large cities generally throughout the United States for similar service; that, without undue burden on consumers and without raising the same to such average, the rates now charged could be increased so as to make available all sums required for the payment of both principal and interest on the proposed loan from the corporation out of the excess of revenues resulting from such increase, over and above the revenues which would be received without such increase.

With the foregoing factual background and financial set-up in contemplation, the respondent contends that the contract, if executed, would be illegal: (1) Because the contract provides for the repayment of moneys to be borrowed out of revenues from the existing electrical works of the city as well as revenues from the transmission system proposed to be constructed out of the moneys so borrowed, thereby incurring an indebtedness by the city of Los Angeles in violation of section 18 of article 11 of the Constitution; (2) because said contract provides for the repayment of moneys out of the power revenue fund of said department, notwithstanding the fact that there are now outstanding general obligation bonds of said city issued for the purposes of the works to which said power revenue fund pertains and with respect to which the board is required each year to apportion and set apart out of said fund an amount or amounts sufficient to pay at maturity all sums coming due thereon, and that thereby an indebtedness on behalf of the city will be incurred without an election and in violation of the same section of the Constitution; (3) because the board has no power, either with or without the approval of the city council, to enter into an enforceable contract to maintain rates for service to electric consumers sufficient to provide for all existing charges against the power revenue fund and to pay at or before maturity the principal and interest on the loans now proposed; and (4) because said contract provides that the total amount to be borrowed is to be advanced by the corporation in the form of six (or under certain circumstances three) separate and distinct loans, at as many different times, each of which is to be repaid in equal annual installments during the period of ten years from the date of advancement of said loan, except that no installments are provided for during the first three years following the advancement of each installment, whereas the city charter, in section 224½ thereof, provides that an equal proportionate part of the entire amount borrowed must be repaid in each year during not to exceed twenty years, subject to the provision that no payment of principal need be required during the first three years following the date of said loan.

[1] In the consideration of the questions presented, it is of prime importance to determine who are, in law, the contracting parties, and the nature of the indebtedness or obligations to be incurred. Under the city charter the board of water and power commissioners is granted extensive powers. These powers are set forth in article 22 of the charter, adopted in 1925 (Stats. 1925, p. 1094), and subsequent amendments. Under these provisions the board is granted power, upon determining that an emergency exists, to borrow money payable only out of the revenue fund pertaining to the municipal works for or on account of which the indebtedness was created. It has long been settled that the indebtedness so created is not an indebtedness of the city as contemplated by section 18 of article 11 of the Constitution. Mesmer v. Board of Public Service Commissioners, 23 Cal.App. 578, 138 P. 935; Shelton v. City of Los Angeles, 206 Cal. 544, 275 P. 421. The emergency has been declared to exist in the present case and all of the preliminary proceedings required by the charter and otherwise by law have been complied with. The Shelton Case involved the power of the board to issue notes payable out of the water revenue fund, also under the control of the board. The power revenue fund is in the same legal situation. When the Shelton Case was decided the charter (section 224) provided that the indebtedness so created should be payable in not to exceed five years. Obviously anticipating the necessity of financing the construction of the transmission line from the Colorado river to the city, and having in view the probable uncertainty and difficulty in obtaining money elsewhere, the people of the city ratified a proposed amendment to the charter, and the same was approved by the Legislature in January, 1933. This section is numbered 224½ and reads in part as follows: "The board is hereby authorized to borrow money from the federal government or the state government, or any duly authorized agency created by either of said governments and acting therefor, to defray the expenses of construction work in the department."

[2] The board is thus specially granted the power to borrow money from the federal government. The Reconstruction Finance Corporation is an authorized agency of the federal government (47 Stats. 5 [15 USCA §§

601–617]), as described in the charter amendment, and the Emergency Relief and Construction Act of 1932 (47 Stats. 714 [see 15 USCA § 602 et seq.]), contains the authority for the loan for the purposes now contemplated.

[3-5] Under the charter provisions and the decisions of the courts of this state, the board has ample power to borrow money and contract for the repayment thereof from the power revenue fund independent of the limitations of section 18 of article 11 of the Constitution. The loan agreement sought to be signed, and the notes to be issued as evidence of said loan, are in no sense obligations of the city. The charter in legal effect so provides, the loan agreement in terms so provides, and the notes to be issued will so provide. Furthermore, the charter by necessary implication prohibits the levying of any taxes for the repayment of said loan. The source of repayment is the revenue collected for furnishing electric energy, and in the manner provided by the charter. The fact that the city council has approved, by ordinance, the establishment by the board of the "Power Transmission Construction Reserve Fund," and the "Power Notes (Reconstruction Finance Corporation) Reserve Fund," in no sense makes the city itself a party to said loan agreement. The creation of such funds, with the approval of the city council, is authorized by the charter as a matter of internal fiscal arrangement. Nor are we able to conclude that the city council's approval by ordinance of other provisions of the loan agreement with reference to limitations on future action concerning the issuance of obligations, etc., payable out of the power revenue fund, creates any binding obligation on the part of the city itself. The ordinance specially states that no legal obligation or liability is incurred thereby, and the ordinance in this respect is at most an expression of intention.

[6] The ordinance which agrees on the part of the city council hereafter to approve rates fixed by the department for electric energy sold by it sufficient to provide revenues to meet the requirements of said loan, so long as any portion of the indebtedness of the board thereunder remains unpaid, may in terms constitute the city, to that extent, a party to said loan agreement, but no indebtedness or liability is thereby incurred in the sense that the general revenues of the city are thereby pledged, or payment therefrom anticipated. It is insisted that this ordinance is an unlawful suspension or surrender of legislative power within the doctrine of Thompson v. Board of Trustees, 144 Cal. 281, 77 P. 951. Under appropriate circumstances the doctrine there announced would apply, but as to the facts now presented we find in section 223 of the charter, as amended in 1927 (Stats. 1927, p. 2026), a binding obligation on the part of the board to apportion each year out of the revenues from electric energy, sufficient to pay at maturity all sums coming due on obligations of the board, as well as sums coming due on all outstanding general bonds of the city issued for the purposes of the electric works, with certain exceptions not necessary to be noted. There is therefore a legal obligation on the part of the board, in fixing rates, to do what the city council has now agreed that it will approve, and there is at least an implied duty on the part of the city council under the charter to do what it has by ordinance agreed to do, i. e., to approve adequates rates for electric service. Clearly no unlawful suspension or surrender of legislative power has taken place. The charter contemplates that the department shall be self-sustaining, and the requirement of approval by the city council by ordinance of the rates fixed by the board was obviously imposed, among other things, to insure the fixing of rates reasonable and adequate for all required purposes.

[7] We attach no particular significance to the first objection, as such, viz., that the loan agreement provides for the repayment of moneys to be borrowed by the department out of revenues from the existing electric system as well as from revenues for the transmission system proposed to be constructed, and that thereby the constitutional provision is violated. If it has any importance it is in connection with the second objection which is to the effect that, although the moneys to be borrowed are payable only out of the power revenue fund, said fund may prove to be inadequate, and the general taxpayers may in that event be required to pay taxes to meet the sums to become due on the general bonds of the city heretofore issued for the construction and acquisition of a municipal electric system, thus rendering the loan agreement and the notes to be issued pursuant thereto without the scope of the special fund doctrine to which this state is committed. See Shelton v. City of Los Angeles, 206 Cal. 544, 275 P. 421; In re California Toll Bridge Authority (City and County of San Francisco v. Wentworth), 212 Cal. 298, 298 P. 485; California Toll Bridge Authority v. Kelly (Cal.Sup.) 21 P.(2d) 425. It would seem that the Shelton Case alone had placed the revenue funds under the control of the board definitely in the category of special funds, the obligations against which are not responsive to section 18 of article 11 of the Constitution; but it is insisted that this court in Garrett v. Swanton, 216 Cal. 220, 13 P.(2d) 725, has so limited the special fund doctrine as to exclude the present case from its application. To this we cannot agree, and the cases are readily distinguishable. In Garrett v. Swanton the contracting party was the

city, a governmental entity held directly submissive to the constitutional mandate. Here the contracting party, in so far as concerns the incurring of the indebtedness or liability, is not the city of Los Angeles, as a municipal corporation, but is an independent municipal agency not controlled by the constitutional provision. It is true that, if the contingency should arise that the funds of the department should be so depleted as to be insufficient to satisfy all of the obligations enjoined by contract and by the charter upon it, then the taxpayers might be called upon to provide the revenue with which to pay the principal and interest on certain outstanding general bonds. But the electors in authorizing those bonds bound the taxpayers constitutionally to meet those payments, and nothing has occurred since the issuance thereof which would relieve them of that burden, unless it may be said that by the charter amendment subsequently adopted the obligation to pay them has been transferred by the fundamental law of the city from the taxpayers to the board.

Each case must necessarily rest upon its own facts. On the showing here made, the department is and will be able, not only to repay the proposed loan from the federal government, but will also be able to meet, as provided by the charter, the obligations heretofore assumed by the city by general bond issue for electric system purposes. Under such circumstances the taxpayers would be in no position to complain by reason of the proposed loan, and under the law the special fund doctrine may be applied in its most comprehensive sense. We therefore conclude that the city, as such, has not by its own act incurred, nor is the board proposing to incur, an indebtedness or liability in violation of the constitutional provision.

Counsel for the petitioner have exhaustively reviewed the authorities from other jurisdictions bearing upon the special fund theory, in an endeavor to show that the holding in Garrett v. Swanton, supra, is contrary to the weight of authority. In view of our conclusion that that case could in no event be controlling under the facts and the law here presented, it is unnecessary to review or comment on the cases cited.

What has been said disposes of the third objection of the respondent in favor of the petitioner. The fourth objection, obviously without merit, is not pressed for determination.

Let the peremptory writ issue as prayed.

We concur: TYLER, Justice pro tem.; CURTIS, J.; LANGDON, J.; IRA F. THOMPSON, J.; SEAWELL, J.; PRESTON, J.

BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N v. CALIFORNIA SAVINGS & COMMERCIAL BANK et al.

FIGUEROA et al. v. SAME.

L. A. 13645.

Supreme Court of California.

June 1, 1933.

Rehearing Denied June 30, 1933.

1. Banks and banking ⇐179.

Where, under tripartite agreement, cotton dealers to whom creditor bank extended acceptance credits, were to deposit security with pledgeholder bank, two-party agreement executed between creditor bank and pledgeholder without dealers' knowledge, whereby pledgeholder in effect guaranteed dealers' drafts accepted by creditor bank, *held* not in fraud of dealers' rights.

2. Banks and banking ⇐80(6).

Where, under tripartite agreement, pledgeholder bank was to hold, as security for acceptance credits extended by creditor bank to cotton dealers, money and sufficient cotton to equal 115 per cent. of outstanding drafts, and balance to credit of dealer's account, allegedly representing proceeds of pledged cotton, was not needed to make up the 115 per cent., creditor bank and dealers *held* not entitled to preference on pledgeholder bank's insolvency.

Such proceeds were released from any lien in favor of creditor bank by reduction of dealers' total indebtedness to creditor bank to figure where balance to credit of such account in form of ordinary general account was not needed to afford creditor bank the 115 per cent. margin of security provided for by tripartite contract.

3. Banks and banking ⇐80(6).

As respects priorities where, under tripartite agreement, cotton dealers to whom creditor bank extended acceptance credits were to deliver to another bank, as security therefor, money and warehouse receipts and bills of lading for cotton, latter bank *held* pledgeholder as to cotton (Civ. Code, § 2993).

4. Banks and banking ⇐80(6).

Where money is made subject of pledge, trust, or special deposit, identity of particular money delivered need not be preserved in specie, as by setting it aside in marked bag or package.

5. Banks and banking ⇐80(2).

As respects priorities, in ordinary commercial transactions with banks or individuals, where money is made subject of pledge, trust, or special deposit, intent that identity of money should be preserved in specie will not be presumed, in absence of clear expression thereof.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

6. Banks and banking ⇐119.

In case of general deposit, relationship of bank and depositor is that of debtor and creditor, and funds deposited become part of bank's general assets which bank may use in conducting general banking business.

7. Banks and banking ⇐80(6).

As respects priorities, when nature of transaction is such that depositor obviously does not intend bank to use deposit in general banking business, bank must keep on hand cash in sum equal to such deposit and those of similar depositors, and is not authorized to use such funds in general banking operations.

8. Banks and banking ⇐80(6).

As to deposits which it was not intended bank should use in general banking business, depositors are entitled to preference on bank's insolvency to extent that bank's cash has not been reduced below amount of such deposits.

9. Banks and banking ⇐80(6).

As respects priorities, where deposit is made as security for performance of obligation of depositor to third person, deposit is one for special purpose, and bank has no right to use amount thereof in general business.

10. Banks and banking ⇐80(6).

Where, under tripartite agreement, cotton dealers, as security for acceptance credits extended by creditor bank, were to deposit money with pledgeholder bank, such money *held* deposit for special purpose which bank had no right to use in general banking business.

11. Banks and banking ⇐80(8).

Ordinarily, holder of cashier's check is general creditor of insolvent bank.

12. Banks and banking ⇐80(6).

Where cotton dealers, under tripartite agreement, were to deposit money with pledgeholder bank as security for acceptance credits extended by creditor bank, fact that pledgeholder bank, without dealers' knowledge, held deposit in form of cashier's checks payable to creditor bank, could not alter dealers' rights, nor did creditor bank, by assenting to drawing of such checks, lose right to rely on tripartite contract as creating deposit for special purpose.

13. Banks and banking ⇐80(6).

That bank which, under tripartite agreement, was to hold security pledged by cotton dealers for acceptance credits extended by third party, was described as "trustee," and was not licensed to do trust company business, *held* not to require conclusion that security was not to be held by bank by way of special deposit as pledgeholder.

14. Banks and banking ⇐80(6).

Special depositors do not have lien on entirety of general assets, but preference in bank's lowest cash balance between date of deposit and closing of bank.

Special depositors are in effect tracing and reclaiming their own property, rather than asserting preference in bank's general assets, and hence, where bank's cash balance at any time after receipt of special deposits falls below amount thereof, identity of special funds is lost, and preference of special depositors does not extend to general assets or to subsequent increases in cash balance, but as to such receipts special depositors are on a par with general depositors.

15. Banks and banking ⇐80(6).

Where cotton dealers, in lieu of directly pledging money to secure debt, delivered check which pledgeholder bank sent to correspondent bank for collection and credit to pledgeholder bank's general account, and where pledgeholder bank drew against such account as cash, proceeds of check *held* in nature of special deposit entitled to preference on pledgeholder bank's insolvency, where cash in vaults of pledgeholder bank always exceeded claim of cotton dealers and their creditor.

16. Banks and banking ⇐135.

Where creditor bank and cotton dealers had joint claim against insolvent bank, consisting partly of special deposit and partly of dealers' general partnership account, and balance in insolvent bank's general account with creditor bank was applied in reduction of such joint claim, *held* such payment should be applied on the special deposit, not to reduce balance in general partnership account.

Such payment should not be applied to reduce balance in partnership account, since this would allow claimants for preference full payment of portion of balance in such account, as to which they were not entitled to preference over general creditors of insolvent bank.

17. Banks and banking ⇐80(3).

Where resistance to payment to special depositors by superintendent of banks as trustee of bank in liquidation is not unreasonable or vexatious, but exercise of reasonable discretion in interest of all parties, special depositors should not be allowed interest by way of damages.

In Bank.

Appeal from Superior Court, San Diego County; Clarence Harden, Judge.

Action by the Bank of America National Trust & Savings Association, successor to the Bank of America of California, against the California Savings & Commercial Bank and

others, wherein Jose Figueroa and Edward G. Brittingham filed a cross-complaint against the California Savings & Commercial Bank and Edward Rainey, as State Superintendent of Banks, and as trustee in charge of the California Savings & Commercial Bank in liquidation. From so much of the judgment as denied plaintiff and cross-complainants a preference for a certain sum, plaintiff and cross-complainants appeal, and from so much of the judgment as allowed plaintiff's and cross-complainants' claim as a preferred claim for a certain sum, defendant Bank and the Superintendent appeal.

Modified, and, as modified, affirmed.

Freston & Files and J. A. McLaughlin, all of Los Angeles, for Bank of America.

Zack Lamar Cobb and Earl A. Littlejohns, both of Los Angeles, for Figueroa and Brittingham.

Elbert W. Davis, J. H. Hoffman and Sullivan, Roche, Johnson & Barry, all of San Francisco, for Edward Rainey, Superintendent of Banks.

PER CURIAM.

The question presented by this appeal is whether the Bank of America National Trust & Savings Association, a national banking association, and Jose Figueroa and Edward G. Brittingham, to whom the defendant California Savings & Commercial Bank is admittedly indebted in the sum of $27,674.44, are general depositors and creditors of defendant bank or are entitled to receive payment in full as preferred creditors, or special depositors, from the cash in its vaults on July 23, 1930, when it was taken over as an insolvent institution by Will C. Wood, superintendent of banks of the state of California. Edward Rainey, successor to Will C. Wood as superintendent of banks, has been substituted as a defendant herein in place of Wood. The superior court of San Diego county, by the judgment appealed from, has decreed that the sum of $16,000 was deposited for a special purpose, and that Figueroa and Brittingham and Bank of America are preferred creditors as to said sum, but general creditors for the balance of their claim in the amount of $11,674.44. The Bank of America and Figueroa and Brittingham have appealed from said judgment in so far as it denies them a preference for the sum of $11,674.44. The defendant superintendent of banks concedes that the Bank of America and Figueroa and Brittingham are entitled in the aggregate to a general claim for $27,674.44, but appeals from that portion of the judgment which allows said creditors a preferred claim for $16,000.

By the complaint as originally filed, the Bank of America sought to have its status as a preferred creditor of the California Savings & Commercial Bank established, or, failing such relief, to obtain a personal judgment against Figueroa and Brittingham for the sum of $15,075.62, later reduced to $9,226.73. Figueroa and Brittingham denied personal liability to the Bank of America for any sum whatsoever, and by cross-complaint asserted a preferred claim for $27,674.44 against the California Savings & Commercial Bank, and further claimed, as against the Bank of America, that, by reason of its participation in the three-party transaction which will be fully related hereafter, said bank had rendered itself personally liable to them for said sum. By stipulation the plaintiff Bank of America dismissed as to defendants Figueroa and Brittingham, and Figueroa and Brittingham as cross-complainants dismissed as to Bank of America as cross-defendant. It was agreed that the case should go to trial on the sole issue of whether said Bank of America and Figueroa and Brittingham were entitled to recover $27,674.44 from the California Savings & Commercial Bank as general creditors or on a trust or preferential basis, and that any judgment entered in their favor should be a joint judgment. The rights of Figueroa and Brittingham and the Bank of America inter se were made the subject of a separate suit filed in Los Angeles county. We are this day affirming the judgment in favor of Bank of America in said Los Angeles county action, L. A. No. 13611 in this court. Bank of America National Trust & Savings Ass'n v. Figueroa, 22 P.(2d) 712.

The case herein was tried on a stipulation of facts from which it appears that the rights of the parties are based on a tri-party contract executed by them on April 24, 1930, and herein denominated the Exhibit A contract. Figueroa and Brittingham, dealers in cotton, are referred to as the "Shippers." They needed credit to finance their operations in the buying and selling of cotton on a large scale, which the Bank of America of California, to which plaintiff Bank of America National Trust & Savings Association is successor, was able to extend to them. Said Bank of America of California, with its principal office in the city of Los Angeles, is referred to in said contract as the "Bank," and the defendant California Savings & Commercial Bank, with its place of business in the city of San Diego, is referred to throughout said contract as the "Trustee." The Bank of America therein agreed to extend to Figueroa and Brittingham, who appear to have been copartners, "acceptance credits" not to exceed $160,000 during the six-month period from April 21, 1930, to October 15, 1930. This figure was later reduced to $90,000 by consent. The acceptance credit was to be made available to Figueroa and Brittingham in the following manner: As they needed funds, they were to deliver to the California Sav-

ings & Commercial Bank at San Diego sixty-day drafts drawn on the Bank of America by themselves, Figueroa and Brittingham, payable to their own order and by them indorsed in blank. The San Diego bank was to transmit said drafts to the Los Angeles office of the Bank of America, for acceptance and discount and sale by said Bank of America as prime banker's acceptances. The agreement provided that the proceeds of the acceptances should be "deposited with the Bank [Bank of America] to the credit of the Trustee [San Diego bank] for the account of the Shippers [Figueroa and Brittingham]."

By accepting said drafts prior to sale by it, the Bank of America rendered itself liable to the persons who became the holders thereof. Figueroa and Brittingham agreed to pay all drafts punctually at maturity, and for this purpose to deposit with the Bank of America at least twenty-four hours before noon of the day of payment Los Angeles funds equal to the amount of maturing drafts. To secure performance of this obligation of Figueroa and Brittingham to the Bank of America, the Exhibit A contract contains provision for security to be delivered to the California Savings & Commercial Bank as "Trustee." It is therein provided that the Shippers should deliver to the California Savings & Commercial Bank "$24,000 in lawful money of the United States," and also negotiable warehouse receipts and bills of lading evidencing cotton owned by them in such quantities that the value of said cotton, plus the $24,000, should at all times equal 115 per cent. of the amount of outstanding drafts drawn by the shippers and accepted by the Bank of America. The value of said cotton was to be determined from the price on the New York Cotton Exchange.

The $24,000 represents 15 per cent. of the total acceptance credit of $160,000, and the sum of $16,000, to which the deposit was later reduced, is approximately 18 per cent. of $90,000, the amount to which the total acceptance credit was reduced by consent.

The agreement further provided that, if at any time the value of the "cotton pledged," plus the deposit in lawful money, fell below 115 per cent. of the amount of drafts outstanding, the Bank of America was authorized to direct the California Savings & Commercial Bank, as trustee, to sell a sufficient quantity to restore the required margin in the event that the shippers failed to deliver additional security in the form of cash and warehouse receipts or bills of lading for cotton. If the shippers failed to pay at maturity, any draft accepted for their benefit defaulted in respect of any of their undertakings in the agreement contained, made an assignment for the benefit of creditors, or went into bankruptcy or receivership, the Bank of America was authorized to sell the "collateral pledged" by itself or by the trustee, acting under the bank's direction, at public or private sale. Any surplus realized from the sale over and above the amount due the bank on acceptances was to be paid to the shippers.

The shippers further agreed to pay all expenses and commissions incident to the contract and to insure the cotton pledged. They agreed that the credit made available to them by the Bank of America should not be used for purposes of speculating or for the manipulation of the market, and that cotton should be purchased only for the fulfillment of bona fide orders received from buyers.

[1] On April 24, 1930, the same day that the triparty Exhibit A agreement was executed, the Bank of America and the California Savings & Commercial Bank entered into a contract to which Figueroa and Brittingham were not parties and of which they had no knowledge. They urge in the case herein, and more particularly in the companion appeal, L. A. No. 13611, that said contract, Exhibit B, was in fraud of their rights, and altered the terms of the Exhibit A contract. We are unable to agree with this contention. Said Exhibit B is in effect a contract of guaranty by which the California Savings & Commercial Bank assumed liability for the drafts accepted by the Bank of America for the benefit of the shippers, and agreed to indemnify and hold the Bank of America harmless on account thereof. It simply afforded the Bank of America additional security, in the form of a guaranty by the California Savings & Commercial Bank, and of this Figueroa and Brittingham had no cause for complaint. There is no showing that the Exhibit B contract was intentionally concealed from them.

As noted above, the case was submitted upon stipulations of facts, from which it appears that on April 21, 1930, three days before execution of the Exhibit A contract, Figueroa and Brittingham, in contemplation of the provision therein requiring them to deliver "24,000 in lawful money" as security, delivered to the California Savings & Commercial Bank their check for $24,000 drawn on an El Paso, Tex., bank, and said check was forwarded by the San Diego bank to the Los Angeles office of the Bank of America "for collection and credit to the account of the California Savings and Commercial Bank." The Bank of America seems to have been the Los Angeles correspondent of the California Savings & Commercial Bank, which maintained a general account with the Bank of America. On payment of said $24,000 check, the Bank of America, as directed, credited said general account of the California Savings & Commercial Bank. From time to time the California Savings & Commercial Bank drew checks against said general account, and made deposits therein. On July 23, 1930, the date of the closing of the California Savings & Commercial Bank, there was a balance of $3,401.18 in the account,

which by consent has been credited to the claim of Figueroa and Brittingham and Bank of America to reduce it from $31,075.62 to $27,674.44.

The California Savings & Commercial Bank drew its cashier's check for $24,000, dated April 21, 1930, and payable to the order of the Bank of America, and held said check until May 17, 1930, when it substituted a similar check for $16,000, upon reduction of the total acceptance credit to $90,000 and the proportionate reduction of the required deposit. The California Savings & Commercial Bank returned $8,000 to the shippers at this time. The balance of the proceeds of said check for $24,000, drawn on the El Paso, Tex., bank and paid by said bank, to wit, the sum of $16,000, the shippers and the Bank of America claim constituted a deposit for a special purpose. The court below allowed said claimants a preference for this sum, which appellant superintendent of banks contests on this appeal.

The shippers had no knowledge that the proceeds of the El Paso check were not remitted to the San Diego bank in cash, but credited to its general account with the Bank of America; nor did they know that the San Diego bank drew and held its cashier's checks payable to the Bank of America. Neither of said cashier's checks was ever delivered to the Bank of America. The check for $16,000 has been in the possession of the superintendent of banks since the closing of the San Diego bank. The Bank of America, however, was informed by letter of the drawing of the cashier's check for $24,000, and appellant relies strongly on this circumstance, as the holder of a cashier's check is ordinarily held to be a general creditor of an insolvent bank.

[2] As to the balance of the joint claim of Figueroa and Brittingham and the Bank of America, to wit, the sum of $11,674.44, for which the court below held them to be general creditors, the following facts appear: Said sum represents the balance remaining to the credit of Figueroa and Brittingham in an account in the California Savings & Commercial Bank after deducting the sum of $3,401.18, which was credited them after commencement of the action herein, as explained above. Figueroa and Brittingham opened said account on April 21, 1930, by signing the regular form of signature card used by the San Diego bank for partnership commercial accounts. It is the contention of the claimants for a preference that it was contemplated by the Exhibit A contract that Figueroa and Brittingham should sell the cotton pledged to secure the Bank of America, and for which warehouse receipts and bills of lading were delivered to the San Diego bank as trustee, and that the proceeds of sale should be held by the San Diego bank as a special deposit in lieu of the cotton pledged, to assure payment at maturity of the drafts accepted by the Bank of America for the accommodation of Figueroa and Brittingham. This explains the notation written by the San Diego bank on the ledger sheet for the Figueroa and Brittingham account to the effect that "All checks must be O. K. by an officer." The claimants for a preference contend that the balance to the credit of said account actually represents the proceeds from sale of the pledged cotton.

The superintendent of banks contends that there is no proof that said balance represents such proceeds. The stipulations of facts in the case herein are incomplete, in that they neither affirm nor deny this fact. In view of the clear showing made in the companion case, L. A. No. 13611, as to said account, it would be unfortunate in the instant case if we were required to reach a conclusion at variance with the decision we would make had the undisputed evidence in the companion case been before us in the case herein. However, we may avoid such a result. It may be conceded, arguendo, in disposing of this appeal, that the balance of said account does in fact represent the proceeds of the cotton originally held as security. Nevertheless, the judgment decreeing said balance to constitute a general deposit must be affirmed. Said proceeds must be held to have been released from any lien in favor of the Bank of America by reduction of the shippers' total indebtedness to the Bank of America to a figure ($20,000) where the balance to the credit of said account, in form an ordinary general account, was not needed to afford the Bank of America the 115 per cent. margin of security provided for by the Exhibit A contract. This matter will be more fully discussed hereinafter. We now proceed to consider the claim for $16,000, as to which we are of the view the claimants are entitled to a preference.

[3] By the terms of the Exhibit A contract, "$24,000 in lawful money of the United States" was to be held by the California Savings & Commercial Bank, designated "Trustee" in said contract, as "collateral security" for the payment by Figueroa and Brittingham of all drafts accepted for their benefit by the Bank of America. The cotton represented by the warehouse receipts and bills of lading which were also to be delivered to the California Savings & Commercial Bank is throughout the agreement described as "cotton pledged as security." That said cotton did not become the property of the California Savings & Commercial Bank or a part of its general assets, but remained the property of the shippers, subject to a lien or charge in favor of the Bank of America, can admit of no doubt. The right to sell the pledged cotton, in the event of default in the performance of the obligation to secure which it was pledged, is conferred on the Bank of America,

any surplus in the proceeds of sale to be returned to the shippers. Section 2093 of the Civil Code provides: "A pledgor and pledgee may agree upon a third person with whom to deposit the property pledged, who, if he accepts the deposit, is called a pledgeholder." The California Savings & Commercial Bank, described in the Exhibit A contract as the "Trustee," is in legal effect a pledgeholder.

The precise reason for adopting this mode of procedure rather than delivery of the pledge directly to the Bank of America as pledgee does not appear. It seems fairly apparent, however, that Figueroa and Brittingham sought credit advances from the California Savings & Commercial Bank, and that said bank, which closed its doors two months later, was unable to meet their application, and accordingly sought to obtain such advances on behalf of its clients from the Bank of America. By acting as agent, trustee, or pledgeholder, the California Savings & Commercial Bank was in a position to charge commissions from Figueroa and Brittingham, and did in fact do so, as indicated by the exhibits in the companion case, L. A. No. 13611.

The requirement of $24,000 in lawful money, to be held as security together with the cotton pledged, was clearly designed to afford security in the form of cash against downward fluctuation in the cotton market. If said security, including the money deposit, had been delivered to an individual as trustee or pledgeholder it would be plain that the relationship of the parties would not be that of debtor and creditor as to said money, and that the pledgeholder would have no right to use such funds in the conduct of his private business. In the case herein, said bank plainly is a pledgeholder as to the pledged cotton. The agreement neither in express terms nor by implication makes a distinction in the capacity in which the said bank is to hold the pledged cotton and the $24,000, also to constitute a part of the security to protect the Bank of America.

[4-8] Where a fungible, such as money, is made the subject of a pledge, trust, or special deposit, in our view it can serve no purpose, and therefore it is not required that the identity of the particular money delivered be preserved in specie, as by setting it aside in a marked bag or package. The test for determining whether a general deposit or a deposit for a special purpose exists is not, therefore, whether it was intended that specific coins or currency should be kept separate and apart in specie from other funds of the custodian. In ordinary commercial transactions, either with banks or individuals, such as intent almost never will be present, and certainly will not be presumed to exist, in the absence of a clear expression thereof. In the case of a general deposit in a bank, the relationship of the bank and depositor is that of debtor and creditor, and the funds deposited become a part of the general assets of the bank, which it may use in making loans and investments and otherwise conducting a general banking business. When the nature of the transaction is such that it must be said that the depositor does not intend that such use shall be made of the amount of his deposit, then it becomes the duty of the bank, not to preserve the identity of the specific coins or currency delivered, or to physically segregate a sum of money, but, rather, at all times to keep on hand cash in a sum equal to said deposit and those of similar depositors, and the amount thereof constitutes a fund which the bank is not authorized to use in its general banking operations. See Missouri Mut. Ass'n v. Holland Bank Co., 220 Mo. App. 1256, 290 S. W. 100, 102. As to such funds, the amount of which will be indicated by the bank's bookkeeping records, said depositors are entitled to a preference in the event of the bank's insolvency to the extent that the bank's cash has not been reduced below the amount of such deposits, as will be more fully discussed hereinafter.

[9, 10] Where money is delivered to a bank to be paid over to a third party upon his fulfillment of a contract with the depositor; where the purchase price of land or other property, or money with which to discharge a mortgage, is delivered to a bank in escrow; where a deposit is made to await the outcome of litigation, or, as in the case herein, as security for performance of an obligation of the depositor to a third person, the deposit is held to be a deposit for a special purpose, and the bank has no right to use the amount thereof in its general business. Hudspeth v. Union Trust & Savings Bank, 196 Iowa, 703, 195 N. W. 378, 31 A. L. R. 466, with note; Northwest Lumber Co. v. Scandinavian Amer. Bank, etc., 130 Wash. 33, 225 P. 825, 39 A. L. R. 922, with note; Corp. Comm. of North Carolina v. Merchants' Bank, etc., Co., 194 N. C. 125, 138 S. E. 530, 57 A. L. R. 382, with note; Blythe v. Kujawa, 175 Minn. 88, 220 N. W. 168, 60 A. L. R. 330, with note. The deposit herein of $16,000 is clearly of this class.

We are aware of expressions in certain cases, including decisions of this state (Anderson v. Pacific Bank, 112 Cal. 598, 44 P. 1063, 32 L. R. A. 479, 53 Am. St. Rep. 228; People v. California, etc., Trust Co., 23 Cal. App. 199, 137 P. 1111, 1115), to the effect that a special deposit of money is in the nature of a bailment in which the identical money deposited is to be returned in specie. A special deposit of this type may be provided for, but the law recognizes a large class of deposits which, if not "special" within this definition, nevertheless are deposits made for a special purpose, which precludes use of the funds by the depositary and entitles the depositor to a preference upon insolvency of the depositary. See note, 31 A. L. R. 472.

[11, 12] Appellant superintendent of banks stresses the fact that the California Savings & Commercial Bank drew a cashier's check on April 21, 1930, for $24,000 payable to the Bank of America, and later a check for $16,000 when the deposit was reduced, and informed the Bank of America of these checks. Ordinarily, the holder of a cashier's check is a general creditor of an insolvent bank. Neither the Exhibit A contract nor the Exhibit B contract in the case herein contains any provision for holding said fund in the form of a cashier's check. The California Savings & Commercial Bank at all times retained possession of said checks, and the shippers did not learn that they had been drawn until after the closing of said bank. The California Savings & Commercial Bank by its ex parte act could not alter the rights of the shippers under the Exhibit A contract. Hudspeth v. Union Trust & Sav. Bank, supra. Nor do we think that the Bank of America, by assenting to the drawing of said checks in the circumstances of this case, lost the right to rely on the Exhibit A contract as creating a deposit for a special purpose. Said checks were mere incidental bookkeeping devices of the San Diego bank, and not the controlling factor in the case. Central Bank & Tr. Co. v. Ritchie, 120 Wash. 160, 206 P. 926; Woodhouse v. Crandall, 197 Ill. 104, 64 N. E. 292, 58 L. R. A. 385.

[13] Nor does the fact that the California Savings & Commercial Bank was not licensed under the laws of this state to do a trust company business compel the conclusion that said funds and cotton pledged were not to be held by it by way of special deposit as a pledgeholder. Although said bank is described in the contract as the "Trustee," the transaction appears to present an escrow transaction in the line of ordinary bank business, rather than an administrative trust.

[14] We now pass to consider the nature and extent of the preference of special depositors, and herein to treat of the question of augmentation of assets of the insolvent bank and the tracing of special deposits into the assets which pass to the trustee in liquidation. It is not the doctrine of the law that special depositors have a prior lien on all general assets of the bank in preference to other depositors and creditors by virtue of the fact that the bank's rights and obligations with respect to their funds differ from those attaching to other funds. United States Nat. Bank, etc., v. D. W. Standrod & Co., 42 Idaho, 711, 248 P. 16; Cavin v. Gleason, 105 N. Y. 256, 11 N. E. 504; Cox v. St. Anthony Bank, etc., Co., 41 Idaho, 776, 242 P. 785; Leach v. Iowa State Sav. Bank, 204 Iowa, 497, 212 N. W. 748, 215 N. W. 728. Rather the very generally accepted theory is this: A special deposit of money augments the assets of the bank by the amount thereof. The bank is under a duty to retain in cash at all times, and not to use in its general business, an amount equal to such special deposits. Therefore, as its balance of cash is reduced, it must be presumed that its general funds are being consumed, rather than that its special funds, which it has no right to pay out, are being dissipated. The last cash to remain represents the funds of the special depositors. From this reasoning the rule is deduced that special depositors have, not a lien on the entirety of general assets, but a preference in the lowest cash balance between the date of deposit and the closing of the bank. Hudspeth v. Union Trust & Savings Bank, 196 Iowa, 706, 195 N. W. 378, 31 A. L. R. 466; Northwest Lumber Co. v. Scandinavian Amer. Bank, 130 Wash. 33, 225 P. 825, 39 A. L. R. 922; Corp. Comm. of North Carolina v. Merchants' Bank, etc., Co., 194 N. C. 125, 138 S. E. 530, 57 A. L. R. 382; Blythe v. Kujawa, 175 Minn. 88, 220 N. W. 168, 60 A. L. R. 330; Leach v. Iowa State Sav. Bank, supra.

The special depositors are in effect tracing and reclaiming their own property, rather than asserting a preference in the bank's general assets. Hence, where the bank's cash balance at any time after receipt of the special deposits falls below the amount thereof, the identity of the special funds is lost, and it is held that the preference of the special depositors does not extend to general assets or to subsequent increases in the cash balance, but as to such receipts the special depositors are on a par with general depositors. This statement of the rule is widely accepted. See Leach v. Iowa State, etc., Bank, supra.

[15] In the instant case the appellant superintendent of banks contends that the requirements to establish a preferred claim for $16,000 against the cash in possession of the San Diego bank when it closed have not been met. To provide the $24,000 to be held as security (later reduced to $16,000), Figueroa and Brittingham did not deposit $24,000 in money with the California Savings & Commercial Bank. Instead, they delivered their check for $24,000 drawn on an El Paso, Tex., bank to said California Savings & Commercial Bank, which sent said check to its Los Angeles correspondent, the Bank of America, for collection and credit to its general account with said Bank of America. The California Savings & Commercial Bank drew checks against said account for purposes not disclosed by the record, and exhausted said account except for $3,401.18, which, by agreement of the parties as explained above, has been credited to the claim of Figueroa and Brittingham and the Bank of America. Therefore, contends the superintendent of banks, the proceeds of the check for $24,000 are traced to said general account, which largely has been exhausted, and it affirma-

tively appears that said proceeds are not represented in and cannot be traced to the cash on hand in the vaults of the insolvent bank when it closed. This argument must be rejected in the final analysis.

If the Bank of America, upon payment to it of the El Paso check, had remitted the proceeds thereof by shipment of currency to the California Savings & Commercial Bank at San Diego, it is conceded that there would be a sufficient tracing to entitle the claimants to priority, with like effect as if Figueroa and Brittingham had personally delivered cash or currency to said bank. But the California Savings & Commercial Bank directed the Bank of America to credit its account. The proceeds of collections in modern banking practice are very generally remitted by the collecting bank sending to the transmitting bank its own draft, or cashier's check, or its draft on another bank, or where reciprocal accounts are maintained, as in the case herein, by the collecting bank crediting the account of the transmitting bank. The San Diego bank adopted this mode of procedure for collecting the check for $24,000, the proceeds of which were to be held as a special deposit. As it checked against its account with the Bank of America, it was under a duty to substitute therefor, as the fund of special depositors Figueroa and Brittingham, a like sum of the cash in its vaults. The general depositors would not be in a position to challenge the prior claim of Figueroa and Brittingham if the California Savings & Commercial Bank, as it drew against the proceeds of the $24,000 check (deposited in its general account with the Bank of America) and used said proceeds as cash, had set aside and marked as the property of the special depositors an equivalent amount from the cash in its vaults. However, we have hitherto indicated that it is not required that there be a physical segregation of money to constitute a special deposit. Rather, at all times the bank's cash balance, provided it does not fall below the amount of the special deposit, will be deemed to contain the amount thereof as a fund which the bank is not entitled to use in its general banking operations. The bank is no more permitted to say that it has wrongfully dissipated the fund of the special depositor in the situation herein, rather than that it has used its own funds, than it is permitted to advance a similar contention where cash or currency has been delivered directly to it. The $16,000 fund of the special depositors Figueroa and Brittingham is traced to the cash balance of the California Savings & Commercial Bank which passed to its trustee in liquidation. See Blythe v. Kujawa, supra.

The credit resulting from deposit of the proceeds of the $24,000 check to the general account of the California Savings & Commercial Bank was the equivalent of cash, and was checked against and used by said bank as cash. Said credit augmented the assets of said bank over and above what they were before the collection by the same amount as a shipment of currency would have increased them. Those cases which hold that, where the bank's cash balance is reduced below the amount of the special deposits by paying debts and in general course of its business, the special depositors do not have a preference in the general assets of the bank, are not here controlling. Bradley v. Chesebrough, 111 Iowa, 126, 82 N. W. 472; Hill v. Miles, 83 Ark. 486, 104 S. W. 198; Cavin v. Gleason, supra; Leach v. Iowa State Savings Bank, supra. The cash in the vaults of the bank herein at all times exceeded the total claim of Figueroa and Brittingham and the Bank of America. The court below acted in accordance with law in sustaining their right to receive payment of the $16,000 special deposit from the cash assets of the insolvent bank in preference to general depositors and creditors.

We have previously stated that their claim for a preference for the balance to the credit of Figueroa and Brittingham in their partnership commercial account with the California Savings & Commercial Bank was properly disallowed by the court below, notwithstanding it be conceded in disposing of this appeal that said balance represents the proceeds from the sale by Figueroa and Brittingham of cotton originally pledged as security. At the time of the closing of the California Savings & Commercial Bank, only the last one of the drafts drawn by Figueroa and Brittingham under the $90,000 acceptance credit remained unpaid. This draft was for $20,000. As security therefor, the California Savings & Commercial Bank held the $16,000 special deposit, and also retained control of certain bills of lading and warehouse receipts for cotton pledged and later sold by Figueroa and Brittingham, which documents of title were in transit together with a draft on the purchaser or his agent for $7,372.09 and were to be surrendered only on payment by the purchaser. This draft was paid after the closing of the bank, and has been credited on the $20,000 acceptance. The sum of $16,000, plus $7,372.09, aggregating $23,372.09, is more than 115 per cent. of $20,000. No portion of the balance in the Figueroa and Brittingham partnership commercial account at the date of the closing of the bank was required to make good the 115 per cent. margin of security. Figueroa and Brittingham at any time would have been entitled to demand payment to them of all sums in excess of the amount required to maintain the margin of security. As to such excess the account is a general partnership commercial account. Corporation Commissioners of North Carolina v. Merchants' Bank, etc., Co., supra.

[16] The claimants for a preference have already received $3,401.18, which represents the full amount of the balance to the credit of the insolvent bank with the Bank of Amer-

ica on July 23, 1930. As noted above, by stipulation it was agreed that said balance should be applied on the joint claim of Figueroa and Brittingham and the Bank of America to reduce said claim from $31,075.62 to $27,674.44. We are of the view that this payment on account must be held to apply on the $16,000 special deposit, and that as a result thereof only a balance of $12,598.82, rather than $16,000, is to be paid to the claimants for a preference from the cash of the insolvent bank which passed to the trustee in liquidation. Said payment of $3,401.18 should not be applied to reduce the balance in the Figueroa and Brittingham partnership account in the California Savings & Commercial Bank from $15,075.62 to $11,674.44, since this would allow the claimants for a preference full payment of a portion of the balance in said account, and we have held herein that they are not entitled to a preference as to any portion of the balance in said account. The result is that the claimants have a preferred claim for $12,598.82, rather than for $16,000, and a general claim for $15,075.62, the balance of the Figueroa and Brittingham general account, rather than for $11,674.44, making a total claim of $27,674.44. To allow the claimants to receive payment of the full $16,000, in addition to the $3,401.18, which they have already received, would give them a preferential payment as to $19,401.18, of the total claim for $31,075.62, whereas they are entitled to the preference only as to $16,000. The judgment of the lower court must be modified as in this paragraph indicated.

[17] The court below allowed interest on the sum of $16,000 from October 10, 1930, when demand was made on the trustee in liquidation for payment. Anderson v. Pacific Bank, 112 Cal. 598, 44 P. 1063, 32 L. R. A. 479, 53 Am. St. Rep. 228, may seem to support such an allowance. However, we are of the view that in the case herein interest should not be allowed. It cannot be allowed as compensation for the use of the fund, since it was a special deposit of which no use could lawfully be made. Where the superintendent of banks' resistance to payment is not unreasonable or vexatious, but an exercise of reasonable discretion in the interest of all parties, the funds available for the general depositors should not be reduced by allowing the special depositors interest by way of damages. Northwest Lumber Co. v. Scandinavian-Amer. Bank, supra; Butler v. Western German Bank (C. C. A.) 159 F. 116; Richardson v. Louisville Banking Co. (C. C. A.) 94 F. 442, 449; Clark Sparks & Sons, etc., Co. v. Americus Nat. Bank (D. C.) 230 F. 738; People v. American Loan & Trust Co., 172 N. Y. 371, 65 N. E. 200.

The judgment is modified by reducing the amount for which additional payment on a preferential basis is decreed from $16,000 to $12,598.82, and by correspondingly increasing (by $3,401.18) the amount for which the general claim is allowed from $11,674.44 to $15,075.62. Said judgment is further modified by striking therefrom the allowance of interest. As thus modified, it is affirmed. The motion of Figueroa and Brittingham to dismiss the appeal of Edward Rainey, as superintendent of banks, and of the California Savings & Commercial Bank is denied.

218 Cal. 281

BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N v. FIGUEROA et al.

L. A. 13611.

Supreme Court of California.

June 1, 1933.

Rehearing Denied June 30, 1933.

1. Banks and banking ⇐167.

Where collecting bank, as directed by transmitting bank, credited proceeds of check and drafts to transmitting bank's account without notice that check and drafts represented drawers' special deposit with transmitting bank, collecting bank *held* not liable to drawers, on insolvency of transmitting bank, for failure to remit currency to transmitting bank.

2. Banks and banking ⇐167.

That collecting bank, instead of remitting currency to transmitting bank, credited to transmitting bank proceeds of check and drafts allegedly constituting special deposit with transmitting bank, *held* not to render collecting bank liable to drawers on insolvency of transmitting bank, where position of drawers was not changed by failure to remit currency.

It appeared that drawers lost no right of preference as against transmitting bank by reason of fact that collecting bank did not remit in cash or currency, since, as to such portion of sum involved as was special deposit, their right to preference was preserved, and, as to balance to credit of drawers' commercial account in transmitting bank, drawers would not have been entitled to preference had cash been remitted, for reason that balance was held by transmitting bank as a general deposit.

3. Pledges ⇐21.

Pledgee of securities for debt did not acquire title.

4. Banks and banking ⇐179.

Where tripartite agreement required cotton dealers to deposit security with pledge-

holder bank to secure creditor bank extending acceptance credits to dealers, two-party agreement between creditor bank and pledgeholder bank whereby latter guaranteed drafts accepted by creditor bank for benefit of dealers *held* not fraudulent variation of tripartite agreement, though admitting creditor bank's ownership and unqualified right to possession and disposal of security.

Such declaration of rights in security was not in accordance with law and was ineffective, but, since it was merely incidental provision, it did not establish wrongful character of main provision of contract, which was to provide guaranty by pledgeholder bank of drafts accepted by creditor bank for benefit of dealers.

In Bank.

Appeal from Superior Court, Los Angeles County; Henry B. Nelville, Judge.

Action by the Bank of America National Trust & Savings Association against Jose Figueroa and another, in which defendants filed a cross-complaint. From a judgment in favor of plaintiff and cross-defendant, defendants and cross-complainants appeal.

Affirmed.

Zach Lamar Cobb and Earl A. Littlejohns, both of Los Angeles, for appellants.

Freston & Files and James A. McLaughlin, all of Los Angeles, for respondent.

PER CURIAM.

This proceeding is a companion case on appeal to Bank of America National Trust & Savings Association v. California Savings & Commercial Bank et al. (L. A. No. 13645) 22 P.(2d) 704, this day decided, which involves an appeal from a judgment of the superior court of the county of San Diego. The appeal in the case herein, L. A. No. 13611, is taken from a judgment of the superior court of Los Angeles county.

As indicated in our opinion in proceeding L. A. No. 13645, the action in the superior court of the county of San Diego was tried on the sole issue of whether the claim of Figueroa and Brittingham and the Bank of America for $27,674.44 against the California Savings & Commercial Bank was a general claim, or a preferred claim to be paid in full from the cash in its vaults when it closed on July 23, 1930. It was stipulated in said case that any judgment against the insolvent bank should be a joint judgment in favor of Figueroa and Brittingham and the Bank of America, and that all issues between them inter se should be dismissed without prejudice. To try said issues the Bank of America filed a separate suit in the county of Los Angeles against Figueroa and Brittingham. From the judgment in favor of the Bank of America in said action, Figueroa and Brittingham prosecute this appeal.

By the complaint in the case herein the Bank of America sued to recover from Figueroa and Brittingham the balance of $9,226.73 due and unpaid on the last draft of $20,000 accepted by it for the accommodation of Figueroa and Brittingham. All other drafts drawn by Figueroa and Brittingham by virtue of the acceptance credit of $90,000 extended to them by the Bank of America, as more fully set forth in our opinion in case L. A. No. 13645, had been paid in full. Figueroa and Brittingham, by answer and cross-complaint herein, contended that the Bank of America, acting together with said California Savings & Commercial Bank, had committed certain acts in violation of the tri-party contract entered into by Figueroa and Brittingham, Bank of America, and California Savings & Commercial Bank (which contract is more fully described in our opinion in case L. A. No. 13645), and that the Bank of America as a result of said acts had rendered itself individually liable to them, Figueroa and Brittingham, for $27,674.44, which is the full amount of the claim against the California Savings & Commercial Bank. This amount appellants Figueroa and Brittingham sought to offset in the action herein as against the Bank of America's claim of $9,226.73, leaving a balance of $18,447.71 due them from Bank of America. The court below rendered judgment for $9,226.73 in favor of Bank of America, and denied appellants' right to recover from said bank any sum whatsoever.

The rights of Figueroa and Brittingham on the one hand and Bank of America on the other to any sum which may be paid by the insolvent California Savings & Commercial Bank depend on a stipulation in the case herein. By said stipulation, filed prior to trial, it was agreed that upon recovery of judgment in the case herein (the Los Angeles county action) and payment thereof, the prevailing party should assign to the losing party all rights in the joint claim against the insolvent bank and in any judgment against said bank in the action in the county of San Diego. Until payment of the judgment in the Los Angeles county action, the prevailing party therein should receive all sums paid by the insolvent bank up to an amount sufficient to fully pay the judgment in the Los Angeles county action.

The question to be determined on this appeal is whether the Bank of America is personally liable to Figueroa and Brittingham for the sum of $27,674.44, which represents the amount of the special deposit of $16,000 held by the California Savings & Commercial Bank and the balance to the credit of Figueroa and Brittingham in their part-

nership commercial account in said bank, as more fully set forth in our opinion in L. A. No. 13645. Figueroa and Brittingham contend that said Bank of America is personally liable to them in the sum of $16,000, for the reason that it should have shipped currency to the California Savings & Commercial Bank instead of crediting the general account of the California Savings & Commercial Bank with the proceeds of the check for $24,000, drawn on the El Paso, Tex., bank, and collected by the Bank of America, and thereafter permitting the California Savings & Commercial Bank to check against said account and exhaust it except for $3,401.18. As pointed out in our opinion in L. A. No. 13645, Figueroa and Brittingham received the balance of the proceeds of said check for $24,000, to wit, $8,000, when the security deposit was reduced from $24,000 to $16,000.

As to the balance in the partnership commercial account of Figueroa and Brittingham, the contention is that said balance represents the proceeds from the sale of cotton pledged under the Exhibit A contract, which proceeds were to be held by the California Savings & Commercial Bank in lieu of the pledged cotton. Drafts drawn by Figueroa and Brittingham on the purchasers were delivered to the California Savings & Commercial Bank, and by it transmitted to the Bank of America for collection. The Bank of America, as directed, credited said general account of the California Savings & Commercial Bank with the proceeds of said collections, and the California Savings & Commercial Bank in turn credited the partnership commercial account of Figueroa and Brittingham. Here again the contention is advanced that the Bank of America should have shipped currency to the California Savings & Commercial Bank instead of crediting its general account and permitting it to exhaust said account. If cash or currency had been shipped upon these collections and on the check for $24,000, submit appellants, the priority of Figueroa and Brittingham against the California Savings & Commercial Bank for the full amount of the claim of $27,674.44 would have been preserved.

[1] The court below found both as to the $24,000 check and the drafts for the sale price of the cotton that the Bank of America was without notice that said items represented the deposit under the Exhibit A contract or the sales proceeds of the pledged cotton. This finding alone is sufficient to relieve it from any implication of wrongdoing, and authorized it to follow the well-established practice in banking procedure of crediting the account of the California Savings & Commercial Bank with it, which was in accordance with its instructions from the California Savings & Commercial Bank. Appellants Figueroa and Brittingham contend that it conclusively appears from the evidence that the Bank of America did have full notice of the nature of these items. In our view, it must be held that the trial court's finding is sustained by the evidence.

[2] Furthermore, irrespective of whether the Bank of America had notice, it is not liable herein to Figueroa and Brittingham. Their grievance against the Bank of America is that it did not remit the proceeds of the collections by shipment of cash or currency. But it is apparent from our discussion at length in L. A. No. 13645 that Figueroa and Brittingham have lost no rights of preference against the California Savings & Commercial Bank by reason of the fact that the Bank of America did not remit in cash or currency, and that their rights against the California Savings & Commercial Bank are exactly the same as if cash had been transmitted. Their right to a preference for the $16,000 special deposit has been preserved. As to the balance to the credit of the partnership commercial account in the California Savings & Commercial Bank, Figueroa and Brittingham would not have been entitled to a preference had cash been remitted, for the reason that said balance, as pointed out in our opinion in L. A. No. 13645, was held by the California Savings & Commercial Bank as a general deposit.

[3, 4] Appellants argue at length that the mode of remitting the proceeds of the collections was in violation of the Exhibit A contract, and was done in pursuance of the Exhibit B contract of guaranty between Bank of America and California Savings & Commercial Bank, of which appellants had no knowledge. Neither the Exhibit A contract nor the Exhibit B contract contains any provision whatsoever as to how the proceeds of the $24,000 check or drafts for the purchase price of cotton sold should be remitted. As pointed out in our opinion in L. A. No. 13645, the claim that the Exhibit B contract constituted a fraudulent variation of the Exhibit A contract is unfounded. It is true that the Exhibit B contract provided that the California Savings & Commercial Bank "admits and recognizes said Bank's (Bank of America) ownership and unqualified right to the possession and the disposal of any such bills of lading, shipping documents or warehouse receipts. * * *" As pledgee of the security, the Bank of America did not acquire title thereto. This declaration of its rights in the security is not in accordance with law, and must fail of effect, but it is a mere incidental provision. It did not establish the wrongful character of the main provisions of said contract, which was to provide a guaranty by the California Savings & Commercial Bank of the drafts accepted by the Bank of America for the benefit of Figueroa and Brittingham.

The judgment is affirmed.

218 Cal. 233

ERNST et ux. v. SEARLE et al.

S. F. 14397.

Supreme Court of California.

May 29, 1933.

1. Brokers ⇐94.

Grantor's delivery of deed to real estate agent to effect exchange of property did not confer authority on agent to deliver deed to grantee in pursuance of sale agreement so as to enable grantee to acquire title to premises though agent absconded with purchase money (Civ. Code, §§ 2317, 2318, 2334).

Such delivery to agent did not confer authority on agent to deliver deed to grantee, because agent had no actual authority, since he was instructed to effect an exchange of the property and not a sale, and his authority was subject to such condition, and because the agent had no ostensible authority to deliver deed, since there was no representation of such authority by the grantors, except in so far as mere intrustment of deed constituted representation. "Ostensible authority" rests on estoppel, and its elements are representation by the principal, justifiable reliance thereon by the third party, and change of position or injury resulting from such reliance.

[Ed. Note.—For other definitions of "Ostensible Authority," see Words and Phrases.]

2. Brokers ⇐96.

Grantee relying solely on real estate agent's representations regarding his authority to sell, when entering purchase contract, *held* not justified in paying purchase price to agent on his subsequent possession of deed, so as to avoid loss from agent's embezzlement (Civ. Code, §§ 2317, 2318, 2334).

3. Estoppel ⇐74(1).

Deed to real property is not quasi negotiable instrument.

4. Estoppel ⇐72.

Rule that where one of two innocent persons must suffer by act of third, he by whose negligence it happened must suffer, *held* not applicable where third party invoking rule had duty to investigate authority of agent with whom it was dealing (Civ. Code, § 3543).

5. Principal and agent ⇐147(2).

Third person dealing with agent takes risk of ascertaining whether person with whom he is dealing is agent and of ascertaining scope of agent's powers (Civ. Code, §§ 2317, 2318, 2334, 3543).

6. Appeal and error ⇐171(1).

Theory upon which case is tried must be adhered to on appeal.

7. Brokers ⇐106.

Evidence in grantors' action to quiet title established that grantee who paid purchase price of land to real estate agent absconding with purchase money knew such agent professed to act for others and not as principal (Civ. Code, §§ 2317, 2318, 2334).

8. Brokers ⇐99.

Grantee paying purchase price of land to real estate agent could not contend it dealt with agent as principal so as to avoid liability for loss of purchase money with which agent absconded, where deed that agent possessed was from grantors to grantee (Civ. Code, §§ 2317, 2318, 2334, 3543).

9. Estoppel ⇐74(1).

Person does not have indicia of ownership unless document of title names him as owner or unless document is negotiable or quasi negotiable (Civ. Code, §§ 2317, 2318, 2334).

In Bank.

Appeal from Superior Court, City and County of San Francisco; C. J. Goodell, Judge.

Action by Julius Ernst and wife against C. R. Searle and others. From a judgment for plaintiffs, defendants appeal.

Affirmed.

For prior opinion, see 15 P.(2d) 159.

Stoney, Rouleau, Stoney & Palmer, T. E. Palmer, and Royal E. Handlos, all of San Francisco, for appellants.

Brobeck, Phleger & Harrison, Maurice E. Harrison, and S. R. Pfund, all of San Francisco, for respondents.

Tobin & Tobin, of San Francisco, amici curiæ.

PER CURIAM.

A rehearing was granted in this case in order to give further consideration to certain contentions made by appellant and by several amici curiæ on its behalf. Upon such reconsideration we are of the opinion that the decision heretofore rendered properly disposes of the issues raised on this appeal. We, therefore, adopt as part of the opinion of this court the following portions of the opinion heretofore rendered:

This is an action to quiet title. Plaintiffs, husband and wife, reside in Los Angeles. The property involved therein is located in San Francisco. In February, 1929, defendant Searle, a real estate agent in Los Angeles, suggested to them that they exchange their San Francisco property for certain property in Los Angeles. Plaintiffs agreed, and on February 28, 1929, they executed a writing authorizing Searle to negotiate the exchange. Searle went to San Francisco, talked with A. J. Conway, another real estate broker, and

thereafter interested defendant Hilbar Properties Company in the purchase of plaintiffs' property. An agreement of sale was drawn up on March 1, 1929, by the terms of which said defendant was to assume a $10,000 mortgage on the property and pay the sum of $5,500 in cash. An escrow was opened with defendant Title Insurance & Guaranty Company in San Francisco. Searle then returned to Los Angeles, and fraudulently represented to plaintiffs that Hilbar Properties Company was the owner of the Los Angeles property which they wanted to obtain; that he had arranged the exchange; and that it was necessary that he have a deed to complete the transaction. A deed executed by Mrs. Ernst to A. J. Conway as grantee was first given to him, and rejected by the Title Company because of the absence of the husband's signature. Thereupon, on March 5, 1929, plaintiffs executed a deed to Hilbar Properties Company, which Searle took to San Francisco and deposited with the Title Company. The deed was recorded, the purchase price was paid into escrow, and pursuant to instructions from Searle, the Title Company paid the commissions, and on March 9 sent him the balance of the money, $3,727.07, in the form of a certified check made out to him as payee. Searle cashed the check and disappeared. Mrs. Ernst expected to hear from him about April 8, and, upon his failure to call, she investigated the ownership of the Los Angeles property, and discovered that the defendant Hilbar Properties Company had no interest therein, and that the authorized exchange had not been carried out. Shortly thereafter, on April 24, 1929, this action was commenced to quiet title to the San Francisco property. Judgment was rendered in favor of plaintiffs, and defendant Hilbar Properties Company appealed.

[1] The evidence showed, and the trial court found, that neither plaintiffs nor said defendant made any investigation of the circumstances surrounding the transaction, prior to its completion. The court further found, and the finding is fully supported by the evidence, that "the plaintiffs Anna Ernst and Julius Ernst never intended, nor did either of them ever intend, that the said document be delivered or that the same should be effective as a deed, unless and until the exchange of properties * * * should be consummated." The decision was based upon the conclusion that the deed executed by plaintiffs was never validly delivered to the grantee. With this conclusion we agree.

The question, of course, is whether Searle had authority, as agent for plaintiffs, to deliver the deed. Such authority must have been either actual or ostensible. He had no actual authority, since he was instructed to effect an exchange and not a sale of the property, and his authority to deliver the deed was subject to this condition. The evidence shows that plaintiffs did not intend the instrument to be delivered except as part of the exchange.

It is just as clear that Searle had no ostensible authority to deliver the deed. "Ostensible authority is such as a principal, intentionally or by want of ordinary care, causes or allows a third person to believe the agent to possess." Cal. Civ. Code, § 2317. An agent also has such authority as is given by statute (Cal. Civ. Code, § 2304 et seq.), unless deprived thereof by his principal; "and has even then such authority ostensibly, except as to persons who have actual or constructive notice of the restriction upon his authority" (Cal. Civ. Code, § 2318). Ostensible authority rests upon the doctrine of estoppel, and its essential elements are representation by the principal, justifiable reliance thereon by the third party, and change of position or injury resulting from such reliance. Cal. Civ. Code, § 2334; Wiley B. Allen Co. v. Wood, 32 Cal. App. 76, 162 P. 121; Harris v. San Diego Flume Co., 87 Cal. 526, 25 P. 758. In the instant case, there is no representation or holding out by the plaintiffs to defendant that Searle had authority to deliver a deed of their property in pursuance of an agreement to sell it. There was no representation made by plaintiffs at all, save in so far as the mere intrustment of the deed constitutes a representation. But, as pointed out by counsel for plaintiffs, the deed might have been handed to Searle for any one of several purposes; to use the property as security for a loan, to exchange it for other property, to sell it, or to place the deed in escrow. In other words, Searle might have been an agent to secure a loan, to effect an exchange, to negotiate a sale, or he might have been a mere messenger to deposit the deed in accordance with the instructions from his principal. It necessarily follows that the equivocal act of intrustment does not amount to a representation of any specific authority on the part of the agent, and certainly not to the broad power contended to exist in the instant case. The only representation which can be said to have been made by plaintiffs as a result of their giving the deed to Searle was that he was their agent or messenger; but it remained for defendant, as in the ordinary case, to inquire into the extent of his authority. Such inquiry would have necessitated the production of the writing which embodied the terms of Searle's employment (and which, by virtue of our statutes, was necessary for any dealing with the real property in question), and an inspection of that writing would have disclosed the limited power which he had.

These principles are applied to a situation very similar to that presented by the instant case in MacDonald v. Cool, 134 Cal. 502, 66 P. 727. There Mrs. Cool, the owner of property, made a deed in favor of MacDonald and

handed it to the agent, Turner. Turner's instructions, evidenced by a receipt which he gave his principal upon taking the deed, were to deliver it as security for a loan to be obtained for Mrs. Cool. Turner instead delivered the deed to the grantee to secure his own indebtedness. The court said (page 504 of 134 Cal., 66 P. 727, 728):

"It is contended by the appellant that Mrs. Cool made Turner her agent, and is bound by his acts within the scope of his agency, although his conduct was contrary to some undisclosed intention on the part of the principal. It is also contended that there was an undefined ostensible agency created by merely intrusting the deed to Turner.

"The agency, if such there was, is defined in the receipt, and, if MacDonald was dealing with Turner as the agent of Mrs. Cool, he should have ascertained the extent of the agency. I see no ground whatever for holding that there was an ostensible agency for any specific purpose."

The same view was expressed in Keele v. Clouser, 92 Cal. App. 526, 268 P. 682, where the principal gave the deed to the agent for deposit in escrow, and the agent instead delivered it directly to the grantee. The court said (page 532 of 92 Cal. App., 268 P. 682, 684): "The plaintiff's testimony showed that her broker had no authority to make such delivery. His authority extended only to a deposit of the deed with the bank, there to remain in escrow, and hence if he gave possession of it to the defendants his act was not binding upon the plaintiff and did not constitute a delivery of the deed. * * * A broker employed to find a purchaser for real property has no authority to make a contract or a conveyance in behalf of his principal, unless special power is conferred upon him for that purpose (4 Cal. Jur. 564, 565), and hence can have no authority to take one of the essential steps toward a conveyance, such as the delivery of the deed. The delivery here cannot be held good under the doctrine of ostensible agency. The broker was a special agent (Civ. Code, § 2297), and it was therefore incumbent on the defendants to inquire as to the extent of his authority (1 Cal. Jur. 715, 744). The delivery of a deed to an agent for the limited purpose of putting it in escrow does not confer on the agent ostensible authority to convert it into a conveyance by delivering it to the grantee, unless there is some further conduct on the grantor's part reasonably indicating to the grantee that the agent has such authority. MacDonald v. Cool, 134 Cal. 502, 66 P. 727."

[2] There is another fact which is fatal to defendant's claim. Said defendant did not rely upon Searle's possession of the deed in making the contract to sell. This contract was made March 1, solely on the faith of Searle's own representations as to his powers, and without any investigation thereof. It was on March 5 that Searle obtained the deed. It is apparent, therefore, that the possession of the deed is being used as a justification for payment of the purchase price to the agent. There is neither authority nor principle to support such an extraordinary theory. Even if the agent were shown to have had express authority to negotiate a sale, this would not give him implied or ostensible authority to collect the purchase price. Schnier v. Percival, 83 Cal. App. 470, 256 P. 1109; Hicks v. Wilson, 197 Cal. 269, 240 P. 289; Gold v. Phelan, 58 Cal. App. 471, 208 P. 1001. Hence, even if defendant's first position, contrary to the facts and to the law, were nevertheless conceded, it would simply mean that said defendant would have been justified in paying the money to plaintiffs. If this had been done, the loss resulting from the embezzlement by Searle would never have occurred. That loss, irrespective of plaintiffs' prior acts, was directly caused by defendant itself, in paying the purchase price to the agent instead of to the principal.

[3-5] In addition to what was thus said in our former opinion, the following observations should be added: The holding that the mere intrustment of the deed to Searle by the Ernsts did not confer on him ostensible authority to deliver it to the grantee cannot be seriously questioned. The question is not a new one. The cases above cited, and many others that might be referred to, have fully and completely settled this point. Although it is true that the courts, for purposes of expediency, have conferred on certain documents of title such as bearer bonds and stock certificates certain elements of negotiability, and have held that mere possession of them confers authority to transfer them, no good reason has been suggested why this exception to the general rule should be extended to a deed to real property. Our prior decisions have fully established the point that a deed to real property is not a quasi negotiable instrument, and we feel bound by those cases. Moreover, we desire to emphasize the point that the principle enunciated in the last section of the Civil Code, § 3543, so confidently relied on by appellant, to the effect that, "Where one of two innocent persons must suffer by the act of a third, he, by whose negligence it happened, must be the sufferer," in no way assists appellant. Here the injury never would have occurred had appellant properly performed the duty imposed upon it by law to investigate the authority of the agent with whom it was dealing. A third person, such as appellant, is not compelled to deal with an agent; but if he does so, he must take the risk. He takes the risk not only of ascertaining whether the person with whom he is dealing is the agent, but also of ascertaining the scope of his powers. The rule is cogently stated in 1 Mechem on Agency (2d Ed.) § 743, p. 527, as follows: "An

assumption of authority to act as agent for another of itself challenges inquiry. Like a railroad crossing, it should be in itself a sign of danger and suggest the duty to 'stop, look and listen.' It is therefore declared to be a fundamental rule, never to be lost sight of and not easily to be overestimated, that persons dealing with an assumed agent, whether the assumed agency be a general or special one, are bound at their peril, if they would hold the principal, to ascertain not only the fact of the agency but the nature and extent of the authority, and in case either is controverted, the burden of proof is upon them to establish it."

[6] Appellant, evidently with the realization that its contention that Searle as agent of the Ernsts had ostensible authority to deliver the deed is not tenable, has attempted to change completely its theory of the case. On this rehearing almost the sole contention made by appellant is that at all times it dealt with Searle as a principal and not as an agent. Based upon this premise, it is urged that the entrustment of the deed by the Ernsts to Searle conferred on Searle such indicia of ownership that a delivery by Searle to the grantee therein named binds the grantors. This contention, in our opinion, is contrary to the facts and clearly contrary to the theory upon which the case was tried. The point was not seriously urged by appellant until the filing of its reply brief. Until that time it appears that it was the theory of all concerned that the question involved was whether Searle as agent of the Ernsts had ostensible authority to deliver the deed and collect the purchase price. The rule is well settled that the theory upon which a case is tried must be adhered to on appeal. A party is not permitted to change his position and adopt a new and different theory on appeal. To permit him to do so would not only be unfair to the trial court, but manifestly unjust to the opposing litigant. 2 Cal. Jur. § 68, p. 237.

[7] Moreover, it is our opinion that this new theory is not supported by the evidence. The evidence discloses that appellant, through its agents, knew that Searle was professing to act for other parties and not for himself, although the identity of the principals was not known until the deeds were produced. Conway testified that during the negotiations at a conference at which he, Searle, and Hilp and Hefferman, both officers of the Hilbar Properties Company, were present, a question over price arose, and Searle stated that he could give no definite answer until he had *telephoned his client* in Los Angeles. Later Conway sought partially to retract this testimony by the statement that Searle had not stated that he could not agree to the price until he telephoned *his client*, but that the statement was that he could not agree until he 'phoned Los Angeles. This testimony alone, evidently believed by the trial court, is sufficient to sustain the agency theory. Although Conway stated that he did not know Searle was acting as agent, the record shows he had documentary evidence in his possession which clearly informed him that Searle was acting as agent.

[8, 9] However, even if we were to consider appellant's new theory on the merits, it would avail appellant nothing. The facts of this case would no more warrant the belief that Searle was a principal than they do that he was an agent with unlimited powers. The deed was from the Ernsts to appellant. Since the deed was executed by a person other than the person who possessed it, it was encumbent upon appellant to inquire into the authority of the party who held it to deliver it. It cannot be held that a person has indicia of ownership unless the document of title names him as the owner or unless the document is negotiable or quasi negotiable. To hold that a deed executed by a stranger and naming a third person as grantee confers on its possessor the indicia of ownership would be to hold that such a deed is quasi negotiable. This, for reasons already given, we are not inclined to do.

The judgment appealed from is affirmed.

218 Cal. 287

PEOPLE v. MORRISON et al.

Cr. 3601.

Supreme Court of California.

June 1, 1933.

1. Aliens ⇐6(1).

State *held* empowered to reserve ownership, occupancy, and control of its agricultural lands for benefit of its citizens or those eligible to become citizens (Alien Land Act [St. 1921, p. lxxxiii], § 9a, as added by St. 1927, p. 881, § 1).

2. Aliens ⇐10.

Constitutional law ⇐250, 266.

Statutes imposing on defendant burden of proving his citizenship or eligibility to citizenship where indictment for violating Alien Land Act alleges defendant's alienage and ineligibility to United States citizenship, *held* not to deny due process nor equal protection of law (Alien Land Act [St. 1921, p. lxxxiii], § 9a and 9b, as added by St. 1927, p. 881, §§ 1, 2).

3. Conspiracy ⇐44½.

In prosecution for conspiring to violate Alien Land Act, burden is on prosecution to

affirmatively establish every element constituting offense, save want of eligibility to citizenship on part of accused (Alien Land Act [St. 1921, p. lxxxiii], § 9a and 9b, as added by St. 1927, p. 881, §§ 1, 2).

CURTIS, SHENK, and PRESTON, JJ., dissenting.

In Bank.

Appeal from Superior Court, San Diego County; A. C. Finney, Judge.

George Morrison and H. Doi were convicted of conspiring to violate the Alien Land Act, and they appeal.

Affirmed.

Prior opinion, 13 P.(2d) 803.

W. K. Brown and Edgar B. Hervey, both of San Diego, and J. Marion Wright, of Los Angeles, for appellants.

Thomas Whelan, Dist. Atty., and John T. Holt, Deputy Dist. Atty., both of San Diego, and U. S. Webb, Atty. Gen., and Frank English, J. Charles Jones, and James S. Howie, Deputies Atty. Gen., for the People.

SEAWELL, Justice.

This cause was transferred to this court after decision by the District Court of Appeal, Fourth District, Barnard, P. J., writing the opinion affirming the judgment.

The defendants were jointly accused by indictment of the crime of conspiring to violate the Alien Land Act of this state. Stats. 1921, p. lxxxiii; Stats. 1923, p. 1020; Stats. 1927, p. 881. Section 13 of said initiative measure provides that the Legislature may amend said measure in furtherance of its purpose. Section 9a, which appellants claim violates the due process clause of the Federal Constitution (Amendment 14) and denies to them equal protection of the law, was adopted as an amendment of said initiative measure by the Legislature of 1927 (Stats. 1927, p. 880, § 1). It provides as follows: "In any action or proceeding, civil or criminal, by the State of California, or the people thereof, under any of the provisions of this act, when the proof introduced by the state, or the people thereof, establishes the acquisition, possession, enjoyment, use, cultivation, occupation, or transferring of real property or any interest therein, or the having in whole or in part the beneficial use thereof by any defendant, or any of such fact, and the complaint, indictment or information alleges the alienage and ineligibility to United States citizenship of such defendant, the burden of proving citizenship or eligibility to citizenship shall thereupon devolve upon such defendant."

Section 1983, Code of Civil Procedure, which was passed by the same Legislature (added by St. 1927, p. 434) that amended the Alien Land Act in the respect above set forth, prescribes as a rule of evidence that whenever ineligibility to citizenship is alleged in a civil or criminal proceeding brought to enforce any law which denies any right, privilege, or license to any person not a citizen or not eligible to become a citizen of the United States, the burden rests upon the state or people to establish that such right, privilege, or license was exercised by the person so alleged to have exercised the same, and upon such facts being so established the burden shall be upon the person claiming the right to exercise such right, privilege, or license to show that at the time he exercised said rights he was a citizen of the United States or eligible to become such citizen. That section contains nothing of substance so far as the question is here involved that is not found in the amendment of the Alien Land Act of 1927. The only purpose it can serve is to make more emphatic the intention of the Legislature to establish a rule of evidence which shall be applied in the class of cases of which the instant case is unquestionably one.

The indictment under which appellants were convicted alleged that they willfully, unlawfully, and feloniously combined and conspired by unlawful means and devices to bring about and accomplish the possession, enjoyment, use, cultivation, and occupancy for agricultural purposes, by the defendant Doi and for his use and benefit, of certain described real property situate in the county of San Diego, which real property is alleged to be agricultural in character. It is alleged that the defendant Doi was and is an alien ineligible to citizenship under the laws of the United States, and that he is a citizen and subject of the empire of Japan and not authorized by law or treaty to acquire, enjoy, occupy, or to have any beneficial interest in any real property in this state for agricultural purposes. It is also alleged that in furtherance of said conspiracy, and for the purpose of accomplishing and effecting the purposes and objects thereof, the defendant Morrison put the defendant Doi into possession of the agricultural land described, and permitted, aided, and encouraged him to take possession thereof and to use, enjoy, cultivate, and occupy the same, and that the defendant Doi took possession of said land, used, enjoyed, cultivated, and occupied the same and raised and harvested crops thereon for his own use and benefit.

Trial by jury was waived and the action was tried before the court. The only evidence introduced consisted of the following stipulation: "It is stipulated that the defendant George Morrison is, and was at all times mentioned in the indictment, a native-born citizen of the United States of America, and lessee of the land described in the said amended indictment; that said land is agricultural land, and at all times mentioned in said amended

indictment has been used exclusively for agricultural purposes; that on or about the 27th day of August, 1931, the said George Morrison did knowingly and wilfully combine, confederate and agree with one H. Doi to bring about and accomplish the possession, enjoyment, use, cultivation and occupancy for agricultural purposes by said H. Doi, and thereafter to continuously keep and maintain the said H. Doi in such possession, enjoyment, use, cultivation and occupancy, for agricultural purposes, and to the use and beneficial interest of the said H. Doi, of all of the said land, and thereafter, and pursuant to said confederation, combination and agreement, and as a result thereof, and in furtherance of, and to accomplish and effect the purposes and objects thereof, the said George Morrison did put the said H. Doi into possession of, and did permit, aid and encourage the said H. Doi to go into possession of, and to use, enjoy, cultivate and occupy the said land, and said H. Doi did go into possession of said land, and did use, enjoy, cultivate and occupy the same, and did raise and harvest crops thereon, for the use and benefit of said defendants and each of them."

By the above stipulation it will be seen that the agricultural character of the lands and the execution of the lease and the entry into the possession thereof by defendant H. Doi (alleged to be a citizen and subject of the empire of Japan) and all facts necessary under the Alien Land Act to sustain a conviction except ineligibility are admitted. The defendants having failed to offer any evidence touching the qualification of Doi to exercise the rights of citizenship, or to meet the burden cast upon him, were adjudged guilty as charged, and released on probation. This appeal is from the judgment of conviction and order denying a new trial.

Appellants' sole attack is made upon that portion of the decision in the case of People v. Osaki, 209 Cal. 169, 286 P. 1025, 1036, which sustains the power of the Legislature to cast the burden upon aliens charged in the manner provided by the acts in question to prove their eligibility to own, possess, or occupy agricultural land. While it was pointed out in that case that the evidence produced by the prosecution was sufficient of itself to show that the accused was an ineligible alien without the necessity of invoking the aid of the burden of proof provisions of said amendment to the Alien Land Act and said statutes, the validity of said burden of proof provisions was nevertheless brought into question and considered by us at great length. In fact, by far the greater portion of the decision was given to a consideration of the validity of said sections which cast the burden of proof upon the accused. In our discussion of the question here pressed by appellants we said: "We are of the view that the better reason supports the conclusion that the burden, in cases involving questions of naturalization and alienage, has always been upon the defendant, who has intimate and peculiar knowledge of the fact."

Again we said: "It is not intended by what we have said to extend the rule of convenience or burden of proof to common-law crimes generally designated as malum in se, nor to all crimes malum prohibitum. We go no further than to apply the rule to the particular situation in accordance with the express mandate of said amendments."

Counsel for appellants recognize the relevancy and application of the authorities cited in the Osaki Case to the instant case, and asks that we disapprove of the rule therein adopted and apply the doctrine announced in People v. Quarez, 196 Cal. 404, 238 P. 363. That case leans heavily upon People v. Frey, 165 Cal. 140, 131 P. 127, which, as pointed out in the Osaki Case, was adopted by a bare majority of the court. People v. Quarez and People v. Frey and many other cases of our own and other jurisdictions were exhaustively considered in the Osaki Case, and counsel in the instant case has presented no important authorities or additional arguments which were not drawn to our attention in the Osaki Case. Both the Quarez and Frey Cases recognize the rule ab inconvenienti, commonly known as the rule of necessity or convenience, but seek to limit its application to the prosecution of persons charged with the violation of statutes regulating the practice of medicine and other professions and certain callings which provide that a license shall first be obtained before any person may engage in the practice of said professions or callings. The rule of convenience or necessity is of common-law origin and was a rule of evidence as early as 1816, a period long prior to the adoption of the modern system requiring persons to obtain a license before they may engage in particular callings, which system has become quite universal as conducive to public health and safety during the present and latter part of the past century.

Chief Justice Ellenborough recognized the rule more than a century ago in the case of King v. Turner, 5 Maule and Selwyn's Reports, 206. This early case did not involve the question of licensing a calling, but was bottomed on the want of qualification on the part of the accused for having game in his possession. The identical principle is presented in the instant case, to wit, a want of qualification to enjoy an exclusive privilege of citizenship. Lord Ellenborough states the question as being one upon whom the onus probandi lies; whether it lies upon the person who affirms a qualification to prove the affirmative, or upon the prosecutor who denies any qualification to prove the negative. He observes that there were about ten different

heads of qualification enumerated in the statute to which the proof might be applied, and, according to the argument made, every person who laid an information as to qualification of the accused would be bound to give satisfactory evidence before the magistrates to negative the defendant's qualification upon each of those several heads. "The argument," the eminent jurist remarks, "really comes to this, that there would be a moral impossibility of ever convicting upon such an information. If the informer should establish the negative of any part of these different qualifications, that would be insufficient, because it would be said, non liquet, but that the defendant may be qualified under the other. And does not, then, common sense show that the burden of proof ought to be cast on the person who, by establishing any one of the qualifications, will be well defended? Is not the statute of Anne in effect a prohibition on every person to kill game, unless he brings himself within some one of the qualifications allowed by law, the proof of which is easy on the one side, but impossible on the other?"

The great jurist makes reference to Lord Mansfield in Spieres v. Parker, 1 T. R. 144, and states that he finds him laying down the rule that in actions upon the game laws, and he saw no good reason why the rule should not be applied to informations as well as actions, the plaintiff must negative the exceptions in the enacting clause, though he throw the burden of proof on the other side. Continuing he said: "The same was said by Heath, J., in Jelfs v. Ballard, 1 B. & P. 468; and such I believe has been the prevailing opinion of the profession, and the practice. I am, therefore, of the opinion that this conviction, which specifies negatively in the information the several qualifications mentioned in the statute is sufficient, without going on to negative, by the evidence, those qualifications."

Bayley, J., in a concurring opinion, said that no hardship was cast upon the defendant by the above rule because the defendant must be presumed to know his own qualification and to be able to prove it.

Holrod, J., concurring, said that it was a general rule that the affirmative is to be proved, and not the negative, of any fact which is stated, unless under peculiar circumstances, where the general rule does not apply. He holds that where it is shown that qualification to exercise a right or privilege is peculiarly within the knowledge of the person assuming to exercise the same, the burden is on such person to prove it.

It will be observed that the rule thus early recognized was not confined to medical cases, but to all of that class of cases in which the qualification of the person to exercise a privilege was the issue. The question before us is one in which qualification is the crux of the proposition. The books are replete with decisions which follow the rule early announced by Chief Justice Ellenborough and concurred in by his associates. Justice Story, in United States v. Hayward, 26 Fed. Cas. page 240, No. 15,336, recognized the rule at length in a case wherein the question arose as to the necessity of negativing the neutrality of a vessel in which goods were brought into this country. In his consideration of negative allegations he holds the reasonable rule is that the burden of proof shall rest upon the party who holds the affirmative; and especially where the facts are peculiarly within his privity and cognizance. In Casey v. United States, 276 U. S. 413, 48 S. Ct. 373, 374, 72 L. Ed. 632, involving the illegal possession of morphine, Mr. Justice Holmes said: "It is consistent with all the constitutional protections of accused men to throw on them the burden of proving facts peculiarly within their knowledge and hidden from discovery by the Government." 1 Greenleaf on Evidence, § 79; 4 Wigmore on Evidence, § 2486; Yee Hem v. United States, 268 U. S. 178, 45 S. Ct. 470, 69 L. Ed. 904; Mobile, etc., R. R. v. Turnipseed, 219 U. S. 35, 31 S. Ct. 136, 55 L. Ed. 78, 32 L. R. A. (N. S.) 226, Ann. Cas. 1912A, 463; State v. Miller, 182 Mo. 370, 81 S. W. 867; State v. Abbey, 29 Vt. 60, 67 Am. Dec. 754; People v. Boo Doo Hong, 122 Cal. 606, 55 P. 402; People v. Goscinsky, 52 Cal. App. 62, 198 P. 40; People v. T. Wah Hing, 47 Cal. App. 327, 190 P. 662. The questions of corpus delicti and compelling the accused to be a witness against himself are fully discussed in a number of the cases cited in People v. Osaki, supra, and it is held that no right of the accused is denied or abridged by the application of the rule of convenience in cases where qualification is made the test of the right to enjoy a certain privilege, and the qualification upon which he asserts his right is peculiarly within the knowledge of the person exercising such privilege.

People v. Velasquez, 70 Cal. App. 362, 233 P. 359, Curtis, J., writing the opinion, held contrary to People v. Quarez, supra, and we are of the view that the treatment of and the application of the rule of convenience made by the District Court of Appeal is sound in reason and is sustained by the greater weight of authority. It held that the accused had absolute knowledge as to whether he was a naturalized citizen, and the burden was on him to offer his proof. If the people in this case should be required to prove the negative, the enforcement of the law would be defeated by imposing upon the people the impossible task of making a thorough and painstaking search of the entire United States and its dependencies in probably a vain effort to establish the nonexistence of a naturalization record. This case was published about the

time that the Quarez decision was rendered. The first Legislature that convened after the Quarez decision became the law, in an effort to supply the ground upon which a contrary decision might rest, adopted the amendment and statutes now before us, casting the burden of proof upon persons whose right to exercise certain privileges granted only to citizens may be challenged upon the grounds of alienage, as in said statutes provided.

[1, 2] That it is competent for the state in the exercise of its sovereign power to reserve the ownership, occupancy, and control of its agricultural lands for the benefit of its citizens or those eligible to become such, and that it may as a means of determining such eligibility when it is drawn into question by an appropriate proceeding cast upon the person claiming or assuming the right to own, occupy, or control said land, the burden of proving his eligibility, are propositions that are entrenched in reason and supported by the great weight of eminent authority, and cannot be seriously questioned.

Medical license cases and liquor cases furnish a fertile field for the application of the rule of convenience or necessity. But it will be found upon an examination of the cases that the rule has been applied to cases of bigamy, relationships, the right to take game, possession of opium, questions of neutrality, and in fact generally to all cases of qualification where the right to enjoy a privilege is peculiarly within the knowledge of the person exercising such privilege, and not within the knowledge of the state which challenges the right by negative allegations. No case can easily be imagined which so aptly justifies the application of the rule of necessity and convenience as do the facts and circumstances which constitute the basis of the instant case. It would be beyond reason to require the state to search the records of every city, parish, and county of the nation in proof of a negative when the question of qualification is peculiarly within the knowledge of the person who asserts the right to enjoy a privilege which attaches to citizenship alone.

We have given no special consideration to section 9b of said amendment to the Alien Land Act (as added by St. 1927, p. 881, § 2), for the dual reason that it is not material to the issue involved in the instant case, and its effect was fully considered in the Osaki Case. That section provides that when the proof shows the defendant to be a member of a race ineligible to citizenship under the naturalization laws of the United States, the burden of proving citizenship or eligibility as a defense shall thereupon devolve upon such defendant. It is specially provided by said section that it shall not modify, limit, or affect in any manner the provisions of said section 9a. Said section 9b was doubtless adopted as a measure offering some assistance in the way of making the act effective if section 9a should for any reason fail.

[3] In the prosecution of cases of this class the burden of proof is upon the prosecution to affirmatively establish every element constituting the offense, save the want of eligibility on the part of the accused. There is nothing unreasonable or unjust in the rule which requires the accused to prove his eligibility. The Legislature has determined that the safety and welfare of the state depend largely upon the ownership of its agricultural land remaining in the hands of its citizens, or those eligible to become such. The United States Supreme Court in a number of decisions has approved this policy. The Legislature by statutory enactment has cast the burden upon those whose eligibility is challenged in the name of state of proving such eligibility. It is entirely competent for it to do so.

The judgment is affirmed.

We concur: WASTE, C. J.; TYLER, Justice pro tem.; LANGDON, J.

CURTIS, Justice.

I dissent. The crime charged against the defendants consists of two elements, (1) the alienage and ineligibility to citizenship of H. Doi, and (2) the possession of agricultural lands by said defendant. The second of these two elements was proven, but there was no evidence whatever in support of the first element—alienage and ineligibility to citizenship of H. Doi. Under section 9a of the Alien Land Act as the alienage and ineligibility to citizenship was alleged in the indictment the burden of proving citizenship or eligibility to citizenship was cast upon the defendants. The conviction of the defendants must stand, therefore, if this section of the Alien Land Act is a valid exercise of legislative power. The majority opinion sustains the validity of the law in question. In the first place it is apparent that there is a marked distinction between the instant case and the case of People v. Osaki, 209 Cal. 169, 286 P. 1025. In that case there was direct proof, and this fact was emphasized throughout the opinion, not only that the defendant Osaki was in the possession of agricultural lands, but also that he was a member of the Japanese race. Under section 9b of the Alien Land Act proof of these facts creates "a prima facie presumption of the ineligibility to citizenship." The constitutionality of section 9b of said act is not questioned. Under that section it is necessary to prove two facts: First, that the defendant is in possession of agricultural lands of this state, and, second, that he is a member of a race ineligible to citizenship. Under section 9a, however, only one of these facts is required to be proven, and that is that the defendant is in possession of agricultural

lands of this state. From this one fact under said section the presumption may be drawn that the defendant is a member of a race ineligible to citizenship and that he is also ineligible to citizenship. Referring back to section 9b of the act and the legislative presumption therein created, we find that upon proof that the defendant is a member of a race ineligible to citizenship, the presumption arises that he is ineligible to citizenship. It is clear that there is a reasonable and rational connection between the fact thus proven and the fact presumed. It is reasonably probable that a member of the Japanese race, for instance, was born in Japan and is, therefore, ineligible to citizenship under the laws of this country. But under section 9a of the act, the only fact necessary to prove is that the defendant is in possession of agricultural lands and the burden of proving that he is ineligible to citizenship is then cast upon the defendant, or which amounts to the same thing, the defendant is then presumed to be ineligible to citizenship. From the foregoing statement, I think it clearly appears that there is no rational or reasonable connection or relation between the fact proven and the fact presumed. The fact that a person is in possession of agricultural lands of the state does not in the least tend to prove that he is a member of any particular race, much less of a race, the members of which are denied citizenship under our laws. The validity of legislation creating presumptions similar to that provided for by section 9a of said act has frequently been before the courts of this and other jurisdictions with the result that it has uniformly been declared invalid. One of the leading cases upon this subject is that of McFarland v. American Sugar Refining Co., 241 U. S. 79, 36 S. Ct. 498, 499, 60 L. Ed. 899. In that case the Legislature of Louisiana had enacted a statute which purported to impose penalties for monopolies and conspiracy in relation to trade. By this statute it was provided that: "Any person engaged in the business of refining sugar within this state who shall systematically pay in Louisiana a less price for sugar than he pays in any other state shall be prima facie presumed to be a party to a monopoly or combination or conspiracy in restraint of trade and commerce, and upon conviction thereof shall be subject to a fine. * * *" The Supreme Court of the United States held that this presumption was invalid as being in violation of the Fourteenth Amendment of the Constitution, and speaking through Mr. Justice Holmes said: "As to the presumptions, of course the legislature may go a good way in raising one or in changing the burden of proof, but there are limits. It is 'essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate.' Mobile, J. & K. C. R. Co. v. Turnipseed, 219 U. S. 35, 43, 55 L. Ed. 78, 80, 32 L. R. A. (N. S.) 226, 31 S. Ct. 136, Ann. Cas. 1912A, 463, 2 N. C. C. A. 243. The presumption created here has no relation in experience to general facts."

In O'Neill v. United States (C. C. A.) 19 F.(2d) 322, 327, the defendant was accused with the violation of the Harrison Anti-Narcotic Act (26 USCA §§ 211, 691–707). In that case the defendant was convicted of the offense of selling drugs without paying the special tax provided by the statute. The prosecution relied upon the prima facie presumption which was claimed to arise under the statute from the possession of unstamped drugs. In discussing this presumption, the court said: "The general principle is well recognized that even in criminal prosecutions, Congress or a state Legislature may with certain limitations enact that when certain facts have been proved they shall be prima facie evidence of the existence of the main fact in question. 12 C. J. p. 823, § 285. The limitations are these: There must be some rational connection between the fact proved and the ultimate fact presumed; the inference of the existence of the ultimate fact from proof of the other fact must not be so unreasonable or unnatural as to be a purely arbitrary mandate. * * *" Further on in the opinion, the court also said: "In our opinion, Congress could not lawfully enact that possession of unstamped narcotic drugs should be prima facie evidence of a violation of the first penal provision of section 1."

In the case of Simpkins v. State, 35 Okl. Cr. 143, 249 P. 168, 171, the court had under consideration a statute of Oklahoma providing that if a person driving an automobile had on or about his person any intoxicating liquors that fact would constitute prima facie evidence of such person having driven while intoxicated. After discussing the constitutional limitations as to legislation of that character, the court said: "It is apparent that the presumption here created violates this limitation, since, in order to draw the conclusion of intoxication from the fact of the driver of an automobile having intoxicating liquors on his person or in said vehicle, there must first be the inference that the driver had used the intoxicants, and the further inference that he had used them to such an extent that he was under the influence thereof to the extent of intoxication. The presumption of intoxication fixed by the statute is also contrary to the fundamental requirement that the inference or presumption of intoxication arising from the possession of the person or in the vehicle of liquors must be a probable or natural hypothesis or explanation of such possession. The inference

between the fact of possession and the presumption of intoxication is too remote."

To the same effect are two recent decisions of the Supreme Court of the United States: Manley v. Georgia, 279 U. S. 1, 49 S. Ct. 215, 73 L. Ed. 575, where the court held unconstitutional a statute of Georgia which allowed a conviction of fraud upon mere proof of insolvency, on the ground that the statutory presumption was not rational and that the connection between the fact proved and that presumed was not rational; and Western & Atlantic Railroad v. Henderson, 279 U. S. 639, 49 S. Ct. 445, 73 L. Ed. 884, holding unconstitutional a statute providing for a shifting of the burden of proof on the issue of negligence upon the mere proof of a collision upon the ground that a statute cannot provide for the shifting of the burden of proof on the basis of a presumption which is arbitrary and irrational.

Many other authorities to the same effect might be cited but we deem the above sufficient for our present purpose. These cases uniformly hold that in order to sustain such a legislative presumption as that created by section 9a of said act, it is absolutely necessary that there be some rational or reasonable connection between the fact proven and the fact presumed. In the present case there is no semblance of such a connection. The mere fact that a defendant is brought into court and proof is made that he is using or is in possession of real property susceptible of producing agricultural products is made the basis of a presumption that he is an alien ineligible to citizenship. There can be no possibility of any rational claim that the possession of land of that character by a defendant gives rise to any inference or presumption as to his alienage or citizenship. In at least some of the cases cited there may be said to be some connection, though slight, between the fact proven and the fact presumed. For instance, in the case of the driver of an automobile with intoxicating liquor in his possession, it might well be said that there is some slight although rather shadowy connection between the fact that the accused had intoxicating liquor in his possession and the fact of his intoxication, yet the court held such legislative presumption to be invalid. But in the case before us there is not the slightest connection or relationship between possession of real property and the alienage or citizenship of the person in its possession. According to the unbroken line of authorities, a presumption created by statute and based upon proof of such an unconnected and unrelated fact cannot be sustained as a valid exercise of legislative power. State v. Lapointe, 81 N. H. 227, 123 A. 692, 31 A. L. R. 1212.

We concur: SHENK, J.; PRESTON, J.

132 Cal.App. 412

KIKU SAITO v. POLICY HOLDERS' LIFE INS. ASS'N.

Civ. 4785.

District Court of Appeal, Third District, California.

June 2, 1933.

1. Courts ⇐122.
Pleading ⇐11.

Ordinarily, pleader in court of record need but set forth in complaint his cause of action in ordinary and concise language, and need not plead evidentiary or jurisdictional facts.

2. Venue ⇐68.

On defendant's motion to change place of trial accompanied by affidavit, plaintiff's counter affidavit was properly considered (Const. art. 12, § 16).

3. Insurance ⇐618.

Proper place for trial of action by beneficiary upon life policy was in county where insured accepted policy, since acceptance was last act to be performed that was necessary to make policy valid (Civ. Code, § 1626; Const. art. 12, § 16).

4. Venue ⇐68.

Neither complaint nor counter affidavit to motion for change of place of trial need show that all exceptions provided in constitutional venue provision with respect to corporations existed, before beneficiary could try action on life policy in county other than county wherein insurer had principal place of business, but venue lay in county where it appeared from complaint or counter affidavit that policy was made (Const. art. 12, § 16).

Const. art. 12, § 16, provides that a corporation or association may be sued in the county where the contract is made or is to be performed, or where the obligation or liability arises or the breach occurs; or in the county where the principal place of business of such corporation is situated, subject to the power of the court to change the place of trial as in other cases.

Appeal from Superior Court, San Joaquin County; D. M. Young, Judge.

Action by Kiku Saito against the Policy Holders' Life Insurance Association. From an order denying its motion for change of place of trial, defendant appeals.

Affirmed.

Hugh Martin Young and C. D. Warner, both of Los Angeles, for appellant.

Lawrence Edwards and Len H. Honey, both of Stockton, for respondent.

MILLER, Justice pro tem., delivered the opinion of the court.

This is an appeal from an order denying appellant's motion for change of place of trial from San Joaquin county, in which the action was filed, to Los Angeles county.

The complaint shows that one Chiuchiro Saito took out a policy of life insurance with appellant corporation; that Kiku Saito was at that time the wife of the insured, and was made the beneficiary in the insurance policy; that the insured subsequently died; that due proof of death was made by the widow, and, together with a demand for the payment of the amount of insurance provided in the policy, was served on appellant; that appellant refused to pay, and the suit followed.

On its first appearance appellant filed a demurrer and an affidavit of merits, a demand and notice of motion for change of place of trial.

In its affidavit appellant avers that it is, and at the time of the commencement of the action was, a resident of the county of Los Angeles, where its principal place of business was located; that it was and is a corporation; that it issued its policy of insurance to the deceased in Los Angeles county; that the obligation sued on was made, and was and is performable, if at all, in Los Angeles county.

It is contended by appellant that the complaint is silent as to where the insured resided, or where the policy of insurance was executed or was to be performed.

At the time of the hearing of the motion for change of place of trial, the plaintiff was permitted to file a counter affidavit alleging that the insured was a resident of and actually resided in San Joaquin county at the time the policy of insurance was issued and delivered to and accepted by the insured; that the insured died in San Joaquin county; and that the obligation under the policy of insurance was performable in San Joaquin county.

Appellant urges here the identical question that it has heretofore repeatedly urged in other appeals to this court in other cases presenting a parallel state of facts to those presented in the case here under consideration, namely: That counter affidavits on behalf of a plaintiff cannot be considered in opposition to defendant's motion for change of place of trial, and that plaintiff is, by law, restricted to a consideration of the facts disclosed in his complaint.

[1, 2] Appellant relies on a number of cases cited in its brief, wherein the only papers considered by the court on motions for change of place of trial were the complaint and defendant's affidavit. In those cases the courts have stated that the motion must be determined from the plaintiff's complaint and the defendant's affidavit. But in none of those cases had there been offered or considered any counter affidavit, and, hence, they are not in point. Ordinarily, it is sufficient and proper for the pleader in a court of record to set forth in his complaint his cause of action in ordinary and concise language, and not to plead evidentiary or jurisdictional facts, and if, upon appearance, the defendant seeks to change the place of trial by presenting affidavits alleging that the county wherein the action was commenced was not the proper county for the trial of the action, the plaintiff may meet the motion by filing counter affidavits to show that the action was properly commenced, as provided in section 16, article 12, of the Constitution of California.

[3] Appellant also contends that the contract of insurance became complete in Los Angeles county. However, the record shows that the contract was made in the county of San Joaquin, and that, by its very terms, it was to become complete only on delivery to, and acceptance by, the insured. Section 1626, Civ. Code. The acceptance was the last act to be performed that was necessary to make the contract valid, which, the record shows, was in the county of San Joaquin. Section 1626, Civ. Code; Bank of Yolo v. Sperry Flour Co., 141 Cal. 314, 74 P. 855, 65 L. R. A. 90; Jester v. Kohler & Chase, 123 Cal. App. 53, 10 P.(2d) 794; Ivey v. Kern County Land Co., 115 Cal. 196, 46 P. 926.

[4] The consideration of counter affidavits on such a motion was proper, but, even if the counter affidavit was improperly considered, still the proper place for the trial of the action was in the county of San Joaquin. The contents of the counter affidavit can be entirely disregarded and reference be had solely to the complaint, and still sufficient facts appear to support the order appealed from, for it expressly appears in the complaint that the policy sued on was executed in San Joaquin county, and that the assured's address was at Acamo, Cal., which is in San Joaquin county, and that the policy of insurance was not to become complete until delivered to and accepted by the insured. It is true that the complaint does not expressly allege that the policy was to be accepted at any particular place, but inasmuch as the address of the insured does appear on the face of the complaint, and there is no provision in the policy of insurance, or in the application therefor, providing any other place as the place at which acceptance should be made, it was manifestly intended that it was to be accepted by the insured at his address. It was not necessary that either the complaint or the counter affidavit should show that each and all of the exceptions provided by section 16, article 12, of the Constitution, should exist before the plaintiff would be en-

titled to commence and try an action in a county other than the county wherein the defendant corporation had its principal place of business. That section of the Constitution provides as follows: "A corporation or association may be sued in the county where the contract is made or is to be performed, or where the obligation or liability arises or the breach occurs; or in the county where the principal place of business of such corporation is situated, subject to the power of the court to change the place of trial as in other cases."

Hence, if it appears, either from the complaint or from the counter affidavit, that the contract was made in San Joaquin county, that would be quite as effective as if it should expressly appear therefrom that the contract was to be performed in San Joaquin county, or that the breach of the obligation occurred therein. Section 16, art. 12, Const.; Trezevant v. Strong Co., 102 Cal. 47, 36 P. 395.

The case of Sims v. Mains (Cal. App.) 21 P.(2d) 447, recently decided, is a case in which a counter affidavit was used, but the court held that the affidavit, as worded, showed no facts that were different from those disclosed by the complaint, and that the nature of the action can only be determined by reference to the complaint. It is not held in the Sims v. Mains Case that the court cannot refer to counter affidavits to determine the right of the plaintiff to have his case tried in any county wherein he has the right under the Constitution to have it tried. The court there did not decide that the complaint alone could be referred to to determine whether a change of place of trial should or should not be granted. The determination of the character of an action is one thing, and a determination as to whether, under section 16, article 12, of the Constitution, the trial of an action against a corporation should be had in the county where the action was commenced, or in the county of the principal place of business of the defendant corporation, is quite a different matter.

Appellant's contention with reference to plaintiff's right to use counter affidavits on a motion for change of place of trial of an action has been repeatedly decided adversely to it in a number of cases that have been brought home to it, particularly in Masajiro Nakanishi v. Policy Holders Life Ins. Ass'n (Cal. App.) 19 P.(2d) 287; Anna Rowe v. Policy Holders Life Ins. Ass'n (Cal. App.) 21 P.(2d) 443; Woods v. Berry, 105 Cal. App. 90, 286 P. 1073; Mills v. Dickson (Cal. App.) 19 P.(2d) 278.

The order appealed from is affirmed.

We concur: PULLEN, P. J.; R. L. THOMPSON, J.

132 Cal.App. 785

TODOME ARAO, Plaintiff and Respondent, v. POLICY HOLDERS' LIFE INSURANCE ASSOCIATION (a Corporation), Defendant and Appellant.

Civ. 4787.

District Court of Appeal, Third District California.

June 2, 1933.

Appeal by defendant from a judgment of the Superior Court of San Joaquin County, D. M. Young, Judge, denying motion for change of place of trial in an action on a policy of life insurance. Affirmed.

Hugh Martin Young and C. D. Warner, both of Los Angeles, for appellant.

Lawrence Edwards and Len H. Honey, both of Stockton, for respondent.

MILLER, Justice pro tem., delivered the opinion of the court.

This case presents the same facts and the same questions of law that are presented in the case of Kiku Saito v. Policy Holders Life Insurance Association, 22 P.(2d) 724, this day decided by this court, except as to the name of the plaintiff and the dates of the transactions involved; and, for like reasons as in that case given, the order denying a change of venue is affirmed.

We concur: PULLEN, P. J.; R. L. THOMPSON, J.

132 Cal.App. 786

Lela L. MAHIN, Plaintiff and Respondent, v. POLICY HOLDERS' LIFE INSURANCE ASSOCIATION (a Corporation), Defendant and Appellant.

Civ. 4786.

District Court of Appeal, Third District, California.

June 2, 1933.

Appeal by defendant from an order of the Superior Court of San Joaquin County, D. M. Young, Judge, denying motion for change of place of trial in an action upon a policy of life insurance. Affirmed.

Hugh Martin Young and C. D. Warner, both of Los Angeles, for appellant.

Nutter & Rutherford and A. P. Hayne, all of Stockton, for respondent.

MILLER, Justice pro tem., delivered the opinion of the court.

This case involves the same questions of law and fact as those presented in the cases of Kiku Saito v. Policy Holders' Life Insurance Association, 22 P.(2d) 724, and Todome Arao v. Policy Holders' Life Insurance Association, 22 P.(2d) 726, this day decided by this court, save and except the name of the plaintiff and the dates of the transactions involved, and the further exception that the complaint in this case does not set out a copy of the policy of insurance, and the application therefor, signed by the insured, showing his address to be in San Joaquin county, nor that the policy of insurance was executed in San Joaquin county, as does the complaint in each of those cases. And, on authority of those cases and the cases relied upon and cited by us in those cases, the order appealed from is affirmed.

We concur: PULLEN, P. J.; R. L. THOMPSON, J.

KALASH v. LOS ANGELES LADDER CO. (ASSOCIATED INDEMNITY CORPORATION, Intervener).*

Civ. 7700.

District Court of Appeal, Second District, Division 2, California.

May 24, 1933.

Hearing Granted by Supreme Court July 21, 1933.

1. Negligence ⇐27.

General rule is that manufacturer or seller is not liable to third persons having no contractual relations with him for negligence in construction, manufacture, or sale of articles manufactured or sold.

2. Negligence ⇐27.

Act of negligence of manufacturer or seller which is inherently or imminently dangerous to life or health of mankind and which is committed in preparation or sale of article intended to preserve, destroy, or affect human life, is actionable by third persons suffering from negligence.

A thing is "inherently dangerous" within the above rule when common experience of mankind has shown its use under any and all conditions to be accompanied with risk or hazard to life, health, or property. What is or is not a thing "imminently dangerous" is much more speculative, and such term as used in law includes to a greater or less degree, something more than the thing itself, namely the manner of its use, and further still the term has been restricted in its application to particular article which may be in question and this specific object is considered with reference to its own peculiar condition.

[Ed. Note.—For other definitions of "Imminently Dangerous" and "Inherently Dangerous," see Words & Phrases.]

3. Negligence ⇐27.

40-foot extension ladder with defective rung near top thereof is "imminently dangerous" in ordinary and anticipated use, hence manufacturer is liable to third person having no contractual relation with manufacturer for negligence in construction.

4. Sales ⇐255.

Statute relating to warranty is inapplicable excepting as between parties to contract of sale (Civ. Code, § 1769).

5. Negligence ⇐27.

Action by painter suing manufacturer of ladder sold to painter's employer for injuries resulting from defective rung causing painter to fall while working was based on negligence, "negligence" in such case constituting lack of ordinary care under circumstances.

[Ed. Note.—For other definitions of "Negligence," see Words & Phrases.]

6. Negligence ⇐134(1).

In painter's action against manufacturer of ladder for injuries sustained when defective rung of ladder broke, evidence *held* insufficient to make out case of negligence against manufacturer who sold ladder to painter's employer.

Appeal from Superior Court, Los Angeles County; W. A. Anderson, Judge.

Action by John Kalash against the Los Angeles Ladder Company, in which Associated Indemnity Corporation intervened. From a judgment for plaintiff, and from an order denying defendant's motion for judgment notwithstanding the verdict, defendant appeals.

Reversed.

Dave F. Smith and Birney Donnell, both of Los Angeles, for appellant.

L. Styskal, of Los Angeles, for respondent Kalash.

Syril S. Tipton, of Los Angeles, for respondent Associated Indemnity Corporation.

PARKER, Justice pro tem.

This is an action brought by plaintiff to recover damages for personal injuries alleged to have been caused by the negligence of defendant in placing a defective rung in a ladder which was manufactured by defendant corporation and sold by it to plaintiff's employer. From a judgment after verdict in

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes
*For subsequent opinion see 34 P.2d 481.

favor of plaintiff and from an order denying defendant's motion for judgment notwithstanding the verdict, the defendant appeals.

We may pause to note the intervention. Intervener is the insurance carrier of plaintiff's employer, under the Workmen's Compensation Act (St. 1917, p. 831, as amended). In the court below the complaint in intervention was dismissed. It was understood between plaintiff and intervener that the matter of adjustment as between themselves should proceed without adjudication. No further mention will be given the intervener and the appeal will be considered without reference thereto.

The facts going to constitute plaintiff's cause of action are substantially as follows: Plaintiff was a painter. He was employed by Hart Bros. Company and on April 8, 1929, he was, under his employment and in the course thereof, engaged in hanging screens on the outside of an apartment house in the city of Los Angeles. The windows upon which the screens were being hung were at a height of approximately thirty feet above the ground. In order to reach this height a ladder was used. This ladder was of a type known as a forty-foot extension in two pieces. The rungs were spread fourteen inches apart and the spaces between the sides were sixteen inches. This ladder was manufactured by defendant corporation and was sold to Hart Bros. Company on March 8, 1929. As noted, plaintiff was using this ladder. He had ascended to the window and was fastening the screen. He was standing on the second rung from the top when without warning the rung broke and plaintiff fell to the ground, sustaining severe injuries.

It is not claimed that the ladder was in anywise defective or improperly constructed save as to the one rung which broke. The fact is that after the broken rung was replaced the ladder was returned to the Hart Bros. Company and used for such general purposes as is usual with ladders of this type.

The foregoing sufficiently states the facts for a discussion and determination of the main point involved in this appeal. Other proven facts will be noted as the case develops. Appellant stoutly maintains here, as it did in the court below, that proof of all of these facts does not entitle plaintiff to recover. As a corollary to this contention it is urged that even if a liability could be fastened on appellant there is a serious deficiency in the evidence going to establish facts sufficient to impose such liability in the instant case.

[1-3] The main question of law presented concerns the liability of a manufacturer to persons other than those to whom the sale of an article is made. The general rule of law is that a manufacturer or seller is not liable to third persons who have no contractual relations with him for negligence in the construction, manufacture, or sale of articles manufactured or sold. This rule is conceded by both parties and it is unnecessary to quote authorities in support thereof. To this rule, however, the courts have generally recognized an exception in the case of articles of sale that are inherently or imminently dangerous. As it ordinarily is stated, an act of negligence of a manufacturer or seller which is imminently dangerous to the life or health of mankind, and which is committed in the preparation or sale of an article intended to preserve, destroy, or affect human life is actionable by third parties who suffer from the negligence. 24 Ruling Case Law 512 et seq.; Huset v. J. I. Case Threshing Machine Co. (C. C. A.) 120 F. 865, 61 L. R. A. 303.

We may well pause here to study the principle involved in the exception. Let us first take the words "inherently" and "imminently" as descriptive of the danger. Much of the law on the subject surrounds the attempted distinction between the terms. Giving to each term every shade of meaning contained within it, we find the words to a great degree interchangeable. Different courts, however, seem to have stolen the words from the general language and given or attempted to give to them a meaning recognizable by lawyers only. Without attempting to harmonize or distinguish the numerous authorities on the subject, we find that the majority of them attempt to define the words purely by illustration or reference to certain things generally accepted as coming within the exception of the rule governing the liability of manufacturers and vendors. What seems at least a practical definition and in line with the reasoning of the multitude of cases on the subject would be that a thing is inherently dangerous when the common experience of mankind has shown its use under any and all conditions to be accompanied with risk or hazard to life, health, or property. In this class there immediately comes to mind poisons, deadly weapons and explosives. What is or is not a thing imminently dangerous is much more speculative. Dictionaries are of little aid in determining the meaning of the word as the law uses it. The term as used in the law includes to a greater or less degree something more than the thing itself, namely, the manner of its use. And further still has the term been restricted in its application to the particular article which may be in question and this specific object is considered with reference to its own peculiar condition. To illustrate, a forty-foot extension ladder properly constructed and without defect, being an appliance of general use, may not be classed as an article either inherently or imminently dangerous. But this assumes the proper and safe construction of the ladder. A ladder forty feet long or whether in one or two pieces is intended

to support weight above the ground and in its use contemplates that the user will be in a situation where, if the ladder fails, he may be suddenly dropped some thirty or more feet. A defect in material or construction would therefore make the ladder imminently dangerous and in this sense the term "imminent" means likely to happen, impending, or near in point of expectancy.

And so, summing up the situation, we conclude and we have little difficulty in holding that a forty-foot extension ladder with a defective and unsound rung at a point in the said ladder near the top thereof is an article imminently dangerous in the ordinary and anticipated use.

[4] It follows that the manufacturer of such an article is liable to third persons who have no contractual relation with him for negligence in construction or manufacture. We come now to the nature of the liability, whether resting upon contract, including warranty, or upon tort. In Cliff v. California Spray Chemical Co., 83 Cal. App. 424, 257 P. 99, it is declared that where there are no contractual relations between plaintiff and defendant recovery can be had only in tort. This rule is likewise conceded in the case of Fidelity & Cas. Co. of New York v. Paraffine Co., 188 Cal. 184, 186, 204 P. 1076, and in the earlier case of Lewis v. Terry, 111 Cal. 39, 43 P. 398, 31 L. R. A. 220, 52 Am. St. Rep. 146. Section 1769 of the Civil Code on the subject of warranty has no application excepting as between the parties to the contract of sale.

[5] The action being ex delicto, the basis thereof is the violation of a duty owed by defendant to the plaintiff. In other words, the right of plaintiff to recover is based upon the negligence of defendant. And negligence in these cases is, as in other cases, the lack of ordinary care under the circumstances. The entire subject has been exhaustively annotated by nearly all of the current law compilers. 24 Ruling Case Law 512; L. R. A. 1916F, 704; 17 A. L. R. 672; 42 A. L. R. 1261; 63 A. L. R. 340. Authorities from every jurisdiction are cited and it is unnecessary to do more than note the reference. We are not without the expression of our own courts on the subject. In Lewis v. Terry, one of the earlier cases, reported in 111 Cal. 39, 43 P. 398, 31 L. R. A. 220, 52 Am. St. Rep. 146, the rule is announced that one who, knowing an article to be defectively constructed, represents it to be safe, and sells it to a person who has no knowledge of the defect, is liable in damages to one who, without fault on his part, was injured while using the same. In Cliff v. Calif. Spray Chemical Co., 83 Cal. App. 424, 257 P. 99, 103, we find many authorities collected and the entire subject reviewed. It is said by the court: "We may, however, state that the contention of the appellant that the court erred in instructing the jury that the defendant could not be held liable for its carelessness and negligence in the manufacture and preparation of the spray material, unless the defendant had knowledge, or should have had knowledge, of a dangerous defect when it shipped the solution, and that it concealed said knowledge from its consignee * * * is not well taken." In Dahms v. General Elevator Company, 214 Cal. 733, 7 P.(2d) 1013, 1016, we have an interesting and instructive discussion on the subject. The court prefaces the discussion by stating that the point to be decided is the liability of manufacturers and vendors. We find this language: "To state the proposition clearly and distinctly, it is that, although a machine may not be in its nature inherently dangerous, yet, if it is made so *by the neglect* of a manufacturer having notice and knowledge that it is to be used by others than the purchaser, and injury results to others than the purchaser, directly traceable to *that negligence*, such manufacturer is liable to the person injured because of *that negligence*. * * * It is to be noted that liability in such cases is predicated *on the negligence* of the manufacturer. * * * *He is in no sense an insurer.*" (Italics ours.) At the conclusion of the opinion the court again emphasizes the necessity of showing negligence. An attack was made upon a certain instruction and the court in approving the instruction says: "The instruction is proper in all respects and contains all the elements necessary for a recovery by plaintiff. The instruction informed the jury that they must find that defendant negligently repaired the elevator, and that such negligence proximately contributed to the injury before they could find for the plaintiff. These were the only two elements necessary under the reasoning above given." While this was an action concerning the repair of an elevator, we note again the language of the court, preceding the discussion, as follows: "It is first to be kept in mind that the duties of defendant must be measured by the same rules that apply to manufacturers and vendors."

[6] Let us now turn again to the instant case. The only fault alleged to be in the ladder was the defective rung or cross bar. It is conceded that in all other respects the ladder was well constructed and of dimensions sufficient to comply with all standards of safety. The sole claim is that as to this particular rung the ladder was negligently constructed and was of defective material. It is claimed that defendant had express knowledge of the defect, though this defect was admittedly hidden, latent, and invisible and not possible of discovery by general observation or superficial examination. There is not a word of testimony in support of this claim of knowledge on the part of defendant or the fact of concealment of such knowl-

edge. The claim is urged that while there may not have been actual knowledge of the defect, yet the defect was such that defendant could, by the exercise of reasonable and ordinary care in the construction of the ladder, have learned of the defect. In other words, that the construction was negligent in failing to ascertain the condition of the rung. The evidence adduced by plaintiff on this subject consisted of the introduction of the broken rung and the testimony of two experts on wood. We deal now with the evidence of plaintiff. The rung was made of oak. Oak wood ranks second to hickory in strength and is a wood generally approved in building ladders of the type and size with which we are now concerned. The particular rung was defective for the reason that it was a piece of oak designated as "brash." Brash wood means that it is brittle, that it will break easily and in its breaking will snap off short without any fibers hanging in the break. There is no definite cause for brashness in wood. It may happen and often does that in one particular board may be found brashness of some parts while the remainder is sound. The cause as given is that a tree, after maturity, stops its growth and from that time begins a process of deterioration. Brash wood is not useless but is used for many purposes where no strain or weight is put upon it. The rung in question was clear wood with no knot holes, decay, or other defects. One of the methods of discovering any brashness is by the weight, inasmuch as such wood will be lighter in weight, owing to absence of moisture. This particular rung, after being locked in an office for some months, contained 9 per cent. moisture, the normal amount of moisture content of sound wood in southern California. The testimony of the wood experts of plaintiff, being the only evidence on this point adduced by plaintiff, was that the ordinary workman or a man working around a factory would not notice whether this rung was a brash piece of wood or a tough piece of wood; that in order to determine the strength of the piece of wood it would require somebody that understood the texture of wood and somebody who knew how to make a thorough examination; that the reason it can be easily determined that the rung is brash is on account of the way it breaks. Quoting verbatim some of the expert testimony, we note: "Q. Could you by observing the end of the stick, before milling and before it was broken tell whether it was brash? A. No sir. Q. Do you think that the ordinary mechanic in a mill, in a lumber mill or in a ladder manufacturing plant would be able to detect it? (The brash.) A. No sir I do not think so." It was stipulated that as to size the rung more than meets the requirements of the Industrial Accident Commission. It was admitted by plaintiff's experts that it could not be stated what weight the rung, even in its claimed brash condition, would carry, within one hundred pounds of accuracy and that the ordinary mechanic in a ladder manufacturing shop would not be able to say as closely as the expert. This is practically the case of plaintiff. On the other hand, the uncontradicted testimony of this defendant may be detailed. The defendant ladder company constructs about 200,000 ladders of this type per year and has been engaged in such manufacturing business for many years. The foremen, laborers, and mechanics employed by said company were competent and skilled. The particular rung in question was purchased from a wholesale dealer in lumber and hardwood, which said dealer was of good repute in the trade and the quality of wares handled by said dealer was generally respected. The rung when delivered had been finished to size and all that was necessary for defendant to do was to fix the ends to fit into the sides of the ladder. The rung here being considered was of a carload purchase, included among thousands of other rungs. The carload was ordered by sample. Upon delivery test was made of a small number of rungs to compare quality with sample and the test was satisfactory and the rungs accepted. The samples from which the carload was ordered were of good material. The selection was made by the general manager of defendant corporation, a man who had been purchasing ladder material for a period of some twenty years. When the carload arrived, the material and the samples were compared and found to tally by the manager and two other experienced men. In all respects the material was approved. This lumber, having been accepted, went into stock and from it were made the rungs on the ladder in question. Before going into stock, however, different tests are made on a set of samples taken from the lot. One or two pieces are put in a vise and struck with a ten-pound sledge for a test of strength. Another piece is taken and put between two side rails, a rope is thrown over the rung from which a platform is hung and a test of eight hundred pounds put upon the piece. The ladder in question was made from this stock and was made subsequent to January 1, 1929, that is, within a few months of the date of sale. In the process of manufacture this ladder, including the rung in question, went through many hands. In order to fit the rung into the ladder the rung was tenoned—that is to say, the ends were shaped and slightly reduced to fit the sides. In this proceeding the rung was handled by the operator three different times. The grain of the wood was observed and the test of weight given. As was conceded by the experts of plaintiff, brashness or defect, if obvious, may be detected by the feel in the "heft" of the piece. The uncontradicted testimony is that whenever a piece or rung felt suspicious it was discarded. Only one rung is handled at a time in the

process of tenoning. Then after the rungs are ready for the ladder they go to another department. There they are again tested and placed. As each rung is placed it is nailed in and in the work the rung is struck with a hammer and if unsound or defective will indicate by the sound. After the ladder is assembled, it goes to the shipping or sales department and there through another inspection. The record shows without dispute that each step was followed in the construction of the ladder in question and the record further shows that each and every man handling the rung was an experienced operator. The ladder, when sold, was unpainted and nothing covered or concealed.

We feel that in this condition of the record before us no negligence has been shown. The only evidence of negligence is the inference arising from the defective condition of the rung. Yet the testimony of plaintiff shows clearly that the defect was not obvious but was of such a nature as to be not discernible by any ordinary tests. Two tests were given. One to saw the piece in two or more pieces when the softness of the wood would indicate inferiority. Yet, according to the testimony, a brash condition might exist in a small portion and be absent in the surrounding area. This would mean that a conclusive result could be obtained only by sawing up the piece into such small portions as to render it useless for any purpose. The next absolute test would be to break the piece up and learn from the break the quality of the piece. This, too, would be an impractical and useless test. The next standard of care outlined would be to go to the forest and study the trees, the climate and the soil. Embraced in this would be pathology, idendrology, timber physics and wood technology. The legal result would be and necessarily must be to make the manufacturer an absolute insurer. This, of course, is contrary to the established law as cited. Paraphrasing the language of Titus v. Bradford, B. & K. R. Co., 136 Pa. 618, 20 A. 517, 20 Am. St. Rep. at page 946, no man is held by law to a higher degree of skill than the fair average of his profession or trade and the standard of due care is the conduct of the average prudent man. The test of negligence in manufacturers is the same, and however strongly juries may be convinced that there is a better or less dangerous way, no jury can be permitted to say that the usual and ordinary way, commonly adopted by those in the same business, is a negligent way, for which liability shall be imposed. Juries must necessarily determine the responsibility of individual conduct but they cannot be allowed to set up a standard which shall, in effect, dictate the custom or control the business of the community. In Kilbride v. Carbon Dioxide, etc., Co., a Pennsylvania case reported in 201 Pa. 552, 51 A. 347, 348, 88 Am. St. Rep. at page 829, we find the following appropriate observation: "'Almost all accidents could be avoided if the especial manner of their occurrence could be foreseen;' and we may add that after almost every one theories are advanced as to how it could have been avoided; but a defendant's liability for negligence is not to be so determined. What would have been wise, simply in view of what is learned after an occurrence like this, is no criterion of care. Failure to do some particular thing which might have prevented an accident and which is brought to the attention of the party charged with carelessness for the first time only after the accident had happened, is not the test of negligence. The standard of proper care is the observance of prudence as the average prudent man observes it by following the ordinary usage of his business. * * * If, having exercised such prudence, unforeseen accidents occur, negligence cannot be imputed to him." It is interesting to note further that in this case last cited the plaintiff recovered in the trial court for damages sustained through the explosion of a tube or cylinder. The judgment was reversed and the court, in reversing, said: "There is nothing more in the case, as presented by the plaintiff, than that, after the unfortunate accident happened, it was discovered the defendant might have used a test method used in a foreign country, which might have prevented the explosion." Many cases have held that proof that defendant purchased the material from a reputable and well-established firm sufficiently refuted the charge of negligence. We do not adopt these authorities further than to note another symptom of the general feeling as expressed in the Dahms Case, supra, by our own court that a manufacturer is not an insurer. Truly has it been said, only God can make a tree. And in this manifestation of the Supreme Power the secret is not disclosed to the comprehension of the finite mind.

The plaintiff here has failed to make out any case from which even an inference of negligence may legitimately follow. To adopt plaintiff's theories would be to make every manufacturer an insurer without qualification. This is contrary to the policy of the law and in its final analysis such a ruling would contravene a sound public policy. It would paralyze industry, render factory production a hazard and flood the courts with all manner of feigned controversy against which defense would be impossible.

The views herein expressed render it unnecessary to determine other points raised.

It is our opinion, however, that our action should be merely a reversal of the judgment, without reference to the intermediate orders involved. Possibly, upon a new trial a different showing may be made and we would not preclude plaintiff from this opportunity.

Judgment reversed.

We concur: WORKS, P. J.; STEPHENS, J.

WEIL v. CALIFORNIA BANK.*

Civ. 4895.

District Court of Appeal, Third District, California.

May 31, 1933.

Rehearing Denied June 30, 1933.

Hearing Granted by Supreme Court July 28, 1933.

1. Evidence ⇐419(1).

Where instrument is silent or uncertain as to true consideration, evidence showing true consideration does not affect terms nor impair validity.

2. Appeal and error ⇐1010(1).

Finding of trial court that written instrument did not express entire agreement, if based on substantial testimony, becomes binding on appellate court.

3. Evidence ⇐419(13).

Parol evidence showing that, as part of consideration, vendee was to pay vendor any profit resulting from transaction, *held* admissible, notwithstanding written agreement, where writing did not express entire consideration.

4. Evidence ⇐546.

Generally, qualification of expert witness is question for trial court in first instance.

5. Evidence ⇐545.

Where opposing counsel made no attempt to interrogate expert witness relating to qualifications, admission of testimony did not constitute abuse of discretion.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by Malwina Z. Weil against the California Bank, a corporation. From a judgment in favor of the plaintiff, the defendant appeals.

Judgment affirmed.

Wm. B. Himrod, Swanwick, Donnelly & Proudfit, and Donald O. Welton, all of Los Angeles, for appellant.

Leo Freund and George Appell, both of Los Angeles, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

Plaintiff, the respondent herein, was the owner as her separate estate of a piece of property which will be referred to as the San Marino property. This was subject to a mortgage for $40,000, a subordinate deed of trust for $16,100, and certain unpaid taxes.

The deed of trust was in process of being foreclosed when respondent and the appellant agreed in a writing hereinafter set out that respondent would convey her equity in the San Marino property to appellant, who, in turn, agreed to satisfy a judgment held by appellant against the husband of respondent, and also agreed, as a part of the consideration, to permit respondent to occupy for a limited period one of the apartments in the mortgaged property. This arrangement was consummated, and thereafter appellant exchanged the San Marino property, together with other parcels for a piece of property referred to as the Highland avenue property.

This action is based on an alleged oral agreement entered into shortly before the signing of the agreement referred to above, under the terms of which oral agreement appellant undertook that upon the sale of the San Marino property it would pay respondent whatever profit it might realize from the deal after deducting its investment therein. The court at the conclusion of the hearing gave judgment for plaintiff in the sum of $4,076, having found that the value of the San Marino property at the date of the exchange was $78,666, and that appellant had invested therein $74,584, making a profit in the amount for which judgment was ordered.

The principal objection urged on this appeal is that the court erred in admitting the oral agreement in evidence. Objection is also made to the testimony of witnesses called as experts as to the value of the property involved. The document in writing, which appellant contends is the contract of the parties, and into which was merged the entire agreement of the parties, is in substance as follows:

"Los Angeles, California,
"January 20th, 1928.

"California Bank, Los Angeles, California.

"Gentlemen: Re: Deed of Malwina Z. Weil and Julius Weil. We hand you herewith our Grant Deed in your favor covering the following described property * * * [San Marino property] subject to taxes for the fiscal year 1927–28; also that certain deed of trust * * * for $40,000.00 * * *; also that certain deed of trust * * * for $16,100.00, * * *

"You are authorized to use enclosed deed only upon the following conditions:

"It is understood that you will cause a search of title covering the above property to be made and if upon such search you find that said property will upon the recording of enclosed Deed be vested in California Bank * * * you are, in that event, authorized to record said Deed, provided you deliver to the undersigned, J. B. Weil, a Satisfaction of Judgment. * * *

"It is further understood and agreed that as part of the consideration for the delivery of enclosed Deed to you that the undersigned Malwina Z. Weil may occupy that certain apartment known as Apartment A * * * without any charge for rent * * * during said period. * * *

*For subsequent opinion see 27 P.2d 904.

"It is further understood that the six apartments * * * are occupied by the following persons whose rental has been paid only to the date stated, to-wit: * * *

"It is understood that all rentals after the above dates shall be payable to the new owner, California Bank.

"[Signed] Malwina Z. Weil
"Julius B. Weil.

"The deed above referred to is accepted, subject to the conditions set out in the above letter, and the same is satisfactory and agreed to by the undersigned.

"California Bank, a corporation
"By James E. Geis, Ass't Sec'y.
"Jan. 21, 1928."

Respondent claims that the foregoing is nothing more than a letter accompanying the delivery of the deed to the San Marino property in accordance with the prior oral agreement, and that it was not necessary to restate the entire oral agreement. Respondent also contends that, conceding the document in question constituted the agreement of the parties as to the subject matter, nevertheless providing as it does that, "as part of the consideration for the enclosed deed," respondent might occupy a certain apartment, the entire consideration being uncertain, she would have the right to show what did constitute the full consideration.

[1] It is undoubtedly the rule that, where an instrument is silent or uncertain as to the true consideration upon which it is executed, evidence to establish the true consideration does not affect the terms of the instrument nor impair its validity. To such effect is the case of W. P. Fuller & Co. v. McClure, 48 Cal. App. 193, 191 P. 1027, 1031: "As a general rule, the recitals of a written instrument as to the consideration are not conclusive, and it is competent to inquire into the consideration and show by parol what the real consideration was, provided the legal effect or operation of the instrument is not thereby altered or defeated."

So, also, in Guidery v. Green, 95 Cal. 634, 30 P. 786, 787: "Neither did this testimony tend to vary or contradict the terms of the subsequent written agreement, but was merely for the purpose of showing the consideration upon which it was executed. The instrument itself was silent upon the subject of its consideration, and any evidence in reference thereto would not affect its terms or impair their validity."

Respondent maintains that in the instant case parol evidence was introduced to prove that the original agreement was for the payment of money which would be realized in the event a profit were made from the sale of the real estate in question, and that the document accompanying the delivery of the deed was incidental, providing for minor details governing the occupancy of the premises by the respondent and a statement of the rentals due. She furthermore claims the transaction between Julius B. Weil and the bank as to satisfaction of a judgment against him was entirely separate and apart from the transaction here in question, which affected only her separate property. The latter seems to have been the theory of the trial court, but upon either theory we believe the judgment should be affirmed.

[2] The court found that it was not true that the written instrument set forth above and delivered to appellant after the oral agreement between the parties expressed the entire agreement, and, the court having so found upon substantial testimony, it becomes binding upon this court.

The case of Luitweiler, etc., Co. v. Ukiah, etc., Co., 16 Cal. App. 207, 116 P. 707, 711. 712, cites with approval the following quotation from Ehrsam v. Brown, 64 Kan. 466, 67 P. 867: "Whether the writing contains the entire agreement is a question to be determined not merely from the face of the instrument, but from all the facts and circumstances connected with it, and is usually for the jury."

[3] Appellant cites and relies upon the case of Thoroman v. David, 199 Cal. 386, 249 P. 513. In that case of claim and delivery a dispute arose as to whether certain personal property was included in the sale of real property. The court there held that the document under consideration expressed the entire consideration passing to the respective parties, and that oral evidence was inadmissible. Appellant also relies upon the case of Harding v. Robinson, 175 Cal. 534, 166 P. 808. That was an action for fraud in the purchase of certain real property. The agreement between the parties was in writing, and was specific as to the consideration, being neither ambiguous nor uncertain in its terms, and therefore required no parol evidence to explain its terms, and the admission of oral testimony was error. In the instant case the writing itself recites that "as part consideration," thereby leaving it to be established outside of the written instrument as to what made up the balance of the consideration.

Appellant claims that the trial court erred in admitting evidence of certain witnesses as to value of the real property, claiming such witnesses were not qualified nor competent to testify as experts thereof. Both of these witnesses testified that they had been engaged in the business of selling real estate and in real estate financing in Los Angeles for over seven years, that they had examined the property in question, and were familiar with land and building values of property, and had sold and appraised many parcels of realty in Los Angeles. Appellant objected to their testimony upon the ground that they had not qualified, but did not seek

to test their qualifications before testifying as to the particular values in question.

[4, 5] As has frequently been said, there can be no exact standard by which the ability or the qualifications of an expert can be measured, and for that reason the qualifications to testify in the first instance are left to the trial court. If opposing counsel doubt the ability of the proffered witness to qualify as an expert, he has the right to interrogate him as to such matters prior to his opinion being received. No attempt was made by counsel here to interrogate the witnesses as to their foundation as experts, and the acceptance of their testimony was not an abuse of discretion by the trial court. As a matter of fact, the objections here urged go rather to the weight of the testimony than as to its admissibility. The rule as to the qualifications of experts in matters affecting real estate is laid down in Estate of Ross, 171 Cal. 64, 151 P. 1138, 1139:

"The party calling a witness to give his opinion on value may qualify him by showing his familiarity with the property and with other property in the neighborhood, his experience in the business, his familiarity with the state of the market and with sales of similar property in the vicinity, and any other facts tending to show his knowledge of the subject and capacity to give an opinion thereon. But while the fact that he knows of sales made and of the prices obtained may be elicited, the prices given in any particular instance are not admissible, except as stated, on the cross-examination of the opposing party, if he sees fit to make the inquiry. The reasons for this are fully set forth in the cases cited, and it is unnecessary to repeat them. We find nothing in San Luis Obispo v. Brizzolara, 100 Cal. 434, 34 P. 1083, or in Montgomery v. Sayre, 100 Cal. 186, 38 Am. St. Rep. 271, 34 P. 646, against this rule. On the contrary, the Brizzolara Case reaffirms the rule and cites the cases above mentioned in support thereof. The statement in the opinion that such evidence had been held admissible upon examination in chief manifestly referred to decisions of other states. The Montgomery Case declares, at most, that the allowance of such questions is within the discretion of the court, and that a judgment or order may be reversed only for abuse of discretion in this respect, but the matter was said to be of slight importance and was evidently not thoroughly considered. Even if that rule be followed, the ruling of the court complained of would be within its discretion under the circumstances shown in this case. There is, it is true, a decided conflict of authority upon this proposition, but the rule in this state and the proper mode of examination are so well settled that counsel should have no difficulty either in following the rule or in eliciting from an expert witness, upon his examination in chief, sufficient of the facts within his knowledge to show the degree of his qualifications and the basis of his opinion."

Appellant also claims the findings are not supported by the evidence, nor that the findings support the judgment, but a careful reading of the record convinces us that there is sufficient to support the findings, and that judgment finds support in the findings.

The judgment is affirmed.

We concur: PLUMMER, J.; R. L. THOMPSON, J.

132 Cal.App. 295

PEOPLE v. BENTSON.

Cr. 2325.

District Court of Appeal, Second District, Division 1, California.

May 26, 1933.

1. Criminal law ⇐1023(8).

Order denying motion to arrest judgment is not appealable (Pen. Code, § 1237).

2. Criminal law ⇐1023(1).

Order denying motion to dismiss action is not appealable (Pen. Code, § 1237).

3. Criminal law ⇐1023(2).

Appeal from "judgment of probation sentence" was not appeal from final judgment of conviction from which appeal may be taken (Pen. Code, § 1237).

4. Criminal law ⇐913(4).

Accused convicted of converting employee's cash bond was not entitled to new trial on ground that sentence was not pronounced within time prescribed by statute, where delay in sentence was for benefit of accused, and accused waived statutory period (St. 1929, p. 961, § 1, adding section 1½ to St. 1917, p. 151; Pen. Code, §§ 1191, 1202; Civ. Code, § 3515).

Verdict convicting accused was rendered October 18, 1932, and October 21, 1932, set for pronouncing of sentence; on that day first motion for new trial was denied, and accused was permitted to apply for probation and passing on application was set for November 18, 1932, accused waiving statutory period. That hearing was continued to November 25 with accused's consent, and court transferred accused to hospital for mental examination, and, accused not having returned from hospital, case was continued to December 9, 1932. On that date case was transferred to another court and continued to December 13, at accused's request, and continued to December 16 by court

without objection, at which date court passed on application for probation and denied motion for new trial.

5. Criminal law ⇐977(3).

Accused who applied for probation and consented to have hearing on such application on date later than statutory period of 25 days after verdict waived maximum statutory period of 115 days, where probation application was not withdrawn (Pen. Code, §§ 1191, 1202).

6. Criminal law ⇐982.

Where accused was convicted of converting employee's cash bond, and amount in information on which conviction was had exceeded $200, placing accused on probation for two years, was not abuse of discretion (St. 1929, p. 961, § 1, adding section 1½ to St. 1917, p. 151; Pen. Code, §§ 487, 489, 490, 1203).

Appeal from Superior Court, Los Angeles County; Elliot Craig, Judge.

Victor L. Bentson was convicted of violating St. 1929, p. 961, § 1, adding section 1½ to St. 1917, p. 151, providing that funds taken from employee as cash bond may be used only to liquidate accounts between employer and employee and shall not be mingled with other funds, and he appeals.

Appeals from order denying motions to dismiss and to arrest judgment dismissed, and orders granting probation and denying motion for new trial affirmed.

Aileen M. MacLymont and Victor L. Bentson, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John D. Richer, Deputy Atty. Gen., for the People.

DESMOND, Justice pro tem.

The defendant was found guilty by a jury of violating section 1½ added to St. 1917, p. 151, by section 1 of chapter 559, p. 961, Statutes of 1929, which reads as follows: "Sec. 1½. Any money or property put up by any employee or applicant for employment as a cash bond in any case must not be used for any purpose other than liquidating accounts between the employer and his said employee or return to the said employee or applicant for employment, and shall be held in trust for this purpose and not mingled with the money or property of the employer who receives same, any provision of any contract between the employer and employee or applicant for employment to the contrary notwithstanding. Any employer or prospective employer, or agent or officer thereof, who misappropriates any such money or property, mingles it with his own or uses it for any other purpose than that set forth above, shall be guilty of theft and shall be punished, upon conviction thereof, in accordance with the provisions of sections 486, 487, 488, 489 and 490 of the Penal Code."

The amount of money delivered by the complaining witness to the defendant and not returned was $260. The verdict in this case was rendered October 18, 1932, and, after various continuances, probation was granted the defendant on December 16, 1932. On that same date the court had denied motions for dismissal, for arrest of judgment and for a new trial, the latter motion being grounded on sections 1191 and 1202, Penal Code; in other words, the defendant claiming then and now that judgment was not pronounced against him within the time prescribed by law in the first mentioned section, and that therefore he is entitled to a new trial under the provisions of the second. Defendant gave oral notice of appeal at the time his various motions were denied and sentence imposed. The written notice of appeal is "from Order denying motion for a new trial under P. C. 1191 and Order denying Motion for Arrest of Judgment in the above entitled case and judgment of probation sentence herein."

[1-3] An order denying motion to arrest judgment is not among the orders from which an appeal may be taken under section 1237 of the Penal Code. See People v. Caldwell, 55 Cal. App. 280, 203 P. 440; People v. Sichofsky, 58 Cal. App. 257, 208 P. 340. The same is true of an order denying a motion to dismiss an action. While it is true that any error of a trial court in denying either of such motions is reviewable upon an appeal from the judgment (section 1259, Pen. Code; People v. Williams, 184 Cal. 590, 194 P. 1019), the appeal in this case is not from a final judgment of conviction, mentioned in section 1237 as the judgment from which an appeal may be taken. The appeal here is "from the judgment of probation sentence," a subject which we hereinafter discuss. Since the two orders last mentioned are not appealable, and since, also, any errors claimed to have been made in regard to them are not reviewable, there being before us no appeal from a final judgment of conviction, it follows that the appeals from said orders must be dismissed.

Consideration of the other principal ground of appeal, refusal on December 16th to grant a new trial, calls for a review of the various proceedings had in the case after the verdict was rendered on October 18, 1932. At that time the pronouncing of judgment and sentence was set for October 21, 1932. On that date, a motion for a new trial was denied and leave granted the defendant, upon his request, to file an application for probation, passing on the same and pronouncing of judgment and sentence then being fixed for November 18th, the "defendant waiving the statutory period" according to the clerk's transcript now before us. On November 18th, the defendant being present in court and making no objection, all matters were continued to November 25th, and at the same time the court having determined that de-

fendant should be examined as to his mental condition, made an order transferring him to ward 110 of the Los Angeles General Hospital for such examination and observation and a report thereon. Section 1191, Penal Code, provides that, if in the opinion of the court there is reasonable ground for believing a defendant insane, the court may extend the time of pronouncing sentence until the question of insanity has been heard and determined, as provided in sections 1367 to 1374 of the Penal Code. On November 25th, the defendant not having been returned from the hospital, the case was continued to December 9th, attorney for defendant being present and not objecting. On December 9th, the case was transferred to another court for further proceedings, and on that date the motion for a new trial under sections 1191 and 1202 of the Penal Code was presented to the court. At that time the application for probation was still pending. Argument on the motion not being concluded on December 9th, the case was continued to December 13th at the request of the defendant. On that date the arguments were still unfinished, and the court, with no objection either by defendant or his associated counsel, continued the case to the next day, December 14th, and at the close of that day's hearing the defendant moved for a continuance to December 16, 1932, at which time all matters pertaining to the case were finally disposed of, including the court's decision on defendant's application for probation.

Upon this record we feel that defendant's motion for a new trial under the sections of the Penal Code hereinbefore noted was properly denied.

[4, 5] It is provided by section 1191 that the ordinary 5-day period for pronouncing judgment may be extended 20 days for consideration and decision upon an application for probation, "provided, however, that upon the request of the defendant such time may be further extended not more than ninety days additional." When defendant's first motion for a new trial was denied, he was granted permission to file an application for probation. The law, as we have just observed, requires a decision on such an application within 25 days following rendition of the verdict, and, if such decision is adverse, then pronouncement of judgment within that period. But in this case the defendant, when he requested and was given leave to file for probation, waived the statutory period, and, since hearing on his application was fixed with his consent for November 18th, a date subsequent to the 25-day period, it is fair to conclude that the statutory period that was waived was any time within the maximum period of 115 days after verdict, provided by section 1191, Penal Code, that the court in its discretion might find necessary for consideration of the probation application. If defendant had not asked for probation, undoubtedly judgment would have been pronounced and sentence imposed on October 21st. It is clear that the first setting for November 18th and all the other continuances were made primarily for the benefit of the defendant, for the purpose was to determine the question of whether or not his request for probation should be granted. Section 3515, Civil Code, declares that he who consents to an act is not wronged by it, and this maxim of jurisprudence seems applicable here. On November 18th the court felt apparently that a determination of defendant's mental condition might have a direct bearing on the probation decision, and the order for his examination was made. No objection to that order was entered, nor was the request for probation withdrawn. Since defendant and counsel associated with him were both present in court on that occasion and made no objection, the court was justified in believing the waiver of time requirements still continued. This continuing waiver was accepted and recognized by the court at all times for the purpose of determining whether defendant's application for probation should be granted. Since that application was never withdrawn, the "waiver of the statutory period" traveled along with it until the court finally rendered its decision and granted probation on December 16th, the fifty-ninth day following the verdict, and well within the maximum period of 115 days allowed by section 1191.

[6] It has been observed that defendant appeals "from judgment of probation sentence herein"; also that such an appeal is not available under section 1237 of the Penal Code. It may be said further that probation was what the defendant asked for and received; we apprehend, therefore, that the basis of his complaint in this regard is the fact that he was placed on probation for 2 years under sections 487 and 489 of the Penal Code, instead of for 6 months, the maximum term provided by section 490, Penal Code. Since the amount involved in the information upon which conviction was had exceeded the sum of $200, we cannot say that this action by the trial judge constituted an abuse of discretion vested in the court by the quoted section, 1½ as added by section 1 of chapter 559, Statutes of 1929, and section 1203 of the Penal Code, governing matters relating to probation.

The appeals from the order denying motions to dismiss and to arrest judgment are dismissed; orders granting probation and denying motion for new trial under sections 1191 and 1202, Penal Code, are affirmed.

We concur: HOUSER, Acting P. J.; YORK, J.

132 Cal.App. 315

CHRISTY et al. v. OAKLAND TITLE INS. & GUARANTY CO.

Civ. 8604.

District Court of Appeal, First District, Division 2, California.

May 27, 1933.

Hearing Denied by Supreme Court July 25, 1933.

1. Joint-stock companies and business trusts ⇐6.

One creating common-law trust need not be required by trustee to pay cash for his shares where he was entitled to receive from trustee full purchase price received for all certificates less certain charges.

2. Joint-stock companies and business trusts ⇐9, 10.

Clause in common-law trust agreement providing no assets should be distributed to shareholders nor dividends declared out of corpus did not prohibit trustee from turning over proceeds from sale of certificates to creator of trust.

The right of the creator to receive the purchase price of the certificates was not as a "shareholder" nor was it paid to him as "dividends," a dividend being a payment to a shareholder of his proportionate interest in a fund which he has as a shareholder.

[Ed. Note.—For other definitions of "Dividend" and "Shareholder," see Words and Phrases.]

3. Joint-stock companies and business trusts ⇐9, 10.

Purchase price of certificates in common-law trust was not "assets" of trust, nor part of "trust corpus" within clause prohibiting distribution of assets to shareholders and declaration of dividend out of corpus.

[Ed. Note.—For other definitions of "Assets" and "Corpus," see Words and Phrases.]

4. Joint-stock companies and business trusts ⇐7.

Purchasers of units of common-law trust could not take certificates and hold them to determine whether investment was good, and then, when investment failed, claim breach of condition, where they had knowledge of facts.

By accepting the certificates with knowledge of the facts, they must be held to have waived the performance of the condition.

5. Joint-stock companies and business trusts ⇐3.

On creation of common-law trust, condition requiring depositing of subscriptions totalling 100 per cent. of ownership of fee to property owned by trust, *held* substantially complied with.

It was contended that such condition was not complied with because creator of trust did not deposit subscription in writing for interest taken by him. However, in amended application filed with corporation commissioner which was verified by creator of trust, it was recited that he had subscribed in writing for his interest. Furthermore, the condition would seem to have been inserted for his protection and not that of subscribers.

6. Joint-stock companies and business trusts ⇐3½.

There was nothing reprehensible in creator of common-law trust doing business under fictitious name.

7. Licenses ⇐39.

Condition of permit requiring trust agreement to be recorded before issuance of certificates in common-law trust *held* not violated.

While the original certificates bore dates before the date of recordation of the trust agreement, they also carried on their face a notation of the book and page in which the trust agreement was recorded showing that they could not have been issued until after its recordation.

Appeal from Superior Court, Alameda County; John J. Allen, Judge.

Action by Adele F. Christy and others against the Oakland Title Insurance & Guaranty Company for damages sustained by certificate holder of interests or units in a common-law or Massachusetts trust through sale of property under a deed of trust. From an adverse judgment, defendant appeals.

Reversed, with directions.

Harrison S. Robinson, Harry L. Price, and R. W. MacDonald, all of Oakland, for appellant.

True Van Sickle and James H. Boyer, both of Oakland, for respondents.

DOOLING, Justice pro tem.

This is an appeal by Oakland Title Insurance & Guaranty Company from an adverse judgment against it in an action brought by certain purchasers of interest or units in a common-law or Massachusetts trust of which appellant was trustee. The basic facts giving rise to the litigation were substantially as follows:

On and prior to February 16, 1926, one V. O. Lawrence was the owner of a parcel of real property in the city of Oakland improved with a building used and rented for stores, and upon which there was an incumbrance in the form of a deed of trust to secure the payment of $25,000 due January 5, 1927. Lawrence desired to create a trust upon this prop-

erty for the purpose of dividing the ownership thereof into one hundred units or interests each representing the beneficial ownership of a one-hundredth part of such property. To carry out this purpose on February 16, 1926, Lawrence conveyed the real property to appellant and concurrently with such conveyance appellant and Lawrence entered into a trust agreement by which appellant agreed to hold the title to the property in trust for the purposes in such agreement recited. Since this trust agreement was afterwards superseded by a second trust agreement executed by the same parties, its provisions are not important to this discussion. On the same date, February 16, 1926, Lawrence, Coast Packing Company, and appellant joined in making application to the commissioner of corporations to sell and issue certificates of ownership in the property of the trust. In such application it was recited that Lawrence owned all of the stock of Coast Packing Company, a California corporation; that proceedings were pending to change the name of this corporation to Oakland Investment Company; that, pending the completion of such proceedings, Lawrence proposed to do business as an individual under the fictitious name of Oakland Investment Company; and that upon the change of name of Coast Packing Company to Oakland Investment Company Lawrence would transfer his interest in the matter of the trust to such corporation. On April 14, 1926, and while such application was pending, appellant and Lawrence entered into a new agreement of trust concerning the real property in question. By this agreement it was recited that the property had been conveyed to appellant by Lawrence for the purpose of dividing the ownership of the property into one hundred parts to be evidenced by certificates of ownership, and it was agreed that appellant should issue such certificates of ownership "to such persons as shall be designated by the said V. O. Lawrence." The conditions of the trust, briefly recited, were: That appellant should have nothing to do with the collection of the rents from such property but that rents should be collected and current expenses paid by Oakland Investment Company; that the life of the trust should be five years, but not to exceed the lives of all of the original certificate holders; that at the termination of the trust appellant should convey the property to the certificate holders; that, if at any time a bona fide purchaser should be found who would pay $60,000 net for the property, appellant should convey it to such purchaser and distribute the purchase price to the certificate holders; that, in the event it should become necessary to renew the $25,000 mortgage, or to borrow money, appellant was empowered to convey the property to a person designated by it in order to execute the necessary documents, title then to be reconveyed to appellant as trustee; and that appellant assumed no liability except for the due performance of its covenants and especially no liability for the performance of any obligation on the part of Lawrence or Oakland Investment Company.

Thereafter an amended application for a permit to sell certificates of interest in such property was filed with the corporation commissioner. In the amended application it was recited that by decree of court the name of Coast Packing Company had been changed to Oakland Investment Company; that the property had been transferred by Lawrence to appellant for the uses and purposes set forth in the trust agreement of April 14, 1926; that petitioners proposed to issue certificates of ownership representing one-hundredth interests in such property at $232.50 cash per interest; that certain named persons had subscribed for an aggregate of 18 interests, and Lawrence had subscribed for 82; and that the purchase price of such interests had been arrived at by appraising the property at $48,250 and deducting therefrom the amount of the mortgage, $25,000, leaving a net value for the property of $23,250.

Between April 14, 1933, and the date of the filing of the amended application with the corporation commissioner, the persons named in the amended application as subscribers had entered into escrow agreements, denominated "preorganization subscriptions," under which they severally deposited with appellant as escrow holder the purchase price of certificates aggregating 18 units or interests at $232.50 per unit. The conditions of these escrows will be hereinafter discussed. On June 18, 1926, the corporation commissioner issued a permit for the issuance of the securities, and shortly thereafter certificates were issued by appellant for 82 interests to Lawrence and for a total of 18 interests to other persons named in the application. Lawrence thereafter sold certain of his interests to other persons to whom appellant issued new certificates. When the debt secured by the deed of trust fell due, the property was sold under the deed of trust, and the entire investment was thereby lost. Subsequently the respondents, as certificate holders, sued appellant for damages and recovered judgment against it. The plaintiffs fall into two groups: (1) Those who represent original subscribers; and (2) those who represent transferees of interests originally issued to Lawrence.

[1-3] As to the latter group of plaintiffs it is claimed in support of the judgment in their favor that the original issue of certificates to Lawrence was void because in violation of the terms of the permit, and hence the attempted issuance to them of certificates as transferees of Lawrence was likewise void. The basis of this claim is the following provisions contained in the permit: "To sell and issue to the persons named in its applica-

tion an aggregate of not to exceed 100 certificates of ownership, at and for a price of $232.50 per certificate, cash, lawful money of the United States, for the uses and purposes recited in its application."

Admittedly Lawrence did not pay any money to appellant, and respondents claim that, since Lawrence did not pay "cash" for his certificates, the provision of the permit in that regard was violated. Appellant replies to this that, since Lawrence was the owner of all the property, and was entitled to receive from appellant the full purchase price received for all certificates, less its charges and the selling costs, it would have been an idle act to require Lawrence to pay appellant cash for the sole purpose of having appellant pay the same cash back to Lawrence, citing Civ. Code, § 3532; Commercial National Bank v. Roberts, 49 Cal. App. 764, 194 P. 751; Witter v. Bank, 204 Cal. 570, 580, 269 P. 614; Central Savings Bank v. Lake, 201 Cal. 438, 447, 257 P. 521; Portola Realty Co. v. Carlston, 32 Cal. App. 282, 162 P. 899; Savings Bank v. Barrett, 126 Cal. 413, 58 P. 914; Herman v. Hecht, 116 Cal. 553, 48 P. 611; Breck v. Barney, 183 Mass. 133, 66 N. E. 643; Rodgers v. H. S. Kerbaugh, Inc. (Sup.) 190 N. Y. S. 245. Under these authorities we are satisfied that if, as appellant claims, it would have been appellant's duty to repay the money immediately to Lawrence, the law would not require the idle act of Lawrence paying appellant cash which appellant would be required immediately to pay back. Indeed, we do not understand that respondents dispute this. What they do dispute is appellant's claim that Lawrence was entitled to receive immediately the purchase price of the certificates from appellant. In this behalf respondents point to the following condition in the permit: "That no assets shall be distributed to shareholders, nor dividends declared by said trustee or its successors out of the corpus of said trust fund nor out of any money or property of said applicant, except the net earnings of said association, without first securing the consent of the Commissioner of Corporations in writing."

This, they assert, was an impounding clause which prohibited the appellant from turning over the proceeds from the sale of certificates to Lawrence without the consent of the corporation commissioner; and this provision was so construed by the trial court. Neither on its face, nor viewed in the light of the other evidence in the case, do we think that it can reasonably bear such a construction. In the first place, by its plain terms it refers to payments of an entirely different character. Lawrence's right to receive the purchase price of the certificates was not as a "shareholder," nor was it paid to him as "dividends." It was the right of an owner selling an interest in his property to receive the price which had been agreed upon. The plain meaning of the language "no assets shall be distributed to shareholders" is that no assets shall be distributed to persons in the capacity of shareholders or because they are shareholders; and the equally plain meaning of the language "nor dividends declared" is the same, since a dividend is a payment to a shareholder of his proportionate interest in a fund which he has as a shareholder. In the second place, the purchase price of the certificates was not an asset of the trust nor a part of the trust corpus. By the trust agreement itself the sole corpus of the trust was the described real property; from the amended application for a permit it appeared that the sole corpus of the trust was intended to be the real property; by the certificates issued in the form approved by the corporation commissioner it was recited that the trustee "holds the legal title to the herein described real property in trust," and that the "trustee holds—interests or parts of the title to said property" in trust for "the named certificate holder." Nowhere in the entire transaction is there anything to suggest that the purchase price should become a part of the corpus of the trust, nor any duty assumed by appellant to manage or handle the purchase price as trustee. Indeed, it would be hard to conceive of an owner of property capitalized at $23,500 giving it to a trustee and then buying back $82\frac{7}{100}$ of it at par for cash.

If this provision could be said to be ambiguous, however, we have the oral testimony of the deputy corporation commissioner who handled the matter that it was the intention in issuing the permit that Lawrence as owner of the property should receive the purchase price of the certificates, and that the condition herein discussed was inserted to place the same restriction upon the distribution of the real property which was the corpus of the trust, or the proceeds of its sale, should it be sold by the trustee, as was placed upon the distribution to shareholders of the capital of a corporation by sections 309 and 309½ of the Civil Code as they then read. We do not consider that the language of the condition is ambiguous, but, if it were, this evidence would be controlling, in the absence of contradiction, in arriving at its proper meaning.

[4] The plaintiffs who belong to the group of original subscribers seek to support the judgment in their favor on the ground that the conditions of the escrow were not fulfilled. The preorganization subscriptions, which were all in identical form, recited among other things that: "Ownership certificates will be issued as and when the Commissioner of Corporations of the State of California shall issue his permit to the Oakland

Investment Company authorizing it to sell and issue to subscriber a certificate evidencing ownership."

The money deposited was to be held in escrow "until the concurrence of the following:

"1. Depositing of similar subscriptions totaling one hundred per cent (100%) of the ownership of fee to said property with said Oakland Title and Guaranty Company.

"2. Granting of permit by the Commissioner of Corporations authorizing issuance of certificates of ownership under said trust."

It is claimed that, since the permit was issued to appellant, and not to Oakland Investment Company, to issue the certificates, condition 2 construed with the recital was not met. This seems frivolous, but, even conceding it force, the evidence shows that a copy of the permit was attached to each original certificate. Plaintiffs therefore had notice that the permit was issued to appellant. If they did not wish to accept the certificates under that condition, then was the time to speak. They could not take the certificates and hold them to determine whether or not their investment was a good one, and then, when the investment failed, claim a breach of condition. By accepting the certificate with knowledge of the fact, they must be held to have waived the performance of that particular condition. Gochnauer v. Union Trust Co., 225 Pa. 503, 74 A. 371; State v. Parker (S. D.) 241 N. W. 318, 320; Burnett v. Continental State Bank (Tex. Civ. App.) 191 S. W. 172, 174.

[5] Respondents likewise claim a failure of condition 1 because Lawrence did not deposit a subscription in writing for the 82 interests taken by him. The purpose of requiring the deposit of 100 per cent. subscriptions in writing could only be to insure the subscription of 100 per cent. in interests. Lawrence actually took the 82 interests concurrently with the issuance of certificates for the other 18, and certificates were issued to him therefor. Furthermore, in the amended application filed with the corporation commissioner, which was verified by Lawrence, it was recited that Lawrence had subscribed in writing for 82 interests. This would have operated to estop Lawrence to refuse to take the 82 interests had he wished to do so. In addition to all this, condition 1 would seem to have been inserted for Lawrence's protection and not that of the subscribers, since the money was to be paid over to Lawrence in any event, and was not made a part of the corpus of the trust. Under all the circumstances, we believe that there was a substantial compliance with condition 1.

[6] Respondents also complain that the preorganization subscriptions recited that Oakland Investment Company was the grantor while in fact the grantor was Lawrence. They do not explain how they could have been injured by this, and there was evidence to show that, as Lawrence represented in the original application to the corporation commissioner, pending the change of name of Coast Packing Company, Lawrence was using the name Oakland Investment Company in his individual dealings with respect to the trust property. Since our law permits an individual to do business under a fictitious name, there was nothing reprehensible in Lawrence doing so in this case.

[7] Finally, respondents claim that the condition of the permit requiring the trust agreement to be recorded before the issuance of any certificates was violated. It is true that the original certificates bear date before the date of recordation of the trust agreement; but they bear on their face a notation of the book and page in which the trust agreement is recorded, showing that they cannot have been issued until after its recordation.

Respondents made an unfortunate and, it would seem, ill-advised investment; but we can find nothing in the law or the evidence which would render appellant liable to them in damages.

The portion of the judgment herein appealed from is reversed, with directions to the trial court to modify its findings in accordance with this opinion and enter judgment thereon in favor of appellant.

We concur: SPENCE, Acting P. J.; STURTEVANT, J.

132 Cal.App. 784

Adele F. CHRISTY et al., Plaintiffs; Alice M. Allen, William H. Mayhew, W. L. Kern, and Maude A. W. Foster, Plaintiffs and Appellants, v. OAKLAND TITLE INSURANCE & GUARANTY COMPANY, Defendant and Respondent.

Civ. 8684.

District Court of Appeal, First District, Division 2, California.

May 27, 1933.

Hearing Denied by Supreme Court July 25, 1933.

Appeal from Superior Court, Alameda County; John J. Allen, Judge.

True Van Sickle and James H. Boyer, both of Oakland, for appellant.

Harrison S. Robinson, Harry L. Price, and R. W. McDonald, all of Oakland, for respondents.

DOOLING, Justice pro tem.

This is an appeal by three of the plaintiffs from portions of the same judgment, unfavor-

able to them, which we passed upon in the opinion this day filed in Adele F. Christy et al. v. Oakland Title Insurance & Guaranty Company, 22 P.(2d) 737. Since we held in that case that judgment should go for appellant against all of the plaintiffs, the questions presented on this appeal are thereby rendered moot. The appeal herein is accordingly dismissed.

We concur: SPENCE, Acting P. J.; STURTEVANT, J.

132 Cal.App. 198

PEOPLE v. COURTNEY et al.

Cr. 2303.

District Court of Appeal, Second District, Division 2, California.

May 23, 1933.

As Modified on Denial of Rehearing June 7, 1933.

Hearing Denied by Supreme Court June 22, 1933.

1. Indictment and information ⇐159(2).

Where accusation in indictment named crime as extortion, but statement of acts constituting offense described crime of robbery, that court struck out word "extortion" and inserted word "robbery" *held* not error (Pen. Code, § 1008).

2. Robbery ⇐24(1).

Evidence supported conviction for robbery in second degree.

3. Criminal law ⇐203.

Acquittal of codefendant *held* not res judicata as to defendants, where codefendant was not with defendants when money was taken from victim, and evidence did not show joint commission of robbery.

4. Criminal law ⇐739(4).

Where only evidence supporting pleas of former acquittal and former jeopardy was identity of indictment and fact that codefendant was found not guilty on count on which defendants were convicted, instruction that there was no evidence supporting such pleas *held* not error; question being one of law for court.

5. Criminal law ⇐829(3).

Refusing defendants' requested instruction that they were on trial for robbery and no other offense *held* not error where, in view of court's instruction, there could have been no confusion in minds of jurors as to offense charged.

6. Criminal law ⇐893.

That printed forms of "not guilty" verdicts were used *held* not to render verdicts inconsistent, where appropriate changes were made in body thereof, notwithstanding designation, "Verdict (Not Guilty)," appearing to right of caption was not crossed out.

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

Don Courtney and John Sullivan were convicted of robbery of the second degree, and they appeal.

Affirmed.

John S. Cooper, of Los Angeles (Buel R. Wood, of Los Angeles, of counsel), for appellants.

U. S. Webb, Atty. Gen., John D. Richer, Deputy Atty. Gen., and Buron Fitts and A. H. Van Cott, both of Los Angeles, for the People.

ARCHBALD, Justice pro tem.

An indictment was returned by the grand jury of Los Angeles county charging Don Courtney, John Sullivan, and John Joseph Courtney, who gave his true name as John J. Creely, with the crime of extortion, in count I. In count II the accusation names the crime as extortion, but the statement of the acts constituting such offense describes the crime of robbery. The dates, the name of the victim, and the amount of money are identical in both counts. Defendants Don Courtney and John J. Creely were arrested and arraigned, and at the time set for pleas, count II was amended by the court by striking out the word "extortion" and inserting instead "robbery," without resubmitting the matter to the grand jury. At the time the indictment was returned defendant Sullivan was in Canada, so far as appears, and remained there until extradited. At the time set for the trial of Courtney and Creely the latter was present, but Courtney was not, and the trial proceeded as to Creely alone, who was convicted on count I and found not guilty on count II. Thereafter, defendant Sullivan was returned from Canada and Courtney was apprehended. Sullivan entered a plea of not guilty to the indictment. Courtney had already entered the same plea thereto. At the date set for their trial both defendants entered further pleas of "prior acquittal" and "once in jeopardy." Defendant Sullivan objected to trial on count I on the ground that he was extradited to be tried for the crime of robbery, extortion not being an extraditable offense, and that under the Webster-Ashburton Treaty with Canada he could only be tried on the charge on which extradition was permitted. On motion of the district attorney count I was dismissed and the trial proceeded on count II, which also charged Courtney with a prior conviction, as to which he had theretofore pleaded guilty. The jury returned verdicts, as to each defendant, of guilty of second degree robbery

and as to the pleas of prior acquittal and former jeopardy the jury found for the people. From the judgments of conviction entered on said verdicts and the orders denying their respective motions for a new trial defendants Courtney and Sullivan have appealed.

Appellants contend: (1) That the court erred in amending count II as it did; (2) that there is a fatal variance between the offense charged and that proved; (3) that the acquittal of Creely on count II was a bar to the prosecution of appellants on such count, that the court erred, (4) in permitting the prosecution to proceed upon the theory of conspiracy to commit robbery with Creely after notice of acquittal of Creely on the robbery charge, (5) in directing the verdict of the jury on special pleas, (6) in refusing certain of defendants' instructions; and (7) that the verdicts and judgments are inconsistent and void.

[1] 1. Appellants urge that the amendment made by the court changed the offense charged from extortion to robbery. Count II charged the crime of robbery, clearly and directly, and not that of extortion, and the date, name of the victim, and amount of money obtained was exactly the same as in the first count. It appears on the face of the indictment to be a typographical error only. No substantial rights of the defendants could possibly have been prejudiced, and in our opinion the amendment was properly made under section 1008 of the Penal Code.

[2] 2. Appellants say that the evidence shows the crime of extortion was committed and not robbery, as charged in count II. From the evidence the jury might well have concluded that the original plan was to obtain the money by means of extortion rather than robbery, but that such plan was changed when the victim withdrew his $500 from the bank and went with appellants to a place near the jail. They had previously represented to the victim that they were police officers and would arrange bail so as to make it unnecessary for them to put him in jail. At such point he refused to give them the money, and the victim's testimony shows that before and after the money was forcibly taken from him by Sullivan he was threatened with a gun. The jury might well have concluded from the evidence that, the original plan having failed to obtain for them the money with the victim's consent, force and fear were resorted to in order to take it from him against his will.

[3] 3 and 4. We fail to see how the acquittal of Creely on count II was res adjudicata of the charge against appellants here. Creely was not with appellants when the money was taken from the victim. As we have said, the plan adopted by the three men charged apparently contemplated extorting money from the victim by some other method than was eventually used. The change in plan occurred when the victim demurred, and without Creely's knowledge. Under that state of facts there could be no bar to a prosecution of appellants under the count on which Creely was acquitted. Furthermore, the evidence does not show a joint commission of the crime charged in count II so far as Creely is concerned, so as to make a verdict of not guilty as to him on such count an acquittal as to his codefendants.

[4] 5. The court instructed the jury that no legal evidence had been introduced in support of the plea of former acquittal and former jeopardy, and that as to such pleas they should find for the people. We see no error in such instruction, as we do not find any evidence supporting the pleas mentioned except the identity of the indictments and the fact that Creely was found not guilty on the count on which appellants were convicted. Under the evidence it was a question of law for the court.

[5] 6. Defendants requested two instructions which were refused. The first was to the effect that they were on trial "for the offense of robbery and no other offense," following which the meaning of robbery was explained to the jury, which, in turn, was followed by the statement that "if you find from the evidence that the complaining witness, Downs, parted with his money willingly, for the purpose of putting the same up as bail or otherwise, and not through fear, then and in that event" they should find defendants not guilty. The second instruction advised the jury that defendants were on trial for the offense of robbery, and "no other offense," and that even if they should find them guilty of some other offense, if they found defendants not guilty of robbery they should be acquitted. The court instructed the jury as to the meaning of "robbery," and also that if the jurors "believe from the evidence beyond a reasonable doubt that the defendants, or either of them, feloniously took from the person or the immediate presence of Peter J. Downs, the property or any part thereof, as charged in the indictment, by means of force or fear and against the will and consent of said Peter J. Downs as charged in the indictment, * * * then you should find the defendants, or either of them, guilty as the case may be." We fail to find anything in the record that might lead the jury to the conclusion that some offense other than robbery was presented for their consideration. At the beginning of the argument to the jury the prosecutor stated that he came "with a commitment from the grand jury of Los Angeles county, which returned an indictment charging these men with the crime that the clerk read to you at the very inception of this case," at which point he was interrupted by counsel for one of the defend-

ants, who said: "We object, the court please. I hate to interrupt Mr. McKay so early. The grand jury never returned any such indictment; it returned extortion, the records show that." To this the court responded: "Just a minute, now let's settle that question. These defendants are on trial charged with robbery; that is all we are interested in, not extortion, so don't refer to that extortion again. The only thing we are interested in in this case is the robbery charge, and that is all this jury has to pass on so far as their guilt or innocence is concerned." We think there could have been no confusion in the minds of the jurors as to the offense charged, and no error in refusing the requested instructions.

[6] 7. We see no merit in this contention. The verdicts were clear, and no inconsistency exists by reason of the fact that printed forms of "not guilty" verdicts were used on such pleas, the appropriate changes being made in the body thereof, although the designation, "Verdict (Not Guilty)," appearing to the right of the caption, was not crossed out. It clearly appears, however, that the general verdict was "guilty," on the pleas of "Not Guilty," and that the verdict was for the people on the special pleas.

Judgments and orders affirmed.

We concur: CRAIG, Acting P. J.; STEPHENS, J.

132 Cal.App. 204

PEOPLE v. COURTNEY et al.

Cr. 2288.

District Court of Appeal, Second District, Division 2, California.

May 23, 1933.

Threats ⊂⇒7.

Evidence *held* not sufficient to sustain conviction for extortion.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Don Courtney and John J. Creely were charged with extortion, Creely was convicted and he appeals.

Reversed.

Gladys Towles Root, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., John D. Richer, Deputy Atty. Gen., and Buron Fitts and A. H. Van Cott, both of Los Angeles, for the People.

ARCHBALD, Justice pro tem.

Defendant Creely was charged jointly, but tried separately, with Don Courtney and John Sullivan [see opinion, People v. Courtney (Cal. App.) 22 P.(2d) 741], in an indictment returned by the grand jury of Los Angeles county, with the crime of extortion, in count I, and robbery, in count II. The jury returned a verdict finding him guilty on count I and not guilty on count II.

Counsel for respondent herein confess that the evidence does not support the verdict and judgment, and with such conclusion we are forced to agree.

Judgment reversed.

We concur: CRAIG, Acting P. J.; STEPHENS, J.

132 Cal.App. 459

TULARE COUNTY v. WOODY, County Auditor et al.

Civ. 783.

District Court of Appeal, Fourth District, California.

June 6, 1933.

1. Mandamus ⊂⇒3(2).

Writ of mandate cannot be granted, if petitioner has legal remedy equally convenient, beneficial, and effectual.

2. Mandamus ⊂⇒102(1).

County *held* not entitled to writ of mandate, requiring officers of another county to draw and pay warrants in former county's favor for money paid latter county by state comptroller on account of registrations of motor vehicles by residents of former county; action against county on rejected claim affording adequate legal remedy (Pol. Code, § 4078).

3. Mandamus ⊂⇒15.

Claimant alleging no excuse for failure to sue county on rejected claim within statutory time *held* not entitled to writ of mandate requiring payment of claim (Pol. Code, § 4078).

Appeal from Superior Court, Kings County; K. Van Zante, Judge.

Application by Tulare County for a writ of mandate to S. A. Woody, Auditor in and for the County of Kern, and others. From an order sustaining a demurrer to the petition and dismissing the action, petitioner appeals.

Affirmed.

Walter C. Haight, Dist. Atty., and Leroy McCormick, Asst. Dist. Atty., both of Visalia, for appellant.

Ray Bailey, Dist. Atty., and W. A. McGinn, Deputy Dist. Atty., both of Bakersfield, for respondents.

JENNINGS, Justice.

Petitioner, county of Tulare, filed its petition for a writ of mandate in the superior court of Kings county. The petition alleges that during the year 1929 certain persons, firms, and corporations whose names are contained in an exhibit attached to said petition and by reference made a part thereof had their actual domiciles and residences in the county of Tulare, and were the owners and operators of 240 motor vehicles which during said year were registered with the motor vehicle department of the state of California; that said owners in their respective applications for registration of said motor vehicles stated that their post office addresses were the city of Delano in Kern county; that during the said year the state controller of the state of California drew his warrants upon the motor vehicle fund in favor of Kern county and paid to Kern county that portion of the net receipts of said fund which he estimated was due to Kern county, and in making such estimate allotted to Kern county the motor vehicles registered by the aforesaid owners who were actual residents of Tulare county in addition to other vehicles that were owned by residents of Kern county; that the amount paid by the state controller upon each motor vehicle was the sum of $1.-837929647; that on July 30, 1930, petitioner filed a claim with Kern county for the sum of $441.10, which was the amount received by Kern county from the state of California by reason of the distribution of registration fees on the 240 motor vehicles owned by residents of Tulare county, and that said claim was rejected by Kern county on August 4, 1930, and said rejection was not based upon lack of itemization or improper form of the demand; that on August 30, 1930, and on various other occasions petitioner demanded from respondent Woody, as county auditor of Kern county, that he draw his warrant in favor of petitioner for said sum of $441.10, but that said respondent refused, and still refuses, to draw such warrant; that petitioner has not received from the state of California or from Kern county any distribution of the aforesaid sum of $441.10, or any part thereof or any allocation of motor vehicle registration fees based upon the aforesaid 240 motor vehicles; that petitioner has no plain, speedy, and adequate remedy at law. The petition closes with the prayer that the court issue its alternative writ of mandate requiring the respondent Woody, as auditor of Kern county, to draw his warrant in favor of petitioner in the sum of $441.10, in payment of the portion of the net receipts of the motor vehicle fund paid by the state controller to Kern county on account of the registration of motor vehicles registered by the aforesaid residents of Tulare county for the year 1929, and further requiring respondent Shields, as county treasurer of Kern county, to pay the said warrant when drawn or that they show cause why they have not done so. To the petition thus framed respondents interposed a demurrer based on the ground that the pleading does not state facts sufficient to justify the court to issue a writ of mandate as demanded. The demurrer was sustained without leave to amend, and the court ordered the action dismissed. From the order sustaining the demurrer and dismissing the action, petitioner has appealed.

[1, 2] We entertain the opinion that the court's order sustaining the demurrer to the petition and dismissing the action should be affirmed. It is fundamental that the extraordinary remedy of mandate may not be granted if the petitioner therefor has a legal remedy "equally convenient, beneficial, and effectual." Dufton v. Daniels, 190 Cal. 577, 213 P. 949. Section 4078 of the Political Code provides as follows: "§ 4078. When Claimant May Sue. If the board refuse or neglect to allow or reject a claim or demand for ninety days after the same has been filed with the clerk, such refusal or neglect may, at the option of the claimant, be deemed equivalent to a final action and rejection on the ninetieth day, and a claimant dissatisfied with the rejection of his claim or demand, or with the amount allowed him on his account, may sue the county therefor at any time within six months after the final action of the board, but not afterward, and if, in such action, judgment is recovered for more than the board allowed, on presentation of a certified copy of the judgment, the board must allow and pay the same, together with the costs adjudged; but if no more is recovered than the board allowed, the board must pay the claimant no more than was originally allowed."

We think that the remedy afforded to petitioner by the aforesaid statute is manifestly equally convenient, since the action could be tried in the same county where this proceeding was commenced, and that it was equally beneficial and effective since the section specifically provides for payment of any judgment that may be obtained and costs of the action. Burbank v. Hamilton, 63 Cal. App. 745, 219 P. 1047.

[3] It may be conceded that the remedy afforded by the aforesaid section is not now equally beneficial and effective since the statute provides a definite period of limitation of six months after rejection of the claim. Nevertheless, petitioner did have a legal rem-

edy which was "equally convenient, beneficial, and effective," and, if by reason of its neglect that remedy is no longer available, the remedy here sought should not be granted. 18 R. C. L., p. 132; 38 C. J., p. 562.

The petition herein shows on its face that petitioner filed its claim with Kern county for the amount demanded on July 30, 1930, and that on August 4, 1930, Kern county rejected the claim. At any time within a period of six months after such rejection petitioner had an entirely adequate legal remedy specifically provided by section 4078 of the Political Code. No excuse for its failure to have pursued this equally convenient, beneficial, and effective remedy is presented by the petition.

The order from which this appeal is taken is therefore affirmed.

We concur: BARNARD, P. J.; MARKS, J.

132 Cal.App. 439

AZEVEDO et al. v. SEQUEIRA et al.

Civ. 4876.

District Court of Appeal, Third District, California.

June 5, 1933.

1. Partnership ⇐121.

In action to quiet title to corporate stock, evidence sustained finding that stock was purchased by partner as agent of individual partners for their private ownership, and that he wrongfully procured issuance of stock in name of partnership (Civ. Code, § 2402).

2. Partnership ⇐67.

Intention with which property is acquired and used will usually determine whether it is partnership or individual property.

3. Partnership ⇐67.

Intention of partners with respect to ownership of property acquired at time of organization of partnership or subsequently may be determined by their acts or oral declarations.

4. Partnership ⇐67.

Absent evidence to contrary, it will be presumed from fact that stock is purchased in name of partnership with partnership funds that it belongs to partnership, and that interest of each member therein extends jointly, not separately, to whole thereof (Civ. Code, § 2402).

5. Partnership ⇐67.

Presumption that corporate stock purchased in name of partnership with partnership funds belonged to partnership *held* rebutted by evidence that partners intended that stock be owned individually by respective partners in equal shares (Civ. Code, § 2402).

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action by A. J. Azevedo and others against M. E. Sequeira and others. From the judgment, plaintiffs appeal.

Affirmed.

Stephen P. Galvin, of Merced, for appellants.

Thomas F. Lopez, of Fresno, for respondents.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

This is an appeal from a judgment quieting title in some of the defendants to nine shares of the capital stock of Gustine Creamery, Inc., a corporation.

The court found that the plaintiffs A. J. and M. J. Azevedo, the defendants Sequeira, Pereira, Avila and one Silveira organized in 1914, and subsequently operated a copartnership under the firm name of A. J. Azevedo & Co., as a dairy business; that they purchased independently of the copartnership seven shares of the capital stock of the Gustine Creamery, Inc., a corporation, which shares were personally owned by said individuals as follows: A. J. Azevedo, two shares, and the other five partners last mentioned one share each. It was further found that these shares of stock were subsequently augmented by the earnings from stock dividends until each of said original seven shares were multiplied by three and aggregated twenty-one shares in all. The plaintiffs thereby became the owners of six shares, and the other last-mentioned partners, to wit, Sequeira, Pereira, Avila and Silveira, became the owners of three shares each. The court found that the partnership was subsequently dissolved, leaving each of the individuals possessed of the Gustine Creamery shares of stock as above related; that all of said stock was purchased and issued in the name of A. J. Azevedo & Co., and subsequently wrongfully transferred to the individual plaintiffs who hold the respective shares in trust for the real owners thereof as specified. Judgment was accordingly rendered quieting title to three shares of said stock in each of the following named defendants, to wit: Sequeira, Avila, and Pereira. The judgment fails to quiet title to any of said stock in plaintiffs. From this judgment the plaintiffs have appealed.

It appears that the defendant Antonio T. Avila was sued as Antonio Homen, and Manuel Souza Pereira was sued as Manual Pereira Souza. Substitution was made in the proper names of said defendants.

The appellants contend the findings and judgment are not supported by the evidence. The theory of the appellants is that the original seven shares of stock were purchased with the funds of the dairy partnership, and that they were subsequently sold at the time of the dissolution of the partnership, and, afterwards repurchased by the plaintiffs. The judgment is not challenged on the ground that the court failed to quiet title in plaintiffs to their six shares of stock. The findings will support such a decree, and it may properly have been so drawn. That, however, is immaterial to the determination of this appeal.

In 1914 a partnership was organized in the name of A. J. Azevedo & Co., consisting of seven members, including the plaintiffs and defendants to this suit. There were no written articles of copartnership. A. J. Azevedo testified that he purchased with partnership funds six shares of the capital stock of the Gustine Creamery, Inc., a corporation, "for the company." He afterwards purchased one additional share of stock. Without the knowledge of the defendants these shares were issued in the name of A. J. Azevedo & Co. Mr. Azevedo testified that about a year later the partnership "split up." Another dairy partnership was organized by the plaintiffs, including members other than the defendants. Mr. Azevedo claimed that he and his brothers purchased the creamery stock as their individual property subsequent to the reorganization of the dairy partnership.

Mr. Sequeira testified that seven shares of the creamery stock were purchased so that each of the original seven partners might separately own one share. He said that the original seven partners had a conversation about the shares of stock when an accounting of the business was had at the time of the reorganization of the partnership. He testified: "Antone Azevedo said that they (the Gustine Creamery) were selling stocks in the creamery at Gustine * * * and (asked) if we wanted to buy some, and all of us said yes. * * * And afterwards he bought it, $300 worth of shares, six shares. * * * We had seven partners in that business and we all agreed to buy one more share so that each of us would have a share. * * * At that time I don't know whether he bought it in the (name of the) company, or for each one individually, * * * but I know now that the shares were all in the name of A. J. Azevedo." At the time this last conversation occurred regarding the stock, it was agreed the seventh share should be purchased "so that each one of us would have one share. * * * It was all agreed and understood between all of us * * * that he would buy one more share so each one of us would have one share in the creamery. * * * I did not know whether he had it in A. J. Azevedo and Company or in each one of us individually." Azevedo was the manager of the dairy business. There is evidence to indicate that he acted as the agent for the respective members of the partnership in the purchase of the stock, and that the purchase price of the stock was originally taken from the proceeds of the business and subsequently charged to each in the final accounting. Sequeira testified that in a subsequent conversation A. J. Azevedo "told me I would get my share without any trouble, * * * that he knew it was mine."

It was stipulated that Mr. Pereira, who was present in court, would testify to the same facts heretofore related by Mr. Sequeira.

[1] This evidence is sufficient to support the findings of court to the effect that the original stock was purchased by A. J. Azevedo as the agent of each individual member of the original partnership for their private ownership, and that he wrongfully procured the issuing of the stock in the name of the partnership; that each member owned one share of the stock which earned by means of stock dividends two additional shares, and that the defendants Sequeira, Avila, and Pereira are the owners of three shares each of said stock. The judgment is therefore amply supported by the evidence.

[2-5] It is true that, "unless the contrary intention appears, property acquired with partnership funds is partnership property." Section 2402, Civ. Code. Almost any kind of property may be acquired and owned as partnership property. The intention with which the property is acquired and used will usually determine the question as to whether it is partnership or individual property. 20 R. C. L. 854, § 61. The intention of the parties with respect to the ownership of property acquired at the time of the organization of the partnership or subsequently may be determined by the acts or oral declarations of the parties. 20 R. C. L. 855, § 62. In the absence of evidence to the contrary, it will be presumed from the fact that stock is purchased in the name of the partnership and with its funds that it belongs to the partnership, and that the interest of each member therein extends jointly and not separately to the whole thereof. 20 R. C. L. 870, § 81. But it is not unusual that real or personal property may be acquired and used for the benefit of the partnership and still be owned individually by one or more of the partners. Grant v. Bannister, 160 Cal. 774, 782, 118 P. 253; Redwood City Salt Co. v. Whitney, 153 Cal. 421, 95 P. 885. Indeed, in

the present case the plaintiffs are contending that the very stock which is involved in this suit is their individual property and not that of the partnership to which they succeeded in association with other members. From the fact that this stock was purchased from the funds of the partnership business in the name of the firm, there is a presumption that it belongs to the partnership. But that presumption has been dispelled by substantial evidence that it was the intention of the parties that the creamery stock was to be purchased and owned individually by the respective partners in equal shares. The fact that one additional share was subsequently purchased so that each of the seven members might own a share is a strong circumstance supporting the finding of the court that it was the intention of the partners that the stock should become their individual property. This was agreed to by all the partners according to Sequeira, at the settlement of their interests after the original partnership was dissolved.

The judgment is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

132 Cal.App. 324

PEOPLE v. CORBIN.

Cr. 247.

District Court of Appeal, Fourth District, California.

May 27, 1933.

Rehearing Denied June 7, 1933.

Hearing Denied by Supreme Court June 26, 1933.

1. **Criminal law** ⇨586.

Denying continuance *held* not abuse of discretion, in absence of showing that prejudice resulted therefrom.

2. **Criminal law** ⇨1201.

Statute permitting certified copies of prison records to be introduced for purpose of establishing former conviction of accused *held* not unconstitutional (Pen. Code, § 969b).

3. **Criminal law** ⇨1202(7).

In prosecution for first-degree burglary, that defendant was charged with having suffered only one prior conviction *held* not prejudicial error (Pen. Code, §§ 969, 1168, 1202a, and § 667, as amended by St. 1931, p. 1051, § 3).

4. **Criminal law** ⇨322.

In determining validity of judgment of conviction, appellate court could not assume that state board of prison directors would, in future, fix any term of imprisonment not in conformity with law.

Appeal from Superior Court, San Diego County; Arthur L. Mundo, Judge.

John Henry Corbin was convicted of burglary of the first degree with prior conviction, and he appeals.

Affirmed.

John Henry Corbin, in pro. per.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

BARNARD, Presiding Justice.

The defendant was charged in an information filed by the district attorney of San Diego county with the crime of burglary, and with having been convicted of two prior felonies. From the evidence it appears that about 1 o'clock on the morning of January 7, 1933, the owner of a café in the city of San Diego left the same with some friends, leaving both the front and rear doors locked. When the party returned about 4 o'clock the same morning, they saw the defendant standing inside the café, but he escaped after prying a lock from a rear door. He was seen running from the premises by a police officer and after a chase was apprehended by other officers. When caught he had in his possession a number of instruments for picking locks, a butcher knife, several hack saw blades, one of which was sewed in the lapel of his coat, and certain money and personal property which was shown to have been taken from the café. During the progress of the trial it developed that the record as to one prior conviction was not properly authenticated and the charge as to that prior conviction was withdrawn. The jury found him guilty of burglary in the first degree and also found in favor of the people upon the remaining charge of a prior conviction. A motion for a new trial was denied, and judgment was pronounced, from which judgment this appeal is taken.

[1] The first point raised is that the court erred in denying a request for a continuance The defendant was brought in for arraignment on January 17, 1933, and, being without counsel, E. G. Langford was appointed by the court to defend him, and, at his request, the arraignment was continued to January 19, 1933. On that day he was arraigned and entered a plea of not guilty, also denying that he had suffered the two prior convictions. At the same time the case was set for trial for January 27, 1933, at which time it was continued to January 31, 1933. When the case came on for trial on that day, with a jury panel present, Mr. Langford asked that he be relieved from serving as counsel for defendant, and that Mr. Hache be substituted in his place. Mr. Hache was present, and the court asked the defendant if this substitution was satisfactory to him, to which he replied that it was. Thereupon the court

informed Mr. Langford that he was relieved from further service, and Mr. Hache was appointed as such counsel. The court then asked if both sides were ready, and, receiving affirmative replies, a jury was ordered drawn. At that time Mr. Hache stated to the court that the defendant had just informed him that he would like to have a continuance. This motion was denied, and the trial proceeded. No notice of such motion had been given, and no proof was offered, in accordance with section 1050 of the Penal Code, that the ends of justice required a continuance. The record indicates that the new counsel was present in court, by arrangement with the other attorney at least, and further indicates that he was quite familiar with the case. The record, not only discloses that the defendant was most ably and energetically represented by the counsel last appointed, but no attempt whatever is here made to point out any prejudice resulting from the failure to grant a continuance. It is not claimed that any additional facts existed which could have been presented had more time for preparation been allowed, or that any evidence was improperly received because of counsel's lack of familiarity with the case. Nothing appears to show any abuse of discretion on the part of the trial court in making the order complained of.

[2] It is next contended "that the code section permitting the certified copies of prison records, such as pictures, finger prints, as prima facie evidence is unconstitutional in so far as it pertains to the identification of the defendant and appellant in this case." While it is not clear what is here meant, apparently the contention is that section 969b of the Penal Code is unconstitutional, although no argument or authority is presented. The principles applicable have been passed upon in other connections and the point raised is without merit. People v. Osaki, 209 Cal. 169, 286 P. 1025; People v. Nakamura, 125 Cal. App. 268, 13 P.(2d) 805; People v. Morrison, 125 Cal. App. 282, 13 P.(2d) 800, 803. So far as identification is concerned the defendant was identified as the person formerly convicted through finger prints and the testimony of experts in that field.

[3, 4] The last point raised is that the court was without jurisdiction to try the defendant for one prior conviction only. It is argued that there is no punishment provided for one prior conviction since the amendment in 1931 of section 667 of the Penal Code (St. 1931, p. 1051, § 3), and that "there is no law in the state of California authorizing a trial court to increase the punishment for one prior conviction." Again, it is not clear just what is meant, but apparently the contention is that the defendant cannot be charged with having suffered only one prior conviction. Aside from section 667 of the Penal Code, such a procedure is contemplated by sections 969 and 1202a of this Code, and section 1158 makes it the duty of the jury to pass upon such a matter when a prior conviction is charged. In addition, under the terms of section 1168 of the Penal Code, the fact of one prior conviction is not only material in some cases in connection with fixing the minimum term, particularly where the defendant was armed with a deadly weapon at the time the offense immediately in question was committed, but the same may also be material in passing upon a later application for parole. The trial court did not increase the punishment because of this prior conviction and in no way fixed the term of imprisonment. That function is to be performed by the state prison board in accordance with the statutes. The matter complained of could not affect the judgment appealed from, and, in any event, we may not assume that the state board of prison directors will, in the future, fix any term not in conformity with the law.

The defendant was positively identified by a number of witnesses, the record shows that he had a fair trial, and neither prejudicial error nor miscarriage of justice appears.

The judgment appealed from is affirmed.

We concur: JENNINGS, J.; ANDREWS, Justice pro tem.

132 Cal.App. 336

WRIGHT et al. v. BANK OF LASSEN COUNTY et al.

Civ. 3856.

District Court of Appeal, Third District, California.

May 31, 1933.

1. Appeal and error ⇐544(2).

On appeal on judgment roll alone, only questions for consideration are sufficiency of complaint, whether findings are within issues and support judgment, and whether reversible error appears on record.

2. Appeal and error ⇐907(3).

All legitimate presumptions are indulged in support of judgment in appeal on judgment roll alone.

Appeal from Superior Court, Lassen County; J. O. Moncur, Judge.

Action by J. Marion Wright and others against the Bank of Lassen County and others. From the judgment, defendant P. M. Reidy appeals.

Affirmed.

I. Henry Harris, of Los Angeles, and J. A. Pardee, of Susanville, for appellant.

R. M. Hardy, of Susanville, for respondents.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

The record discloses that M. S. Stevens, Camile F. Frizzie, and P. M. Reidy were partners and were the owners as such of approximately $10,000 on deposit in the Bank of Lassen County. Some time prior to March 26, 1926, this money had been received by the bank pursuant to some judgment or agreement, the record being silent, the bank had issued a certificate of deposit for $6,000 thereof in the name of M. S. Stevens and Camile Frizzie and made said certificate "payable to the order of the Judge of the Superior Court of Lassen County." The balance thereof so deposited was received by the bank and held as follows: "M. S. Stevens and Camile Frizzie. Do not pay against this account except on order of Judge of the Superior Court of Lassen County." Prior to March 8, 1926, but subsequent to the deposit mentioned above, an action was brought to dissolve the partnership of Stevens, Frizzie & Reidy, in which action a judgment was entered on November 8, 1926, awarding to Stevens some $3,100 out of said fund and directing the bank to pay that amount to him. Prior to March 8, 1926, an action had been commenced in the county of Los Angeles by one Roy G. Downing, as plaintiff, against M. S. Stevens, as defendant, and in the forenoon of March 8, 1926, a writ of attachment was levied upon the Bank of Lassen County garnisheeing all moneys in its custody belonging to M. S. Stevens. On the afternoon of the same day a duly certified copy of the judgment and decree awarding to Stevens the $3,100 was served upon the bank and demand made for payment, but by virtue of the writ of attachment that day served in the case of Downing v. Stevens, the bank refused to comply with the demand. On June 10, 1927, Stevens executed three partial assignments of judgment, one to each of the plaintiffs herein which assignments were duly filed and docketed in the office of the county clerk of the county of Lassen and notice in writing thereof given to the Bank of Lassen County.

Shortly thereafter P. M. Reidy, one of the defendants herein, was interpleaded in the action pending in the county of Los Angeles, wherein Downing was plaintiff and Stevens defendant, and a writ of attachment was caused to be issued by Reidy against Stevens and levied upon the Bank of Lassen County. Thereafter, about July 1, 1927, a judgment in that action was entered, dismissing the complaint of plaintiff Downing and awarding judgment to cross-defendant Reidy and against Stevens, together with interest and costs, and an execution was issued upon said judgment and served upon the Bank of Lassen County. The bank refused to deliver any moneys to the sheriff by virtue of the execution and thereafter this action was commenced. The bank thereafter paid into court the sum of $2,426.67, and was discharged from liability, and P. M. Reidy, appellant herein, was substituted as a party defendant.

Reidy filed an answer to the complaint filed in the present action admitting that the funds were on deposit in the bank, but claiming that they were deposited by Stevens and Frizzie and not by virtue of any order of the court of Lassen county. He also admitted the assignments by Stevens to the plaintiffs herein, but contends that these assignments were of no effect because prior thereto the writs of attachment above referred to had been levied. He also claimed title by virtue of the execution upon the judgment obtained in the action in the county of Los Angeles.

[1] This being an appeal upon the judgment roll alone, we are limited in our determination of the issue to the questions presented by the judgment roll itself. The only questions to consider are: First, does the complaint state facts sufficient to constitute a cause of action; secondly, are the findings within the issues; thirdly, is the judgment supported by the findings, and, finally, does reversible error appear on the face of the record. 2 Cal. Jur. p. 690.

[2] An examination of the record discloses that the amended complaint states a cause of action and that the findings are responsive thereto. The seventh finding by the court specifically holds that at the time of the assignments hereinbefore mentioned and particularly set forth in paragraph 7 of the amended complaint and the moneys affected by such assignments, were not at that time subject to valid levy under attachment execution or garnishment for the benefit of defendant Reidy. Just why, having no evidence before us, we do not know, nor may we speculate, but "all legitimate presumptions are to be indulged in support of the judgment in an appeal on the judgment roll alone." Fietz v. Cates, 105 Cal. App. 673, 288 P. 728. And the trial court upon the evidence before it found that the funds in question were in custodia legis.

We are of the opinion that the judgment is supported by the findings and that no reversible error appears upon the face of the record.

The judgment is affirmed.

We concur: PLUMMER, J.; R. L. THOMPSON, J.

132 Cal.App. 462

TULARE COUNTY v. KERN COUNTY.

Civ. 784.

District Court of Appeal, Fourth District, California.

June 6, 1933.

1. Automobiles ⇐49.

Complaint alleging that certain residents of plaintiff county in applying for registration of motor vehicles gave post office addresses as city in defendant county and that state controller allotted fuel fund based on their motor vehicles to defendant county, stated action for money had and received.

The complaint alleged that in certain year there were certain persons, firms, and corporations actually residing in plaintiff county but who in applying for registration of motor vehicles owned by them stated their post office addresses to be in certain city located in defendant county and that state, acting through its state controller in distributing motor vehicle fuel fund allotted to defendant county all of motor vehicles owned by such residents and that amount of money which was paid to defendant county and should have been paid to plaintiff county amounted to $1,379.71; that plaintiff county filed with defendant county claims on blanks provided by defendant county demanding payment of such sums and that these claims were rejected by defendant county, and prayer of complaint was for judgment against defendant county in sum of $1,379.71 with interest and costs.

2. Money received ⇐1.

Basis of action for money had and received is that defendant received money which belongs to plaintiff and which in equity and good conscience defendant should pay plaintiff.

3. Counties ⇐210.

Action for money had and received may be maintained by one county against another in proper case.

4. Pleading ⇐214(2).

Demurrer admitted all properly pleaded material allegations of fact contained in complaint.

5. Automobiles ⇐49.

Where state controller erroneously paid to defendant county part of motor vehicle fuel fund which should have been paid to plaintiff county, plaintiff could recover from defendant in action for money had and received, state controller not being only person authorized to recover money (Pol. Code, § 4123).

6. Automobiles ⇐49.

Where state controller erroneously paid to defendant county part of motor vehicle fuel fund belonging to plaintiff county, state controller was not necessary party to plaintiff's action against defendant.

7. Statutes ⇐208, 211.

Statute section found in article relating to duties of county treasurers must be read with reference to (other sections contained in article and with reference to) title of article (Pol. Code, § 4101 et seq.).

8. Counties ⇐195.

Statute respecting recovery of money erroneously paid into county treasury, when read with other sections in article, prescribes procedure to be followed by county treasurer in dealing with claims for return of money erroneously coming into his hands; it does not establish rule of substantive law, but is wholly adjective (Pol. Code, § 4123).

9. Counties ⇐195.

Statute respecting recovery of money erroneously paid into county treasury *held* not mandatory but permissive (Pol. Code, § 4123).

10. Counties ⇐195.

Statute respecting procedure for recovering money erroneously paid into county treasury could not defeat county's action for money had and received against another county unjustly enriched at expense of plaintiff through payment made by state controller (Pol. Code, § 4123).

Appeal from Superior Court, Kings County; K. Van Zante, Judge.

Action by the County of Tulare against the County of Kern. From an order sustaining a demurrer and dismissing the action, plaintiff appeals.

Reversed with instructions.

Walter C. Haight, Dist. Atty. of Tulare County, and Leroy McCormick, Deputy Dist. Atty., both of Visalia, for appellant.

Ray Bailey, Dist. Atty. of Kern County, and W. A. McGinn, Deputy Dist. Atty., both of Bakersfield, for respondent.

JENNINGS, Justice.

Plaintiff instituted this action to recover from defendant the sum of $1,379.71 paid to said defendant by the state controller of the state of California in distributing the motor vehicle fuel fund collected by the state of California for the year 1929. The defendant interposed a demurrer to the complaint on the ground that the complaint failed to state facts which were sufficient to constitute a cause of action against the defendant. The

demurrer was sustained without leave to amend. From the order sustaining the demurrer and dismissing the action, plaintiff appeals.

[1-3] The complaint, which was held to be vulnerable to the attack presented by respondent's general demurrer, alleges that in the year 1929 there were certain persons, firms, and corporations who were actually residents of the county of Tulare but who, in applying to the motor vehicle department of California for registration of motor vehicles owned by them stated their post office addresses to be in the city of Delano, which is located in the adjoining county of Kern; that the state of California, acting through its state controller in distributing the motor vehicle fuel fund for the year 1929, counted and allotted to the county of Kern all of the motor vehicles owned by the aforesaid residents of Tulare county and paid to said county of Kern that portion of said fund which was based on the motor vehicles so owned and registered by actual residents of Tulare county; that the amount of money thus paid to and received by Kern county which should have been paid by the state of California to Tulare county amounted to $1,379.71; that the county of Tulare filed with the county of Kern claims upon blanks provided by the county of Kern demanding payment of the sums which aggregated the aforesaid amount and these claims were rejected by the county of Kern and the rejection of the claims thus made was not based upon any defect in form or itemization of said claims. The prayer of the complaint is for judgment against respondent in the sum of $1,379.71, together with interest and costs.

It is apparent that the cause of action stated in the complaint is the ordinary cause of action for money had and received. The basis of such a cause of action is that the defendant has received money which belongs to the plaintiff and which in equity and good conscience he ought to pay to the plaintiff. County of Colusa v. County of Glenn, 124 Cal. 499, 57 P. 477. It was long ago decided that an action for money had and received may be maintained by one county against another in a proper case. Colusa County v. Glenn County, 117 Cal. 434, 49 P. 457.

[4-6] The single contention advanced by respondent in support of the order from which this appeal is presented is that section 4123 of the Political Code provides the sole method by which money erroneously paid into the treasury of a county may be recovered and by whom the recovery may be had. This section is in the following language: "Any money other than taxes, erroneously paid in to the county treasury, may be returned to the person paying it in, upon a warrant drawn by the county auditor on the order of the board of supervisors, based upon such voucher as will show proper evidence of the facts."

Respondent's demurrer admits all properly pleaded material allegations of fact contained in the complaint. For the purpose of this appeal therefore it must be taken as admitted that the amount of money stated in the complaint which should have been paid to appellant was paid to respondent. Unless, therefore, the above-mentioned section of the Political Code constitutes a bar to the cause of action stated in the complaint the court's order sustaining the demurrer and dismissing the action is clearly erroneous.

It is our opinion that respondent's contention may not be sustained. It is urged that since the money sought by this action to be recovered was paid into the county treasury of Kern county by the state controller he is the only person authorized by the aforesaid statute to recover it. This is another way of saying that the state controller is the real party in interest and a necessary party to an action of the character here presented. This is obviously not correct. The real party in interest is appellant, who is shown by the allegations of the complaint to be entitled to the money which by mistake was paid into the county treasury of respondent. The outcome of this suit is a matter of utter indifference to the state controller and he is therefore not a necessary party to the action. If respondent's contention should be sustained and a claim were later made upon respondent for the return of the money and it should be returned to the state controller, this official would be duty bound to pay it over to appellant, assuming the allegations of the complaint to be true.

[7-9] Since the allegations of the complaint clearly show a cause of action in appellant's favor for money had and received, the statute relied upon by respondent should not be so construed as to defeat recovery unless it can be said that no other construction is reasonable. Section 4123 of the Political Code is found under article 3, chapter 5, title 2, part 4, of the Code. The subject of part 4 is "Of the Government of Counties, Cities and Towns." Title 2 is entitled "The Government of Counties." Chapter 5 is entitled "Executive Department." Article 3 is entitled "The Treasurer" (section 4101 et seq.). The various sections which are found in article 3 relate particularly to the duties of the treasurer of a county. The section in question must therefore be read with reference to the other sections which are contained in article 3 and with reference to the title of said article. When it is thus read, it is evident that the section prescribes the procedure which is to be followed by the treasurer of a county in dealing with claims for the return of money which has erroneously come into his hands. The section does

not purport to establish a rule of substantive law. It is wholly adjective in character. Furthermore, it is to be noted that its language is not mandatory but permissive.

[10] Appellant's right to recover the money here sought to be recovered is not dependent on any statute. It is based upon a fundamental principle of equity that one who has received money which belongs to another is bound in equity and good conscience to pay it over to the owner. No purely procedural statute can affect this right. Such a statute may furnish the procedure which a county treasurer may insist shall be followed in the matter of demands for money which it is claimed he has erroneously received. It cannot avail the county which is unjustly enriched at appellant's expense and serve as a valid ground for a general demurrer under the mistaken theory that it makes the real party in interest in an action of this character an official of the state who obviously has not the slightest interest in the outcome of the action.

The order from which this appeal has been prosecuted is therefore reversed with instructions to the trial court to overrule respondent's demurrer.

We concur: BARNARD, P. J.; MARKS, J.

132 Cal.App. 391

HOFFMAN v. HAASIS et al.

Civ. 7880.

District Court of Appeal, Second District, Division 2, California.

June 2, 1933.

Assignments for benefit of creditors ⇐352.

Whether assignment for benefit of creditors was accompanied by change of possession satisfying statutory requirements, so as to afford nonconsenting creditor sufficient protection until consummation of transfer, *held* fact question for trial court (Civ. Code, §§ 3440, 3459).

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by Fred Hoffman against J. F. Haasis and others. Judgment for defendants, and plaintiff appeals.

Affirmed.

Denio, Hart, Taubman & Simpson, of Long Beach, for appellant.

Henry D. Lawrence, of Long Beach, and Frank C. Weller, of Los Angeles, for respondents.

CRAIG, Justice.

In a suit praying return to the plaintiff of certain store fixtures, goods, wares, and merchandise, or a judgment for moneys alleged to be due, after trial without a jury judgment was rendered in favor of the defendants, from which the plaintiff appealed.

The respondents Fulton Bros. entered into possession of premises of the plaintiff under the terms and provisions of a lease in writing by which it was agreed that they would "not let, sublet, sub-lease or assign this lease or the premises hereunder mentioned in whole or in part, or transfer, assign or sell the business, or assign or sell the stock of goods comprising the same; * * * no furniture, shelving, tools, equipment or fixtures placed by the lessee in or upon the premises shall be removed from said premises during the term of this lease and not until rents and charges have been paid, and that said furniture, shelving, books and equipment and fixtures are hereby pledged by lessee to lessor as security, and shall belong to lessor until all rents and charges provided for in this lease shall have been paid and shall be subject to issue by lessor with or without legal process and lessor may sell the same and apply the proceeds thereof, to discharge any rents or charges that may be due and unpaid." Rents became due, the lessor obtained a judgment against the lessees, and the latter assigned to the respondent Haasis for the benefit of creditors all of their property of every kind and nature. Execution was levied by the respondent on all moneys, goods, wares, and merchandise of Fulton Bros., in the hands or under the control of Haasis, to which he made return that he had nothing. It is contended in the present action that the judgment debtor's assignment without the appellant's consent was void because not in accordance with the provisions of section 3459 of the Civil Code. Said section provides that an assignment for the benefit of creditors is void against every creditor not assenting thereto, unless acknowledged or proved and certified, etc., as required by other sections of the same code. Notice was recorded on February 20, and the property remained in the storeroom until March 11, whereas said assignment was executed previously thereto and on the 13th day of February. By section 3440 of the Civil Code the Legislature ordained that every transfer of such property is conclusively presumed to be fraudulent and void against the creditors of the assignor while he remains in possession and unless accompanied by immediate change of possession; "provided, also, that the sale, transfer, or assignment of a stock in trade, in bulk, * * * and the sale, transfer, assignment or mortgage of the fixtures * * * will be conclusively presumed to be fraudulent and void as against the existing cred-

itors of the vendor * * * unless at least seven days before the consummation of such sale, transfer, assignment or mortgage, the vendor, transferor, assignor or mortgagor * * * shall record * * * a notice of said intended sale, transfer, assignment or mortgage," etc. By said notice of February 20th it was proclaimed that Haasis intended to purchase, and said sale and transfer would take place and be consummated on the 28th day of February. According to the evidence, removal of the property did not occur for some time thereafter, yet the appellant's levy was withheld for a period of more than two weeks after such removal. Whether or not there was such a change of possession pursuant to the requirements of the statute, including said notice, as to afford the appellant sufficient protection until consummation of such sale, was a question of fact for determination by the trial court. Elsom v. Moore, 11 Cal. App. 377, 105 P. 271; Bucher v. Allen, 11 Cal. App. 650, 105 P. 942. The trial court found that the plaintiff's allegations that said property was assigned with intention to defraud him were untrue, that it was not true that the defendants sold the same illegally, and that said assignment and transfer were valid. It appeared further that the assignee entered into possession prior to removal of the property from the premises of the assignor, which may have been the determining factor. The facts adduced fail to bring the case within the purview of the rule announced in Jarvis v. Webber, 196 Cal. 86, 236 P. 138, wherein neither a general assignment nor attempted compliance with said Code sections was made to appear. From the case presented we conclude that legally the findings of fact are sufficiently supported by the evidence. A similar case is Hassell v. Bunge, 167 Cal. 365, 139 P. 800.

The judgment is affirmed.

We concur: WORKS, P. J.; STEPHENS, J.

CRAWFORD v. FRANCE.*

Civ. 7603.

District Court of Appeal, Second District, Division 1, California.

June 5, 1933.

Rehearing Denied July 5, 1933.

1. Evidence ⇐441(1).

Oral stipulations or understandings of parties preceding execution of written contract cannot be introduced to vary written contract (Civ. Code, § 1625; Code Civ. Proc. § 1856).

2. Evidence ⇐441(6).

In architect's suit for breach of written contract which provided that architect was to be paid percentage of cost of construction of hotel, evidence that parties orally agreed before execution of contract that cost would not exceed $45,000 *held* inadmissible where cost actually would be $62,000 and contract did not limit cost (Civ. Code, § 1625; Code Civ. Proc. § 1856).

YORK, J., dissenting.

Appeal from Superior Court, Santa Barbara County; Pat R. Parker, Judge.

Action by Louis N. Crawford against J. E. France. Judgment for defendant, and plaintiff appeals.

Reversed.

Shaeffer & Weldon, of Santa Maria, for appellant.

Preisker, Goble & Twitchell, of Santa Maria, for respondent.

HOUSER, Justice.

Plaintiff appeals from a judgment rendered against him and in favor of defendant in an action tried before the court, sitting with a jury. The issue relates to a question of compensation claimed by plaintiff to be due to him under the terms of a written contract entered into between plaintiff as an architect, and defendant as the owner of a piece of real property upon which a hotel building was proposed to be constructed.

After having provided in detail regarding the general and the specific services which were to be rendered by plaintiff, the contract contained the following clause: "The Owner agrees that the Architect is to be paid for his services, the sum equal to six per cent of the cost of the work exclusive of the cost of the land, in installments as follows: 1/5 of the total fee based upon the estimated cost, on acceptance of preliminary drawings and estimates of cost; on completion of working drawings exclusive of details, a sum sufficient to bring the total payments to 3/5 of the total fee based on the estimated cost or upon the lowest reputable bids for construction; the balance, 2/5, to be in installments as the work progresses."

Following the preparation by plaintiff of "preliminary drawings" and their acceptance by defendant, bids for the construction of the building were procured by plaintiff, and thereupon it was discovered that, notwithstanding the subsequent elimination of certain features from the original plans, the cost of the construction of the building would be largely in excess of the amount which had been contemplated would be its cost. Thereupon defendant abandoned the project; and

upon his failure and refusal to compensate plaintiff for the services rendered by him, plaintiff commenced an action against defendant for damages arising from alleged breach of the contract. Besides a general denial of the several allegations of the complaint, the answer contained specific allegations to the effect that the plaintiff agreed to prepare plans and specifications for a hotel building not to exceed in cost the sum of $45,000, which was the asserted consideration upon which defendant entered into the contract; that plaintiff failed to perform his contract, "because the building he planned could not be built for less than $62,000; that the plaintiff failed to design a hotel building 'suitable to the needs of the owner,' in accordance with and as required by the terms of the contract. That one of the known needs of the owner was that the hotel should cost the defendant not to exceed $45,000, whereas, the hotel building designed by plaintiff could not be constructed by defendant at a cost of less than $62,000." (Respondent's Reply Brief, p. 6.) In addition thereto, defendant restated the said alleged facts, and thereupon predicated a defense of fraud on the part of plaintiff in inducing defendant to enter into the agreement.

On the trial of the action, evidence was admitted by the trial court not only for the purpose of establishing what was the "estimated cost" of the building and for which the contract did not specifically provide, but as well to prove that orally and outside and beyond the terms of their written agreement, the parties previously had agreed that in the event the building should cost an amount in excess of the said "estimated cost" defendant was to pay to plaintiff nothing for his services. However, after all the evidence had been introduced, "the charge of fraud was abandoned because proof constituting the elements of fraud was lacking." (Respondent's Reply Brief, p. 7.) Notwithstanding such abandonment, at the request of defendant the trial court instructed the jury that: "If you find that the plaintiff agreed to design a building so that the cost thereof should not exceed $45,000, there is the implied agreement that the architect cannot recover unless he performs his contract in this respect, and it is not necessary in order to produce this result that the parties should expressly agree that the architect should receive no pay in the event that he failed to perform this part of the agreement." Pursuant to the request of defendant, other instructions, to similar effect, were also given to the jury by the trial court.

Conceding that evidence offered for the purpose of explaining the ambiguity in the contract relating to the item of "estimated cost" was admissible, it is apparent that the addition to the written contract of a provision which, on the happening of a specified contingency, would excuse defendant from making compensation to plaintiff for services performed or to be performed by him, would be a most material alteration of the agreement which was executed by the parties, and as to which, because of the absolute silence of the agreement with reference thereto, no ambiguity existed. As far as the written agreement was concerned, the questioned evidence introduced, or proposed to introduce, into it an entirely new element which, as hereinbefore has been stated, rested wholly in parol, or was evidenced solely by the precedent oral stipulations of the parties to the agreement.

[1] Notwithstanding what may be the effect of the decision in the case of Hudson v. Barneson, 41 Cal. App. 633, 183 P. 274, by a host of authorities in this state, as well as by others throughout the several jurisdictions of the United States, the principle of law is well established that in circumstances such as were present in the instant case, the written contract of the parties could not be varied or modified by evidence which related to oral stipulations or understandings of the parties which preceded the execution of the contract. Indeed, by the terms of section 1625 of the Civil Code it is provided that: "The execution of a contract in writing, whether the law requires it to be written or not, supersedes all the negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument." And as far as affects the instant situation, section 1856 of the Code of Civil Procedure provides as follows: "When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be between the parties and their representatives, or successors in interest, no evidence of the terms of the agreement other than the contents of the writing. * * *"

[2] Although on the trial of the action the evidence to which appellant now objects may have been admissible under the allegations of the answer with respect to the defense of fraud, on the abandonment of that defense, evidence with reference to the precedent oral negotiations or stipulations of the parties which was not explanatory of some ambiguity in the provisions of the agreement should not have been permitted to remain in the case for the consideration of the jury. In other words, the evidence in question related to facts which could not constitute a defense to the action. It follows that by reason of the action of the trial court in the premises, of which appellant complains, plaintiff was substantially prejudiced.

The judgment is reversed.

I concur: CONREY, P. J.

YORK, Justice.

I dissent. I can see no difference in the question of law involved here from that decided in the case of Hudson v. Barneson, 41 Cal. App. 633, 183 P. 274. In that case a rehearing was denied by the Supreme Court without a dissenting vote. Until that case is specifically overruled by the Supreme Court, I believe that we should follow that decision.

CONLIN et al. v. BLANCHARD et al. (two cases).*

CLUTTER v. CONLIN et al.

Civ. 9015.

District Court of Appeal, First District, Division 2, California.

May 25, 1933.

Hearing Granted by Supreme Court July 24, 1933.

1. **Judgment** ⇐518.

In ejectment action, allegation that conveyances upon which defendant relied to prove his chain of title were invalid constituted direct and not collateral attack upon decrees adjudging that title was in defendant's predecessors in interest.

2. **Judgment** ⇐12.

Decree rendered in action to foreclose assessment lien against property owner who died before action was instituted *held* void because court had no jurisdiction, and of no effect against owner's heirs.

3. **Judgment** ⇐486(1).

Void decree was assailable directly or collaterally.

4. **Judgment** ⇐509.

Public administrator's failure to appear and defend on behalf of estate in quiet title action wherein plaintiff's case rested upon foreclosure decree against testator and known to be void by plaintiff and administrator *held* fraud upon heirs against whom decree rendered was of no effect.

Appeals from Superior Court, Los Angeles County; R. M. Rankin, Judge.

Two actions by Francis M. Conlin and others against Lola A. Blanchard and others. J. O. Clutter intervened in the first action and filed a cross-complaint in the second action. From a judgment for intervener and cross-complainant, plaintiffs appeal.

Reversed, with directions.

Edwin J. Miller, of Los Angeles, for appellants.

Gallaudet & Hoffman, Rex Hardy, and Sylvester Hoffman, all of Los Angeles, for respondent.

NOURSE, Presiding Justice.

Plaintiffs brought two actions in ejectment. The defendant Clutter intervened in the first and filed a cross-complaint in the second, claiming title to the real property involved. Plaintiffs demanded a trial by jury, which the trial court denied. Trial was had before the court upon Clutter's complaint in intervention and cross-complaint and a consolidated judgment covering both cases was entered quieting his title to the property and denying plaintiffs a trial upon the issues raised in their complaints. From this consolidated judgment the plaintiffs have appealed upon typewritten transcripts, and the defendant Clutter alone appears as respondent.

On June 17, 1924, Sam H. Conlin died testate in the state of Missouri. The plaintiffs herein are the heirs or devisees under his will. At the time of his death Conlin was the owner of record of the real property involved in this litigation. On February 25, 1925, an assessment was attempted to be levied upon this property to cover the proportionate cost of a local public improvement. On November 13, 1925, an action was commenced against Sam H. Conlin to foreclose the lien of this assessment and service of summons therein was had by publication based upon affidavits stating that Conlin could not be found. The default of Conlin was thereafter taken and a decree of foreclosure was entered against him on April 23, 1926. Following the issuance of the commissioner's deed, the South Holding Corporation, claiming ownership of the property through conveyance of the grantee of the commissioner's deed, commenced an action against the public administrator as administrator of the estate of Sam H. Conlin on April 15, 1929. The petition of the public administrator for letters disclosed that Sam H. Conlin died on June 17, 1924, and also alleged that the public administrator was to be appointed for the purpose of a quiet title action only and that the interest of the estate in the property involved did not exceed the sum of $10. The public administrator did not defend the action, but stipulated that it might be heard on the default calendar, and judgment was thereupon entered quieting title against him. In that action the heirs of Sam H. Conlin were not sued, did not appear, and had no knowledge of the proceeding until long after the decree was entered.

In this proceeding the respondent Clutter, as the successor in interest of the party prevailing in the quiet title action, pleaded the chain whereby he claimed title to the property, omitting, however, the reference to the proceedings to foreclose the assessment lien

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 28 P.2d 12.

and the proceeding to quiet title just mentioned. The plaintiffs answering denied the right and title of all those grantors and grantees pleaded in the chain of title and affirmatively pleaded that the conveyance to this respondent was null and void and that respondent took the conveyance with full knowledge of the claims of these appellants after their lis pendens was duly recorded. In attempting to prove the chain of title under which he claimed, the respondent offered in evidence the record of the quiet title action instituted against the public administrator including the petition of the public administrator for letters. He also offered in evidence the commissioner's certificate of sale on foreclosure and the commissioner's deed reciting that it was issued pursuant to a decree in foreclosure dated April 23, 1926. Having closed his case, the appellants offered in evidence the entire record in the foreclosure suit and this was admitted without objection from the respondent. From this it appears that the complaint to foreclose the assessment lien was filed November 13, 1925, and that the lien attached for work completed on February 25, 1925. The appellants also offered in evidence two notices of pendency of these actions, one recorded June 16, 1930, and the other recorded October 29, 1929. Respondent's pleadings disclosed that his first interest in the property was acquired December 15, 1929, and that he actually became a purchaser under a trustee's sale on June 17, 1930.

[1] Though the pleadings do not set forth the prior actions in detail or specifically allege their invalidities, both causes were tried upon the theory that those were the only issues involved and the evidence of those proceedings was admitted either at respondent's instance or without his objection. Having alleged the invalidities of the conveyances upon which respondent relied to prove his chain of title, the appellants made a direct and not a collateral attack upon those decrees. Follette v. Pac. L. & P. Corp., 189 Cal. 193, 205, 208 P. 295, 23 A. L. R. 965; Swallow v. Tungsten Products Co., 205 Cal. 207, 210, 270 P. 366; Moakley v. L. A. Pac. Ry. Co., 99 Cal. App. 74, 79, 277 P. 883; Anglo-California Trust v. Kelley, 117 Cal. App. 692, 694, 4 P. (2d) 604.

[2, 3] It is true that as to the foreclosure proceeding the allegations are not as full as those in the cases cited, but respondent offered the deed in evidence and told the court that he had no objection to the admission of the entire record and this was a necessary link in the proof of his chain of title. These proceedings were void and not merely voidable because the court had no jurisdiction to entertain them; the defendant named therein having died before the proceedings were instituted. 15 R. C. L. 621, 622; Garrison v. Blanchard (Cal. App.) 16 P.(2d) 273; and see In re Estate of Parsell, 190 Cal. 454, 456, 213 P. 40, 25 A. L. R. 1561. That decree having been rendered against a dead man had no legal effect against his heirs in whom the title to the property vested immediately upon his death. These parties did not have their day in court, and so far as their interest in the property is concerned that decree is just the same as if it had been rendered against one who was an entire stranger to the title. Technically, because of the pleadings here, the attack upon the foreclosure decree may be said to be collateral and not direct; but this is immaterial because being void it is assailable in either manner.

[4] Coming to the action to quiet title, the proceedings disclose a clear case of extrinsic fraud practiced upon the heirs and upon the court to prevent the real owners of the property from claiming their rights in the premises. That record discloses that the date of the death of Conlin was known to the plaintiff therein and to the public administrator before those proceedings were instituted. They thus knew that the title to the property in suit was vested in these heirs who resided in a foreign state. They knew that the decree of foreclosure was void for want of jurisdiction of the court entering it. The plaintiff prevailed upon the public administrator to file an answer before he was legally appointed as administrator of the estate and it prevailed upon him to default at the trial and to fail to offer any defense on the part of the estate or to represent the true owners in a defense of the property. Inasmuch as plaintiff's whole case in the quiet title action rested upon a void decree in foreclosure known to be void by both the plaintiff and the defendant therein, the failure of the administrator to appear and defend on behalf of the estate was a fraud upon the court as well as upon the heirs. To permit the successor in interest of that plaintiff to come into a court of equity and to prevail solely on proof of a judgment obtained in that manner it would be necessary to disregard all rules applicable to the equity side of the court.

It is suggested that, notwithstanding these considerations, the respondent should still prevail because the appellants are in some way estopped from asserting their title. There was no proof of any facts which would warrant the conclusion of the trial court that these plaintiffs were estopped. There was no evidence that the appellants by language or conduct led the respondent to change his position in any respect. 10 Cal. Jur. 624; City of Los Angeles v. Babcock, 102 Cal. App. 571, 576, 283 P. 314. The whole record discloses that respondent is the victim of the fraud of his predecessors in interest and that he acquired title to the property after the appellants asserted their rights and filed their lis pendens. The suggestion now made that

respondent was an innocent purchaser was not raised in the trial court, and, by reason of the stipulation herein noted, is not available to respondent at this time.

After the appeal was taken the parties filed a stipulation in the Supreme Court wherein it was agreed that the appellants herein are the owners of the premises described in the complaint and entitled to recover herein unless the title of them and of Sam H. Conlin was divested in the foreclosure proceedings *and* in the quiet title action against the administrator of the estate. It was further stipulated that if these proceedings are void and did not convey title to respondent then the plaintiffs should recover in these actions. Because of this stipulation it is not necessary to return the cause for a new trial.

The judgment is reversed, and the trial court directed to amend its conclusions of law and to enter judgment for plaintiffs in accordance with the views expressed herein.

We concur: STURTEVANT, J.; SPENCE, J.

132 Cal.App. 467

Alice KELLEY, Plaintiff and Respondent, v Lester E. SILBOUGH, Defendant and Appellant.

Civ. 8979.

District Court of Appeal, Second District, Division 1, California.

June 7, 1933.

Motion to dismiss appeal by defendant or affirm judgment of the Superior Court of Los Angeles County, Joseph P. Sproul, Judge, in an action for damages for personal injuries. Judgment affirmed.

C. F. Jorz, of Los Angeles, for appellant.

Butcher & Haines, of Santa Barbara, and Sherman Anderson, of Los Angeles, for respondent.

CONREY, Presiding Justice.

Proceeding under rule V, section 3, of Supreme Court and District Courts of Appeal rules, respondent moves for dismissal of appeal or affirmance of judgment.

The sole ground of appeal as presented by appellant is found in his contention that the amount of damages awarded is so excessive, and so disproportionate to the injuries received, as to raise a presumption that the verdict was influenced by passion and prejudice "rather than honest and sober judgment."

Neither the quotations from the evidence as found in appellant's brief, nor the evidence contained in the supplement to that brief, nor both together, are sufficient to justify appellant's claims in relation to the point stated. While the amount of the verdict ($7,660) may seem to be a very liberal compensation, there is no doubt that the plaintiff has suffered very serious injuries and disabilities which are traceable to the accident and are legally sufficient to sustain the verdict. This being so, we think that respondent should not have imposed upon her the burden of further argument, nor should the court be required to give further time to the case.

The motion is granted, and the judgment is affirmed.

We concur: HOUSER, J.; YORK, J.

132 Cal.App. 376

PEOPLE v. BEATTY.

Cr. 2340.

District Court of Appeal, Second District, Division 1, California.

June 1, 1933.

Hearing Denied by Supreme Court June 30, 1933.

1. Criminal law ⇐686(1), 1153(3).

Court may permit prosecution to reopen case for further testimony, and its action will not be disturbed in absence of showing of clear abuse of discretion.

2. Jury ⇐31(11).

In prosecution for possessing concealed firearm where by stipulation case was tried to court on preliminary transcript, permitting prosecution to reopen case after resting, and introducing authenticated fingerprint record of Ohio penitentiary, *held* not error as denying defendant constitutional jury trial (St. 1923, p. 695; Pen. Code, § 969b).

3. Criminal law ⇐964.

Where accused, convicted of possessing concealed firearm, moved for new trial after denial of probation, that court said after denying motion that he thought accused was too late, *held* not error, as controversial words were surplusage (St. 1923, p. 695; Pen. Code, § 969b).

4. Criminal law ⇐1202(7).

In prosecution for possessing concealed firearm, alleged error in admitting certified copy of judgment of conviction in Ohio, as not being prison record as provided by statute, was harmless where without such record there was uncontroverted testimony of previous conviction (St. 1923, p. 695; Pen. Code, § 969b).

5. Constitutional law ⇐55.

Legislature has power to change rules of evidence and to create presumptions.

6. Statutes ⇐87.

Statute providing that prison records or copies thereof may be introduced to establish prima facie proof of prior conviction does not constitute special legislation as permitting proof of element of corpus delicti by hearsay, since it merely creates presumption (Pen. Code, § 969b; Const. art. 4, § 25, subd. 3).

7. Criminal law ⇐1202(3).

In prosecution for possessing concealed firearm, introduction of prison record of accused as permitted by statute merely created lawful presumption of prior conviction (Const. art. 4, § 25, subd. 3; St. 1923, p. 695; Pen. Code, § 969b).

8. Constitutional law ⇐266.

In prosecution for possessing concealed firearm, proof of prior conviction by prison record and not by witnesses confronting him did not deprive accused of due process (St. 1923, p. 695; Pen. Code, § 969b).

9. Criminal law ⇐662(1).

Fundamental right of defendant in criminal prosecution to be confronted by witnesses is not guaranteed by California Constitution, but by statute (Pen. Code, § 686).

10. Criminal law ⇐662(1).

Provisions in Sixth Amendment to Federal Constitution concerning right of accused in criminal prosecution to be confronted with witnesses against him are not applicable in prosecution in state court (Const. U. S. Amend. 6; Pen. Code, § 686).

11. Criminal law ⇐662(4).

Right of accused to be confronted by witnesses against him was taken away to extent that statute provided that authenticated prison record or copy thereof was sufficient to establish prima facie proof of prior conviction, since right was statutory, and could be deprived by statute (Pen. Code, §§ 686, 969b).

12. Constitutional law ⇐208(1).

Statute providing that prison records or copies thereof may be introduced to establish prima facie proof of prior conviction of accused *held* not discriminatory since statute applied with equal effect to all persons (Pen. Code, § 969b; Const. art. 1, § 21).

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Charles L. Beatty was convicted of violation of the Firearms Act, and he appeals.

Affirmed.

Alexander L. Oster, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John D. Richer, Deputy Atty. Gen., for the People.

HENDERSON, Justice pro tem.

The appellant was charged by an information with the offense of violation of chapter 339, p. 695, of the laws of 1923 (The Firearms Act), more specifically, the possession of a firearm capable of being concealed upon the person, he having been convicted previously of a felony. Having waived a trial by jury, he was found guilty and appeals from the judgment and the order denying his motion for a new trial. At the commencement of the trial it was stipulated that the case be tried upon the preliminary transcript, which was read into the record.

Pursuant to section 969b of the Penal Code the people introduced in evidence copies of fingerprint cards of the defendant taken at the state penitentiary in Ohio and the county jail at Los Angeles, both of which were exhibits at the preliminary examination, to establish the prior conviction. Thereupon the prosecution rested its case, and the defendant moved for a dismissal on the ground of the insufficiency of the evidence to prove a prior conviction since the foreign prison record was not properly authenticated. With this contention the trial judge agreed, but the prosecution was granted permission, irrespective of the stipulation, to reopen the case and introduce a duly authenticated fingerprint record from the state penitentiary of Ohio and a certified copy of a judgment of conviction of grand theft from the same state, neither of said documents having been offered at the preliminary examination.

[1, 2] It is urged that the failure of the court to set aside the stipulation of the parties before granting the prosecution permission to reopen the case was erroneous, because it left the defendant bound by its terms and at the same time relieved respondent from its effect. Appellant maintains that he was thereby denied his constitutional right to demand a trial by jury, which he would have requested in the first instance could he have anticipated this departure from the agreement of the parties. It is a well-established principle of law that a court in its discretion may permit the prosecution to reopen the case for further testimony, and its action in this regard will not be disturbed in the absence of a showing of clear abuse of discretion. People v. Champion, 193 Cal. 441, 225 P. 278. A review of the record discloses that the sole objection to the court's ruling was made on the ground "that the case had already been submitted." There is nothing to indicate that the defendant was dissatisfied with the waiver of a trial by jury nor with the method of the presentation of the evidence. Under such circumstances, we are of

the opinion that no abuse of discretion on the part of the trial court is disclosed.

[3] Subsequent to the denial of the defendant's application for probation, his motion for a new trial was made on all of the statutory grounds. The trial judge denied the motion forthwith in the following language: "Motion denied. I think you are too late anyway." Appellant insists that this erroneous opinion on the part of the trial judge (People v. Lamattina, 38 Cal. App. 82, 94, 175 P. 484) is an indication of his failure to consider the claim of insufficiency of the evidence to sustain the judgment, when passing on the motion. It is apparent, however, that the controversial words, uttered subsequent to the determination of the matter, were but mere surplusage and could in nowise affect the decision of the court theretofore made.

[4] It is next contended that the court erred in permitting the prosecution to introduce in evidence a certified copy of a judgment of conviction from the state of Ohio, which appellant insists is not a prison record within the requisites of section 969b of the Penal Code, citing People v. Wilson, 100 Cal. App. 397, 280 P. 137. In that case the proffered document lacked the certificate of its legal custodian, and with its rejection there remained insufficient evidence to sustain the verdict. But even without the disputed exhibit in the instant case, there still remains an abundance of uncontroverted testimony of the previous conviction, and the error, if any, by reason of its admission was rendered harmless.

Finally, it is insisted that section 969b of the Penal Code, which was added to the Code in the year 1931 (St. 1931, p. 995), and which provides in substance that for the purpose of establishing prima facie proof of a prior conviction that records or copies thereof of any state or federal penitentiary, where a person has been imprisoned, may be introduced as such evidence, offends the Constitution of the state of California.

[5-7] In this regard appellant first assails the section as constituting special legislation regulating the courts of justice (section 25, subd. 3, of art. 4) in that it permits the proof of an element of the corpus delicti by hearsay testimony. Such a construction, however, would ignore the well-established rule recognized by courts, both state and federal, that the Legislature has the power to change rules of evidence and to create presumptions. People v. Bullock, 123 Cal. App. 299, 11 P.(2d) 441; People v. Osaki, 209 Cal. 169, 286 P. 1025. In the latter case, which involved the construction of a legislative change affecting the rules of evidence as to certain presumptions and the burden of proof respecting alienage, after an exhaustive review on the subject, the court said in part at page 187 of 209 Cal., 286 P. 1025, 1032: "Legislation, providing that proof of one fact shall constitute prima facie evidence of the main fact in issue is but to enact a rule of evidence, and quite within the general power of government. Statutes, national and state, dealing with such methods of proof in both civil and criminal cases abound, and the decisions upholding them are numerous. * * *" Under these authorities it is manifest that the prosecution in the instant case, pursuant to the terms of the disputed section, by the introduction of the prison record, merely created a lawful presumption.

[8] The contention is further made that as proof of the prior conviction was not made by witnesses confronting him, the defendant was deprived of the right of due process of law by the said section. This is contrary to the rule announced in People v. Bullock, supra, in the favorable construction of a portion of section 476a of the Penal Code, which made provision for a class of evidence similar to that contained in said section 969b of the same Code, where the court said (page 302 of 123 Cal. App., 11 P.(2d) 441, 442): "In the case of Casey v. United States, 276 U. S. 413, at page 418, 72 L. Ed. 632, 48 S. Ct. 373, 374, it is said in this connection: 'It is consistent with all the constitutional protections of accused men to throw on them the burden of proving facts peculiarly within their knowledge and hidden from discovery by the Government.'"

[9-11] Although the right of a defendant to be confronted by witnesses is fundamental, it is not expressly guaranteed by the Constitution of this state, and the provisions of the Sixth Amendment to the Federal Constitution are not applicable here. People v. Wilson, 26 Cal. App. 336, 146 P. 1048. The right in this state is guaranteed by section 686 of the Penal Code, and the defendant can be deprived of the same only by statutory authority to the contrary. People v. Ward, 105 Cal. 652, 39 P. 33. Section 969b of the Penal Code falls squarely within the category of legislation of this character.

[12] It is finally urged, in this connection, that the section is discriminatory in contravention of article 1, § 21, of said Constitution, by placing such a burden of proof upon persons accused of this particular offense. In this regard, however, it cannot be questioned that the provision, as a rule of evidence, applies with equal effect to all persons who are compelled to overcome the same. We are of the opinion that the classification occasioned by the terms of the statute is a reasonable and natural one. See People v. Nakamura, 125 Cal. App. 268, 281, 13 P.(2d) 805.

The judgment and order denying defendant's motion for a new trial are affirmed.

We concur: CONREY, P. J.; HOUSER, J

132 Cal.App. 444

PEOPLE of State of California, Plaintiff and Respondent, v. W. J. KELLY (True Name W. J. Morris), Defendant and Appellant.

Cr. 1264.

District Court of Appeal, Third District, California.

June 5, 1933.

Appeal from Superior Court, Sacramento County; Martin I. Welsh, Judge.

Robert A. Zarick and John C. Stoller, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

PER CURIAM.

The appellant was convicted in the superior court of Sacramento county of a felony, to wit, robbery of the first degree.

The transcript on appeal was filed in this court March 1, 1933. No brief has been filed in behalf of appellant. The cause was regularly placed on the calendar for oral argument on June 5, 1933. No appearance was made for appellant at the time the case was called for hearing.

Pursuant to the provisions of section 1253 of the Penal Code, the judgment and the order are affirmed.

132 Cal.App. 449

CONNOR v. JOHNSON.

Civ. 4784.

District Court of Appeal, Third District, California.

June 6, 1933.

1 Appeal and error ⇐757(1).

Appellate court need not consider brief of appellant, relying on typewritten transcript and not printing in brief or supplement thereto enough of record to justify reversal of judgment (Code Civ. Proc. § 953c).

2. Trial ⇐165.

Whole evidence must be considered on motion for nonsuit.

3. Automobiles ⇐224(8).

Automobile passenger, testifying in his action against driver for injuries sustained, that he would never have re-entered car but for impression that he could stop it by turning off ignition, as he had done during trip on discovering driver's intoxication, *held* contributorily negligent as matter of law, though he also testified that he thought driver was "all right."

Appeal from Superior Court, Yuba County; K. S. Mahon, Judge.

Action by Alvin H. Connor against Eugene F. Johnson. From a judgment of nonsuit, plaintiff appeals.

Affirmed.

Ray Manwell, of Marysville, for appellant.

Rich, Weis & Carlin, of Marysville, for respondent.

MILLER, Justice pro tem, delivered the opinion of the court.

[1] This is an appeal from a judgment of nonsuit. At the outset objection is urged to the consideration of appellant's brief upon the ground that, inasmuch as appellant relies upon a typewritten transcript, and is required by section 953c of the Code of Civil Procedure to print in his brief, or in the printed supplement thereto, sufficient of the record to justify a reversal of the judgment or order appealed from, and, appellant having failed to comply with that requirement, this court should decline to consider the brief of appellant. And while it is true that under the rule and under the circumstances herein related, this court might, with propriety, decline to consider the brief, we have, nevertheless, read the entire record to the end that we may pass upon the merits of the case, it appearing to be a case that should properly be determined upon its merits.

It appears from the record that on September 14, 1931, appellant and respondent were on their way from Marysville to Chico. Before starting on the trip, appellant, who was to be respondent's guest, went to the home of respondent in preparation for the trip. There they each had two highballs composed of whisky and ginger ale. That was the extent of the liquor that appellant had, and that was all the liquor that he saw respondent consume. They left Marysville at between 6 and 6:30 p. m. in respondent's automobile, which respondent was driving. Shortly after leaving Marysville, appellant noticed that respondent was driving recklessly, was going at about seventy miles an hour, and had a drowsy, groggy appearance, and appellant became satisfied that respondent was intoxicated. Appellant became alarmed, and before they had proceeded a great distance turned off the ignition on respondent's automobile, and when the car came to a stop, respondent got out to see what was the matter with his engine, whereupon appellant moved over into the driver's seat and told respondent that the car was all right, that he had cut off the ignition, whereupon respond-

ent demanded to know what the big idea was, and appellant, not wishing to anger respondent, stated that he had never driven that machine and wanted to operate it, to which respondent consented. As respondent walked around the machine to the right side, he held onto the machine, which apparently prevented him from staggering. For the next twenty-five or thirty minutes appellant drove the automobile, and respondent appeared to be asleep, but, upon awaking he complained of the slowness of the speed at which they were traveling (they were then making forty-five miles an hour), declared they would be late, and that he could coax more miles than that out of the car, and that he would drive his own machine, whereupon appellant, not wishing to start an argument with respondent, who seemed inclined to be quarrelsome, surrendered the wheel and they proceeded on their trip with respondent driving fast, whereupon appellant told him not to drive so fast, and then devoted himself to memorizing a song he was preparing to sing at a meeting the two of them were to attend at Chico, when a sudden lurch of the machine attracted appellant's attention, and the car rolled over several times, and both he and the respondent were injured. Appellant brought suit against respondent for the injuries he sustained as the result of the accident. He testified at the time he surrendered the wheel to respondent he thought "he was perfectly all right." But notwithstanding his testimony that he thought that he was "perfectly all right" when he relinquished the wheel to him, he testified, "I would never have got in the car when he took the wheel, only I was under the impression if anything went wrong I could stop the car as I did the first time."

At the time of the accident an eyewitness who rendered assistance to the injured testified that he could not observe any liquor about appellant, whose mind was clear, and who was perfectly sober, but that respondent was dazed, that "it would take him a few minutes to straighten out a sentence so he could word it"; that "he talked sort of insane"; that "he was pretty well liquored up"; that "he smelled liquor on him badly"; that "he had to be helped as he walked, mostly due to his intoxication"; and that in the opinion of the witness, based upon his experience with drunken men, and the actions of respondent, that respondent was under the influence of liquor.

After appellant had been taken from the scene of the accident to a hospital, and at about 7:30 p. m., a Mr. Williams, one of his previous employers, saw him, and testified that respondent was sitting in a chair with the smell of liquor on his breath; that respondent would not allow anybody to help him when he started to walk, and that from the witness' experience in seeing intoxicated people and knowing how they act, and from his observation, that, in his opinion, respondent was under the influence of liquor and intoxicated.

A Mr. Minor, another of his employers, visited respondent at the hospital, and while he found him to be mean, not allowing anybody to touch him, he couldn't say whether he was drunk or not, although he testified that appellant was sober.

The only question presented by this appeal is as to whether or not the nonsuit was properly granted. Appellant contends that because of the fact he testified that at the time he relinquished the wheel to respondent and got back in the automobile to continue the trip, he thought respondent "was perfectly all right," that there was sufficient evidence to justify the submission of the case to the jury.

Can a reasonable mind, after considering the facts as developed in the plaintiff's case, reach any other conclusion than that the plaintiff knew that defendant was intoxicated at all times after he turned off the ignition and stopped the car?

[2] When the testimony, as a whole, is fairly considered, and not one small isolated portion of it alone considered, we think that but one conclusion can be reasonably drawn from it. We are equally satisfied that the whole of it must be considered in passing upon a motion for a nonsuit. It is not the duty of a court, in order to reverse a judgment, to scan the testimony of a plaintiff for a few isolated words, to the effect that he thought the defendant was "perfectly all right," which, if that were all the evidence upon the point, would entitle the case to go to the jury, when, if taken with its context, and when considered with other and more detailed testimony by the same witness to the effect that "I would never have got in the car when he took the wheel, only I was under the impression if anything went wrong I could stop the car as I did the first time," it is apparent that a nonsuit was proper.

[3] It is clear that the few isolated words cannot be taken at their face value, but must be qualified by his further testimony to the effect that he would never have gotten in the car when defendant took the wheel, had he not been under the impression that if anything went wrong he could stop the car as he had done before.

It would seem inescapable to an unprejudiced mind that appellant knew full well when he relinquished the wheel to respondent that respondent was in no fit condition to drive an automobile, and yet with that knowledge in his mind he calculated the chances he would be taking if he rode with respondent, and, having weighed the risk, concluded to accept it with the hope that if occasion required him to act for his own safety he could turn off the ignition as he had previously done. In so doing, he was, in our

opinion, clearly guilty of contributory negligence, which should defeat a recovery in this case, and that reasonable minds could arrive at no other conclusion. Lynn v. Goodwin, 170 Cal. 112, at page 113, 148 P. 927, L. R. A. 1915E, 588, and cases there cited; Jones v. Pac. Gas & Elec. Co., 104 Cal. App. 47, at page 57, 285 P. 709.

The judgment is affirmed.

We concur: R. L. THOMPSON, J.; PULLEN, P. J.

132 Cal.App. 239

PEOPLE v. BISBINES.

Cr. 2252.

District Court of Appeal, Second District, Division 2, California.

May 24, 1933.

1. **Criminal law** ⇐407(2).

Where one accused of crime stands mute under conditions which fairly afford him opportunity to reply, his silence may be taken against him as evidence indicating admission of guilt.

2. **Criminal law** ⇐1139.

On appeal in criminal case, there is no trial de novo.

3. **Burglary** ⇐41(1).

Evidence supported conviction for second-degree burglary of candy shop.

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

George C. Bisbines was convicted of second degree burglary, and he appeals.

Affirmed.

Frederic H. Vercoe, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen. and Seibert L. Sefton, of San Francisco, for the People.

PARKER, Justice pro tem.

Defendant was convicted of the crime of burglary and the degree thereof found to be second. From the judgment following he appeals.

The case was tried without a jury, defendant and the people having waived a jury trial. The only point raised is as to the sufficiency of the evidence.

The place burglarized was a candy store and the property stolen consisted entirely of cash. The candy store was a going concern, though closed after 10 o'clock at night. The store was in charge of a young lady. She had taken the store money and hid it away in the night of Friday, February 12th, before closing. The hiding place was some boxes placed under or near the shelving or counters. On opening the store the next morning it was discovered that the money was stolen. There was sufficient evidence to indicate that whoever stole the money had knowledge of the hiding place, for the reason that there was no apparent disturbing of anything else in the store and no evidence of any disarrangement of goods or fixtures, as would indicate a random search. The store was located next to a moving picture theater. There was evidence indicating that a view of the inside of the store could not be had directly from the street on account of the location of showcases, etc.; meaning by this, that a person standing on the outside in the street could not observe the movement of the clerk at closing time or watch her hide the money. However, it was shown that such a view could be obtained from certain positions on the theater premises, next door. As stated, the burglary took place between 10 o'clock p. m. of February 12th and 7:30 a. m. of February 13th, in the year 1932. The defendant had been employed in the theater for a period of some seven months prior to February 9th, on which date he ceased his employment. Without further noting this fact it will be understood that all of the times mentioned are in the year 1932. This day, February 9th, was a Tuesday. On Wednesday night after the theater is closed it is customary for the employees to change the display on the outside. This occupation usually takes three or four hours. Here it might be mentioned that defendant has a brother who was also employed at the theater and who remained after defendant quit. On Wednesday night the defendant attended a party until a late hour and upon leaving went to the theater to see if he could find his brother, believing that the latter would be still there engaged in changing the exterior display. When the defendant arrived there it was about 1:30 Thursday morning. After looking a short time for his brother and not finding him, defendant testified that he left the place and did not return again that day or Friday. The record further discloses that the entrance to the candy store was effected through a back door. This door leads into a basement or underground space which can also be reached through the theater. The imprint of a hand was found on the door. Such imprint disclosed the little finger side of the hand and contained all of the identification marks used by experts in comparisons. This imprint tallied with an admitted imprint of the defendant's hand, and no serious point is made that the imprint on this door was not made by the hand of defendant. The door

was fastened by a small bolt, apparently of no great strength, and across a narrow passageway from the door was a wall, against which a brace might be obtained by which hand pressure could be applied. The testimony was that this imprint could have been forty-eight hours old, but not older, and it was taken about 11 o'clock on the morning of February 13th. Defendant admitted that, while on the premises in the course of his employment, he may have frequently placed his hand on the door, owing to the poor lighting conditions in the passageway through which he had legitimate occasion to pass. But he contended he had not been there within forty-eight hours of the time the hand prints were found. Nevertheless, the prints of his hand, according to the testimony, had been placed on the door within that time. After the arrest of defendant he was confronted by his brother who, in the presence of a police officer, accused defendant of the crime. The accusatory language was as follows: "You know you told me you went in there and got that money; that the fellows in the theater were talking about getting it, and you said that you had better go in and get it before they did"—to which defendant made no reply.

[1] The law is well settled in this state that, when a defendant under conditions which fairly afford him an opportunity to reply, stands mute in the face of an accusation of crime, the circumstance of his silence may be taken against him as evidence indicating an admission of guilt. People v. Egan, 77 Cal. App. 279, 246 P. 337, and cases therein cited.

[2, 3] Summing up, we have evidence that the burglary had been committed, and that defendant had a familiarity with the premises burglarized to a degree not possessed by the general public; that defendant was one of a small group having access to the rear of the store through his connection with the theater and his familiarity with the premises; that imprints of defendant's hand were found on the door, which imprints were of recent impression. And on top of this, there is the final evidence of defendant's implied admission of guilt when accused by his own brother. We, of course, do not consider the testimony opposing this, for the all-sufficient reason that we do not try anew the charge.

As a matter of law the evidence detailed was sufficient to establish a degree of proof satisfying the mind and conscience of one sworn to act conscientiously upon it.

Incidentally, the defendant admitted prior conviction of a felony. His own testimony was thereby impeached, and likely the trial judge gave it little credence.

The judgment is affirmed.

We concur: WORKS, P. J.; STEPHENS, J.

132 Cal.App. 394

PIROTTE v. CIVIL SERVICE COMMISSION OF CITY OF LOS ANGELES et al.

Civ. 7638.

District Court of Appeal, Second District, Division 2, California.

June 2, 1933.

1. Evidence ⇐14.

Court takes judicial notice that convicted felons are not proper persons in any capacity on police force.

2. Mandamus ⇐75.

Petitioner's conviction of felony *held* to deprive him of right to mandamus to compel his classification in police department (Pen. Code U. S. §§ 32, 37 [18 USCA §§ 76, 88]).

Appeal from Superior Court, Los Angeles County; J. Walter Hanby, Judge.

Mandamus by P. J. Pirotte against the Civil Service Commission of the City of Los Angeles and others, to compel the classification of petitioner in the Police Department. From judgment granting the writ, defendants appeal.

Reversed, with directions.

Erwin P. Werner, City Atty., Frederick Von Schrader, Asst. City Atty., and Loren A. Butts, Deputy City Atty., all of Los Angeles, for appellants.

Gratton & Johnson, Russell A. Johnson, and John Gratton, all of Los Angeles, for respondent.

STEPHENS, Justice.

This is an action in mandamus. In circumstances which it will be quite useless to detail here the Civil Service Commissioners of the City of Los Angeles, sitting as a commission, refused to classify the petitioner in the police department of said city. He filed his petition in the superior court, asking that the writ of mandamus be issued as against such commission and the members thereof, commanding that he be so classified. The writ issued and the commission and the commissioners appeal. By the charter of the city of Los Angeles the classification requested is a prerequisite to the performance of regular city police service.

At the time this case was before us for argument and submission, neither respondent nor his attorney appeared, but the attorney for appellants appeared and informed this court through properly authenticated documents that since the judgment in the superior court petitioner had been confined in the federal prison at McNeil's Island, Wash., under conviction and sentence in the United States District Court for the Southern District of

California, for the crime of violating section 37 of the federal Penal Code (18 USCA § 88) conspiracy to violate section 32 of the federal Penal Code, and section 32 of the federal Penal Code (18 USCA § 76), pretending to be a government officer.

[1, 2] We think we can take judicial notice of the fact that convicted felons are not proper persons in any capacity on a police force and that petitioner's conviction thereof while his equitable proceeding was pending in court deprives him of the right to ask any such relief.

The judgment against appellants is reversed, and the superior court is directed to enter a judgment denying all or any relief.

We concur: WORKS, P. J.; CRAIG, J.

132 Cal.App. 153

CALIFORNIA CANNING PEACH GROWERS v. BARDELL & OREGONI et al.

Civ. 4493.

District Court of Appeal, Third District, California.

May 20, 1933.

1. Appeal and error ⇐1071(5).

Where determinative findings are supported by evidence, it is immaterial whether other findings are supported.

2. Partnership ⇐139, 155, 156.

Where partners refused marketing association's offer to reinstate marketing agreement, alleged copartner's subsequent signing of application for reinstatement of agreement, not to be performed within year, *held* not to bind partners, or to estop them, because of subsequent deliveries to marketing association, to deny alleged copartner's authority, or reinstatement of agreement (Civ. Code, §§ 2309, 2403; Code Civ. Proc., § 1973).

Appeal from Superior Court, San Joaquin County; M. G. Woodward, Judge.

Action by the California Canning Peach Growers against Bardell & Oregoni and others. From the judgment, plaintiff appeals.

Affirmed.

Hadsell, Sweet & Ingalls, of San Francisco, for appellant.

R. M. Dunne and Edward Van Vranken, both of Stockton, for respondents.

Mr. Justice PLUMMER delivered the opinion of the court.

As filed in the trial court the complaint in this action named the defendants as follows: "Bardell & Oregoni, V. Bardell, John Doe Oregoni, Richard Roe and Sam Stoe." While our attention has not been called to the substitution of the name of Maria Oregoni as one of the defendant's given a fictitious name in the title, it appears from the record that she filed an answer as one of the defendants. The complaint does not allege the existence of any partnership between the defendants, but simply sets forth that the defendants, on a certain date, applied for membership in the plaintiff-association. Upon this appeal it is contended that U. Bardell, G. B. Oregoni, and Maria Oregoni are copartners. The trial court, however, found that the partnership consisted only of U. Bardell and G. B. Oregoni. (We may here state that the names of the defendants are spelled differently in different portions of the transcript, but we will follow the spelling as given above.)

The plaintiff, appellant in this action, is an association regularly incorporated under the laws of the state of California, as a nonprofit co-operative association, for the purposes of marketing peaches grown by the members of the association. The general features of the association have been fully set forth by this court in the case of California Canning Peach Growers v. Downey, 76 Cal. App. 1, 243 P. 679, and California Canning Peach Growers v. Harris, 91 Cal. App. 654, 267 P. 572, and need not be again set forth herein.

The defendants are the owners, as cotenants, of a trifle over 179 acres of land situate in San Joaquin county, upon which they were engaged during all the times mentioned herein in raising peaches for the market. G. B. Oregoni and Maria Oregoni are, and were, during all of said time, husband and wife. On the 11th day of June, 1928, Bardell & Oregoni and the plaintiff entered into a marketing agreement covering the marketing of peaches grown upon the lands of the defendants, beginning with the year 1928, and ending with the year 1936, both years inclusive. The agreement, so far as the defendants are concerned, was signed "Bardell & Oregoni, by U. Bardell." The agreement contains no recital of the members composing the partnership, nor any recital that Bardell & Oregoni constitute a partnership. No mention is made of the ownership of the premises included in the agreement, or of the fact of any of the premises being owned by the respective parties as cotenants.

The agreement describes the plaintiff as the buyer, and the defendants as the grower. While this form of the agreement is used, the association really directs the place where the grower shall make delivery of peaches, and also to whom delivery is to be made. Whether the association is the actual buyer of the

peaches, or is simply the controlling agent for the marketing of the peaches, the collecting of the moneys agreed to be paid therefor does not need to be further considered, as this court has held such agreements valid irrespective of the legal relationship created by the execution of the standard form of marketing agreements.

After setting forth what each of the contracting parties may do, provision is made for the termination thereof, paragraph 18 reading as follows: "The grower may file with the buyer, between February 1st and March 1st of each of the years 1924, 1926, 1928, 1930, 1932 and 1934, a written notice of his desire to withdraw from this contract, and the buyer will thereupon give its written release thereof, and thereupon said contract shall be canceled as to the succeeding years of the contract period. And the buyer is also hereby given the right to give notice to the growers, between March 1st and May 1st of either of the above named years, of its desire to withdraw from this contract, and thereupon said contract shall be canceled as to the succeeding years of the contract period."

On February 1, 1930, the defendants U. Bardell and G. B. Oregoni, through their attorneys, gave the following notice to the plaintiff-association.

"Law Offices
"Gumpert & Mazzera
"Bank of Italy Building,
"Stockton, California.

"February 1, 1930.

"California Canning Peach Growers, 244 California Street, San Francisco, California.

"Dear Sirs: The undersigned, G. B. Oregone and U. Bardell, Route 1, Box 449, hereby give notice of withdrawal from the California Canning Peach Growers Association as per previous communications with you.

"Very truly yours,
"U. Bardell and G. B. Oregone,
Route 1, Box 449,
"By Gumpert & Mazzera, Attorneys."

To this notice the plaintiff, under date of February, 1930, replied as follows:

"Bardell & Oregoni, No. 2429. R. F. D. 1, Box 449, Stockton, California.

"Gentlemen: We beg to acknowledge your letter under date of February 1, 1930, wherein you give orders of withdrawal from your membership contract with the Association. As your notice of withdrawal has been filed in accordance with the provisions of Paragraph No. 18 of the Marketing Agreement, we hereby cancel contract in compliance with your request. We regret very much that you have elected to withdraw your support from our Association, and thanking you for the cooperation and support you have given, we are,

"Very truly yours,
"California Canning Peach Growers,
"By A. D. Poggetto, Manager."

Under the provisions of paragraph 18 of the marketing agreement, the contract theretofore executed between the plaintiff and Bardell and Oregoni became no longer effective and stood as a canceled instrument. Subsequent to the occurrences which we have just stated, two agents of the plaintiff named F. J. Campodonico and H. D. Jackson called upon the defendants, U. Bardell, G. B. Oregoni, and Maria Oregoni a number of times for the purpose of having them sign an instrument applying for a restoration of the canceled contract. The record shows that U. Bardell and G. B. Oregoni stated to the agents of the plaintiff that they would not sign an application for the restoration of the agreement, and that they did not care to again become members of the association. It appears, however, that the agents of the plaintiff called upon Maria Oregoni at a time when both U. Bardell and G. B. Oregoni were absent, and obtained her signature to the following instrument:

"California Canning Peach Growers, California Street, San Francisco, California.

"Gentlemen: In the matter of my withdrawal in February of this year, from the association, I have decided to cancel the same and ask that my contract shall be restored. Please consider this letter as a notice and application to that effect, and greatly oblige.

"Yours truly,
"Bardell & Oregoni,
"Per Maria Oregoni.

"Dated this 10 day of June, 1930."

Under date of June 13, 1930, the association wrote a letter addressed to Bardell & Oregoni, as follows (omitting the title):

"We wish to acknowledge receipt of your letter dated June 10, 1930, advising that you have rescinded your withdrawal action. In accordance with your instructions we have disregarded your letter of withdrawal, and therefore, your marketing agreement No. 2429, signed on June 11, 1938 (evidently intended to be '1928') remains in full force and effect. We appreciate very much your action in this matter, and thanking you for your continued support, we are,

"Yours very truly,
"California Peach Growers,
"By A. D. Pogetto."

The trial court found that Maria Oregoni was not a partner with U. Bardell and G. B. Oregoni, in the raising and marketing of peaches, and, likewise, that she was not authorized, as the agent of Bardell & Oregoni, to sign the application for a restoration of

the rescinded marketing agreement which we have referred to herein.

The contention of the appellant is that Maria Oregoni is shown by the testimony to be a copartner in the raising and marketing of peaches with U. Bardell and G. B. Oregoni; that if not a partner, she was an authorized agent of the partnership to sign the paper purporting to request the restoration of the canceled agreement. It was further contended by the appellant that if Maria Oregoni was not authorized to sign the paper dated June 10, 1930, that her acts were subsequently ratified by U. Bardell and G. B. Oregoni, and also that the subsequent delivery of fruit by U. Bardell and G. B. Oregoni to the plaintiff, estops the defendants from denying the partnership relation, and also from denying the authority of Maria Oregoni to sign the name of Bardell & Oregoni, by herself, to the application for restoration of the marketing agreement. The complaint asks for a specific enforcement of the agreement, attorneys' fees and costs, and an injunction restraining the defendants from delivering peaches, other than as directed by the plaintiff-association.

While the contention of the appellant is presented in about a dozen different specifications, a determination of this appeal revolves around three questions: The authority of Maria Oregoni to bind U. Bardell and G. B. Oregoni, as their agent; the existence or nonexistence of a partnership relation between Maria Oregoni, U. Bardell, and G. B. Oregoni, and the authority of Maria Oregoni to bind the partnership; and finally, was there any ratification by U. Bardell and G. B. Oregoni of the acts of Maria Oregoni so as to estop them from denying the restoration and binding effect of the marketing agreement executed June 11, 1928.

[1] The court found that Maria Oregoni was not a member of the partnership; found that Maria Oregoni was the agent for the partnership in the usual and ordinary conduct of its business; found that Maria Oregoni was not authorized to sign the application for the restoration of the marketing agreement contract; and found also that the acts of U. Bardell and G. B. Oregoni did not constitute a ratification of the application signed by Maria Oregoni for the restoration of the marketing agreement; and that the defendants were not estopped to deny the claim of the appellant as to Maria Oregoni being a member of the partnership. If there is sufficient testimony in the record to support these findings, it is immaterial whether other findings challenged by the appellant may not be adequately supported, as these issues are determinative upon this appeal.

In considering the relationship and the authority of Maria Oregoni, it must be remembered that the record discloses no representations made by any of the defendants that Maria Oregoni was ever authorized to sign any agreements binding the partnership, nor were any representations ever made by any of the defendants to the plaintiffs, or to any one else, that Maria Oregoni was a member of the partnership of Bardell & Oregoni. The defendants U. Bardell and G. B. Oregoni both denied the existence of any partnership relation with Maria Oregoni. Also denied that they had ever given Maria Oregoni authority to sign the request for the restoration of the marketing agreement. Both U. Bardell and G. B. Oregoni had stated to the agents of the plaintiff that they would not again become members of the association, and that after the cancellation of the agreement it was their purpose to sell peaches as best suited their business interests.

During the year 1930 the record shows that U. Bardell and L. B. Oregoni sold a limited quantity of peaches to the Sun Garden Canning Company under an agreement of sale. We have not figured up the quantity so sold, as that is immaterial. The agreement of sale was not, as claimed by appellant, signed by Maria Oregoni as one entering into the agreement. The record shows that the agreement was signed by U. Bardell and L. B. Oregoni, per Maria Oregoni. In none of the papers called to our attention does the name of Maria Oregoni appear as a principal. Her name appears only as the person by whom the names of other persons are signed.

Commencing on August 10, 1930, and ending on or about September 6, 1930, Bardell & Oregoni delivered to the association approximately 133 tons of No. 1 canning peaches, varieties being "Paloras," "Homesteads," and "Phillips." On August 12, 1930, the association wrote a letter to Bardell & Oregoni in which it was stated that it had come to the attention of the association that they had endeavored to make disposition to others of canning peaches from the orchards, claimed by the association to be under the provisions of the alleged restored marketing agreement. It further appears that at the direction of the association, Bardell & Oregoni allowed 137½ tons of No. 1 "Cling" peaches to go to waste or drop to the ground during the year 1930.

The record further shows that in demanding delivery of peaches by Bardell & Oregoni to the association, the association indicated that it would take legal proceedings against them in the event they did not deliver peaches to the association, and cause them considerable trouble and expense.

The argument advanced by the association that the association had no authority or legal right to accept peaches except under the terms of the marketing agreement, does not appear to us to have any bearing upon the issues involved in this action, as it does not tend in the least to establish either the authority of Maria Oregoni to bind the partnership, or

to establish the fact of partnership. All it does establish is that the association asserted a title and right to the peaches and threatened action in the event that they were not delivered, and that the partnership did deliver at least 133 tons of peaches during the year 1930.

This brings us to the controverted question bearing upon the validity of the request for a restoration of the marketing agreement.

The record shows, as we have stated, that the signature of Maria Oregoni to this paper was obtained after the agents of the association had been notified by both U. Bardell and G. B. Oregoni that they would not sign the application for the restoration of the canceled contract. The testimony also shows that the request for a restoration of the contract was prepared by the agents of the association, and the name of Bardell & Oregoni annexed thereto by the agents of the association, and Maria Oregoni's only act was to sign her name after the word "Per." This application was replied to in a letter dated June 13, 1930, set forth herein, but which we cannot find, from the record, was ever called to the attention of U. Bardell and G. B. Oregoni, other than appears from the testimony that Maria Oregoni, when she stated to U. Bardell and G. B. Oregoni that she had signed the application, they were angered by reason of her act.

The testimony relating to the understanding which Maria Oregoni had as to the terms of the application and its binding effect, is exceedingly lengthy and involved, too long to be set out herein. We may, however, set forth a limited portion thereof:

"Q. How did you come to write your name there? What was said and done at the time? (This, in relation to the application for restoration.) A. They came and asked me about that, if Bardell & Oregoni would sign with the association, and I said 'no'. Then they asked me if I would sign it and I said 'no'.

"Q. Who did? A. Mr. Campodonico. I told him that they said they wanted to sell outside, and didn't want to go into the association. Then Mr. Campodonico told me that he would give me a paper, black and white, that I could ship and sell to anyone I wanted to; and at the same time he got the contract from his pocket and he read—I don't know—but he says, they made that paper—here—it is in black and white that you can ship and sell to anyone you want.

"Q. Was it a paper like this that he showed you? A. Yes sir.

"Q. What language did you speak? A. Italian.

"Q. You and Campodonico had a conversation in Italian? A. Yes sir.

"Q. Did he tell you that you could not sell or ship to canneries without the consent of the association? A. No, sir.

"Q. Just how long were they talking about it? A. Oh, maybe an hour.

"Q. Where were Mr. Bardell and Mr. Oregoni at the time? A. They were working on the ranch.

"Q. Did he tell you what that paper said —explain it to you? A. No sir. I told him after I signed this paper they might put me in jail, but he said, 'Sign it; it is all right.' I don't know what was in it. I signed that because I thought that I could sell as I wanted to, and felt also that he was going to send me a contract so that I could show it to Bardell and my husband.

"Q. Some printed form, you mean? A. Yes.

"Q. Was there anything said about Campodonico giving you something in writing about shipping and selling? A. He told me to give him a sheet of paper, and that he would give it to me in white and black.

"Q. That he would give that to you in white and black? A. That I could sell and ship whatever I wanted to; and it was then he pulled out this paper that was in writing, that was there, that I could ship and sell as I wanted to. I was waiting for a paper, a contract like that. (Indicating exhibit No. 1.) They stated that that was so I could show it to Oregoni, my husband, and Mr. Bardell, but it was just as he stated to me.

"Q. Was there anything said about shipping fruit green or dried? A. No sir."

The whole tenor of the testimony given by Maria Oregoni is to the effect that her understanding of the paper which she signed was such as did not preclude the selling of peaches outside of the association.

On behalf of the appellant, Campodonico testified as follows:

"Q. Now, I call your attention to plaintiff's exhibit No. 2 (being the application for restoration), and ask you if you have seen that before? A. Yes.

"Q. Where? A. At Bardell & Oregoni's dining room on the ranch, June 10.

"Q. Who was present? A. Mrs. Oregoni.

"Q. Anybody else? A. Mr. Jackson was with me; Mrs. Oregoni was alone.

"Q. And what conversation took place at that time? A. Well, at that time we came there to get the answer, whether she was going to join the association or not, and we signed her up that night.

"Q. What conversation took place, Mr. Campodonico? A. She discussed this contract with us, and said that she had signed the contract, and she wanted to ship some fruit green to some of the eastern firms—I don't know whether she mentioned the firms or not, but I said— * * * she discussed it very much about shipping, and I explained and read the paragraph to her, and she said —she did ask me—she wanted it in writ-

ing, and I said, I did not have to give it now in writing, but I said, 'It is in paragraph 12 here,' and I read it to her in Italian and explained it to her after I read it to her.

"Q. What was done with the paper after that? A. We took it to San Francisco and Mr. Jackson gave it to the association.

"Q. Did she sign that? A. Yes, she signed that.

"Q. And the words, 'Bardell & Oregoni', whose handwriting is that? A. That is my handwriting, and the word 'per' there, too.

"Q. Mrs. Oregoni told you she did not want to sign this agreement unless she could ship or sell outside, did she? A. She said she wanted to ship green to the eastern market.

"Q. Did she say 'green', or did she say she wanted to ship or sell any place she wanted? A. She did not say that, because the contract would not let her. I explained that to her.

"Q. You told her she could sell to any cannery she wanted? A. I told her she could sell to any cannery that was satisfactory to the association.

"Q. And didn't you also tell her that you would give her a letter to that effect, and she could sell where she wanted? A. I did not.

"Q. Didn't you say, 'You can have that in black and white?' A. I did not offer to give it to her—she asked for it.

"Q. And what did she say? A. I told her, 'that is in paragraph 12'. I read it to her and explained it to her. I read it to her in English—she understands English."

The same difference of understanding of the parties appears from the testimony at the time the appellant notified the defendants not to deliver any peaches other than to the association, and controverts the claim of the appellant that U. Bardell v. G. B. Oregoni, by their acts, ratified the restoration of the marketing agreement.

It appears from the testimony that Campodonico was told that while plaintiff did not have any right to a certain 18 acres of peaches, that the defendants, during the year 1930, had quantities of peaches, and that it could have 100 tons if desired, and the court found that the defendants did deliver to the plaintiff peaches pursuant to the request of the plaintiff, and not as a ratification of any agreement that had theretofore existed between the parties.

The record further shows that nearly all of the conversation was had with Maria Oregoni, rather than with the defendants U. Bardell and G. B. Oregoni, and that Mrs. Maria Oregoni used the singular pronoun in nearly all of her conversation. She spoke of doing this or that, without reference to the partnership or without reference to any authority given to her, and as found by the trial court, Mrs. Maria Oregoni was exceedingly voluble. We may here state that while Mrs. Maria Oregoni signed the names of others, by herself, the record fails to show that the appellant made any inquiry whatever as to the authority of Maria Oregoni to bind U. Bardell and G. B. Oregoni by her actions.

The trial court found against the allegation of fraudulent conduct on the part of Campodonico and Jackson in procuring the signature of Maria Oregoni to the restoration request, after having failed to secure the signatures of U. Bardell and G. B. Oregoni. This finding, however, does not preclude what the record clearly shows, that Campodonico and Jackson obtained the signature of Maria Oregoni with knowledge of the fact that both U. Bardell and G. B. Oregoni were objecting thereto and were refusing to again become members of the association. This, under the authorities which we shall hereinafter cite, establishes the invalidity of the request for restoration and its lack of binding effect upon U. Bardell and G. B. Oregoni, even though a partnership relation, as to the peaches, existed between Maria Oregoni, U. Bardell and G. B. Oregoni.

Without quoting the testimony which would unduly extend the length of this opinion, it is sufficient to state that the peaches delivered by G. B. Oregoni and U. Bardell to the association during the year 1930, were delivered voluntarily and because of the fact that there was a surplus of peaches. That there was a large surplus is shown by the fact, as we have stated, that over 130 tons were allowed to go to waste.

There is considerable testimony in the record as to the reading and explanation of the letter written by Poggetto for the association, dated June 13, 1930, by a daughter of Maria Oregoni, and its explanation given by the daughter to Maria Oregoni, but there is no showing in the record that this letter was ever read or explained by the daughter to either U. Bardell or G. B. Oregoni. The daughter was educated in the local schools and appears to have been able to read and understand English very well. Not having been brought home to either U. Bardell or G. B. Oregoni, it has no binding effect upon either of them.

[2] Again, there is no pretense that either U. Bardell or G. B. Oregoni ever represented to the association or to the agents of the association, that Maria Oregoni had any power to make application for a restoration of the marketing agreement, nor is there anything, as we have stated, in the record indicating that either U. Bardell or G. B. Oregoni ever represented that Maria Oregoni was a partner or had any authority to bind the partnership in the manner asserted by the appellant. This makes the following excerpt which we take from the opinion of the trial court pertinent: "If either Oregoni or Bardell had accepted the benefits of the marketing agreement, with full knowledge of its terms and conditions; or, if they had wil-

fully or from palpable negligence, permitted Mrs. Oregoni to pose as their authorized agent, or, if there had been no circumstances in the transaction between Mrs. Oregoni and plaintiff's agents tending to arouse their suspicion or put them on guard, the doctrine of ratification and estoppel could be justly invoked." (A clerical error appears in the quotation by the use of the word "any," which we have changed to the word "no," to express the intent of the court.) "But these factors are not present. In the first place, as previously pointed out, plaintiff was aware of the partnership, and had taken particular pains, when the original contract was signed, to see that one of the partners executed it. Moreover, the court is convinced that during negotiations with Jackson and Campodonico in the month of June, 1930, neither of the partners had the slightest idea that Mrs. Oregoni would sign the so-called reinstatement letter. The mere fact that she proved the most voluble of the three, and did most of the talking to Jackson and Campodonico is not the fault of Bardell or Oregoni. Neither of these defendants desired a renewal of the contract, and they were under no legal duty to inform plaintiff's agents of Mrs. Oregoni's disability. * * * And in this connection it may be pointed out that the plaintiff also had some responsibility in the matter, and if it chose to enter into negotiations with the woman, after having failed to interest the partners, it should not in good grace be permitted to complain of the resulting entanglements. It cannot be gainsaid, as the court has already pointed out, that the partners were opposed to a reinstatement of the contract. * * * Both Jackson and Campodonico testified that neither of the men would sign the letter, and that when Mrs. Oregoni signed it, both of them were absent." As an agent of the partnership, Maria Oregoni confessedly had no authority in writing to bring about the revival of the marketing agreement, as it was not to be performed within one year from the date thereof. Section 1973, Code Civ. Proc. Section 2309, Civil Code, relating to agency, limits authority as follows: "An oral authorization is sufficient for any purpose, except that an authority to enter into a contract required by law to be in writing can only be given by an instrument in writing." Nor does the first subdivision of section 2403, Civil Code, assist the appellant upon this appeal. That section does provide that every partner is an agent of the partnership for the purpose of carrying on the business thereof and executing instruments for carrying on the business in the usual way, and may bind the members of the partnership, but there is a limiting provision in these words: "Unless the partner so acting has in fact no authority to act for the partnership in the particular matter, and the person with whom he is dealing has knowledge of the fact that he has no such authority."

Thus, in view of the fact that the appellant's agents had knowledge that U. Bardell and G. B. Oregoni objected to and had refused to sign any application for a restoration of the marketing agreement, the invalidity of the agreement as to them is not changed, even though the appellant's contention be correct that Maria Oregoni was in fact a member of the partnership. The agents of the appellant were acting with full notice, and when that is the case, the decisions supporting the rule that the objecting partners are not bound, are uniform.

In 47 C. J., page 833, the rule which we have just stated is set forth and amply supported by the decisions cited in the footnotes. It is there said, in substance, that where a third person deals with one of the partners, without notice to the contrary, he has a right to assume that the partner with whom he is dealing has authority, but where such third person has notice, he is bound by the limitations placed upon the powers of the partner with whom he is acting.

In 20 Ruling Case Law, page 887, § 98, we find the following: "When a partner gives to a third person notice that he will not be bound by the acts of his copartner, this amounts to a notice that the implied agency has ceased, and such partner will then not be bound by a contract entered into by his copartner, although the fruits of the contract have been enjoyed by the partnership of which he is a member." This quotation from Ruling Case Law is approved in the case of Bank of Bellbuckle v. Mason, 139 Tenn. 659, 202 S. W. 931, where the rule with which we are now dealing is fully discussed and set forth, and it is there held that an instrument given to a third person having notice of the objections of other partners, is valid only as to the partner signing the instrument.

The same rule is supported in Dawson, Blakemore & Co. v. Elrod, 105 Ky. 624, 49 S. W. 465, 88 Am. St. Rep. 320. We quote from the syllabus in that case as follows: "A person selling goods to one partner on credit cannot bind the other partner after notice that he will not be bound. And this, though the goods come to the firm and are used by it."

In Monroe v. Conner et al., 15 Me. 178, 32 Am. Dec. 148, the same rule is followed, and it is held that "one partner is not bound by a contract entered into by his copartner, after giving actual notice to the party proposing to make it, that he will not be bound thereby, although the fruits of the contract have been enjoyed by the partnership of which he is a member."

In the case at bar, as we have said, the appellant's agents, after having failed to

secure the signatures of U. Bardell and G. B. Oregoni to the request for reinstatement of the marketing agreement, and after they had been told by both of the partners that they would not again become members of the association, obtained the signature of Maria Oregoni in the manner which we have stated, and therefore must be held to have obtained her signature with full knowledge of the objections of U. Bardell and G. B. Oregoni, and yet, so far as the record shows, made no inquiry as to who were the persons actually constituting the partnership of Bardell & Oregoni, nor did they make any inquiry as to the authority of Maria Oregoni to sign her name to the application for reinstatement, purporting to sign the name of Bardell & Oregoni, by herself. Under such circumstances, no plea of estoppel can be allowed.

While we have not followed the chronological order of the reasons urged by the appellant for reversal, which would have unduly extended the length of this opinion, we have considered them all.

The judgment is affirmed.

We concur: PULLEN, P. J.; R. L. THOMPSON, J.

132 Cal.App. 351

Ex parte STROFF.

Cr. 1265.

District Court of Appeal, Third District, California.

May 31, 1933.

1. Burglary ⇐10.

Under information charging accused with entering a store building, accused could be guilty of first-degree burglary if offense was committed in nighttime, or if he was then armed with deadly weapon, or if he made assault upon person in commission of crime, and of second-degree burglary if store was uninhabited and offense was committed without preceding circumstances (Pen. Code, §§ 809, 1192).

2. Indictment and information ⇐110(18).

Information charging accused with burglary in language of statute was sufficient, though it did not charge facts from which degree of crime could be determined (Pen. Code, §§ 460, 809, 1192).

3. Criminal law ⇐223.

Prisoner *held* not entitled to discharge on habeas corpus on ground that he was not preliminarily examined, in view of record (Pen. Code, § 860).

Record disclosed that upon proceedings duly had in justice's court, prisoner was taken before magistrate for preliminary examination and was informed of his rights, that he waived right to be represented by counsel, and expressed desire to proceed, and admitted burglary with which he was charged, and that he was then sworn and admitted guilt, and was then held for trial.

4. Criminal law ⇐245.

Alleged irregularity of proceedings and insufficiency of evidence at preliminary hearing were waived by accused charged with burglary, where he did not object to proceedings and did not move to set aside information (Pen. Code, §§ 995, 996).

5. Habeas corpus ⇐4.

Alleged defects or irregularities in information and proceedings under which prisoner was convicted could not be raised for first time upon writ of habeas corpus (Pen. Code, §§ 995, 996).

6. Criminal law ⇐995(2).

Failure to determine degree of burglary for which prisoner was convicted, was mere irregularity in proceedings and did not invalidate conviction (Pen. Code, §§ 460, 809, 1192).

7. Habeas corpus ⇐109.

Where information charged accused with entering store building and he could have been found guilty of first or second degree burglary, and court sentenced him without finding degree of burglary, prisoner was entitled to have trial court determine degree of burglary of which he was convicted, and term of imprisonment limited thereby (Pen. Code, §§ 460, 809, 1192).

Peter Stroff was convicted of burglary, and he applies for writ of habeas corpus.

Writ discharged, and petitioner remanded.

A. M. Mull, Jr., of Sacramento, for petitioner.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for respondent.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

This is a petition for a writ of habeas corpus.

[1] The petitioner was convicted of the crime of burglary upon an information duly filed in the superior court by the district attorney of Humboldt county pursuant to the provisions of section 809 of the Penal Code. The information charged the accused with

"wilfully, unlawfully, feloniously and burglariously entering that certain store building known as Brizard Store * * * with the felonious intent then and there to commit the crime of theft." His cause was regularly set for trial for September 4, 1928. He duly waived the right to be represented by counsel and thereupon entered his plea of "guilty of the offense charged in the information." Having waived time for sentence, he was duly sentenced to imprisonment in the state prison at San Quentin for the term prescribed by law. The judgment of commitment which was certified by the clerk on that day fails to show that the court determined the degree of burglary as required by section 1192 of the Penal Code. The proceedings of the trial, which were fully reported and which are before this court upon this proceeding, show that the court failed to determine the degree of burglary to which the defendant pleaded guilty. The information merely charges the defendant with the crime of burglary. It does not charge facts from which the degree of the crime may be ascertained. While he was charged with entering a "store building," it may be true that the facts will show the offense was committed in the nighttime, or that he was then armed with a deadly weapon, or that he made an assault upon some person in the commission of the crime. Under any such circumstances he would be guilty of burglary of the first degree. If it was an uninhabited store building, and the offense was committed without the preceding circumstances, then he would be guilty of burglary of the second degree only.

[2] The information which charges the petitioner with the crime of burglary in the language of section 460 of the Penal Code is sufficient. It is apparent that the accused might be found guilty of burglary of the first or the second degree under that charge. He merely pleaded guilty to burglary.

It is contended the petitioner is entitled to his discharge from custody for the reason that he was not preliminarily examined and held by a magistrate pursuant to section 860 of the Penal Code prior to the filing of an information against him, and because the court failed to fix the degree of the crime of burglary to which he pleaded guilty, as required by section 1192 of the Penal Code.

[3] There is no merit in the assertion that the petitioner was not properly examined or held for trial by a magistrate as required by section 860, supra. Upon proceedings duly had in a justice's court, he was taken before the magistrate for preliminary examination. He was informed of his rights according to law. He waived the right to be represented by counsel, and expressed the desire to proceed with the hearing and to admit the commission of the crime with which he was charged. He was thereupon sworn and confessed under oath to the facts charged in the complaint. He admitted his guilt of burglary as charged. He was thereupon held by the magistrate for trial in the superior court upon the charge of burglary, in the form required by statute. This is a sufficient compliance with the statute with respect to the holding of a preliminary hearing.

[4, 5] Moreover, having failed to object to the proceedings, and having failed to move to set aside the information under the provisions of section 995 of the Penal Code, the irregularity of proceedings and the insufficiency of evidence at a preliminary hearing are waived. Such defects or irregularity may not be raised for the first time upon a writ of habeas corpus. Section 996, Pen. Code; Ex parte McConnell, 83 Cal. 558, 23 P. 1119; In re Heinze, 116 Cal. App. 286, 2 P. (2d) 561; People v. Godfrey, 100 Cal. App. 233, 279 P. 1031. Section 995 of the Penal Code provides, in part:

"The indictment or information must be set aside by the court in which the defendant is arraigned, upon his motion, in either of the following cases: * * *

"If it be an information:

"1. That before the filing thereof the defendant had not been legally committed by a magistrate."

The following section of the Penal Code provides that: "If the motion to set aside the indictment or information is not made, the defendant is precluded from afterwards taking the objections mentioned in the last section."

[6, 7] Clearly there was a mere irregularity in the proceedings of the trial court in failing to determine the degree of burglary of which the petitioner was duly convicted. This irregularity does not invalidate the judgment of conviction. Under such circumstances it is proper to remand the prisoner with directions to the trial court to fix and determine the degree of the crime of which he has been convicted. In re Lee, 177 Cal. 690, 171 P. 958; People v. O'Brien, 122 Cal. App. 147, 158, 9 P.(2d) 902; People v. Scott, 39 Cal. App. 128, 178 P. 298. It is apparent that the facts of this case may show that the defendant was guilty of either the first or second degree of burglary, according to the definition which is found in section 460 of the Penal Code. The term of his sentence should be governed accordingly. He is entitled to have the degree of his crime fixed by the court, and the term of his imprisonment limited thereby.

The writ is discharged and the prisoner is remanded, with directions to the warden of Folsom state prison to deliver the petitioner into the custody of the sheriff of Humboldt county at a time to be fixed by the superior

court of that county without unnecessary delay for the purpose of ascertaining and fixing the degree of the crime of burglary of which he was convicted, and that he be then returned to the warden of that prison to be held until his term of imprisonment shall have been completed.

We concur: PULLEN, P. J.; PLUMMER, J.

132 Cal.App. 339

In re NAPA JOURNAL.

Civ. 4875.

District Court of Appeal, Third District, California.

May 31, 1933.

1. Newspapers ⇐1(1).

Court must vacate judgment establishing newspaper's status as one of general circulation, where statutory requirement as to place of printing is not observed (Pol. Code, §§ 4460, 4462, 4463).

2. Newspapers ⇐1(1).

Judgment decreeing that newspaper was one of general circulation, then and continuously since 1884 established, printed, and published at certain city, did not establish its standing as such before passage of act preserving standing of such previously established newspapers, whether printed at place of publication for one year or not (Pol. Code, §§ 4460, 4463, 4465).

3. Newspapers ⇐1(6).

Newspaper, to retain status as one of general circulation, must meet statutory requirement that 50 per cent. thereof be printed at place of publication, though statute preserves status of newspapers previously established as such (Pol. Code, §§ 4460, 4463, 4465).

4. Newspapers ⇐1(3).

Statute requiring that 50 per cent. of newspaper be printed at place of publication to entitle it to establishment as newspaper of general circulation *held* not unconstitutional (Pol. Code, §§ 4460, 4463).

Appeal from Superior Court, Napa County; Hilliard Comstock, Judge.

Proceeding by George H. Francis and another to modify, vacate and set aside a judgment establishing the status of the Napa Journal as a newspaper of general circulation. From an order modifying the judgment, the Napa Journal appeals.

Affirmed.

King & King, of Napa, for appellant.

Clarence N. Riggins, of Napa, for respondent.

John A. McGilvray, of Sacramento, amicus curiæ.

TUTTLE, Justice pro tem., delivered the opinion of the court.

Appellant, Napa Journal, appeals from an order modifying a judgment establishing its status as a newspaper of general circulation, and adjudging that it has ceased to be such a newspaper. Such procedure is expressly authorized by section 4462 of the Political Code.

On June 30, 1930, a judgment was duly made and entered in the superior court of Napa county, whereby it was decreed that appellant was a newspaper of general circulation, and "that it is now and has been continuously since the year 1884 established, printed and published at regular intervals at the City of Napa."

On December 9, 1930, respondents George N. Francis and George H. Francis filed a petition to modify, vacate, and set aside said judgment, upon the ground that the appellant had ceased to be a newspaper of general circulation, in that it "has for more than two months last past been printed and published in the City of Vallejo, County of Solano." The relief sought was granted by the trial court, which vacated the judgment and decreed that appellant has ceased to be a newspaper of general circulation.

From the agreed statement of facts it appears "that since the first day of October, 1930, a monthly average of less than fifty per cent of the typesetting required for printing said newspaper has been done in the City of Napa, Napa Township and County of Napa, and more than fifty per cent thereof has been done at the northeasterly corner of Maryland and Napa Streets in the City of Vallejo, County of Solano and State of California. That since said 1st. day of October, 1930, the type so set in the City of Napa has been sent to said address at the northeasterly corner of Maryland and Napa Streets in the City of Vallejo and at that point the forms for the printing of said newspaper have been made up and all the work of impressing the type on the paper has been done. That after said work has been completed the newspapers so produced have been sent to the place of business of said newspaper in the City of Napa and distributed from that point to the subscribers. That the portion of the said work done in the City of Vallejo as aforesaid, has been done at that point because it was more convenient and economical to the owners of the newspaper."

Under the provisions of sections 4460 and 4463 of the Political Code, a newspaper, in order to establish its status as "a newspaper

of general circulation," must be printed where it is published. It is expressly provided in section 4463 that the word "printed" refers to the mechanical work of producing the newspaper, and that, if a monthly average of at least 50 per cent. of the work of typesetting and a monthly average of at least 50 per cent. of the work of impressing types on paper be done in accordance with the other provisions of this title, such shall be deemed to meet the requirements embodied in the word "printed."

The parties agree that the provisions of the Code last quoted were not being complied with at the time of trial and judgment. To meet this situation, appellant relies first upon section 4465 of the Political Code, which was enacted in 1923, and reads as follows: "Nothing in this title shall be construed to alter the standing of any newspaper which, prior to the passage of this act, was an established newspaper of general circulation, irrespective of whether it has been printed in the place where it is published for a period of one year as required by section four thousand four hundred sixty."

Appellant earnestly contends that the original judgment of June 30, 1930, not only established its status as of that date, but also established its status as far back as the year 1884. Therefore, they argue, they are exempted from the provisions of the Political Code which require that at least 50 per cent. of the printing be done at the place of publication.

[1, 2] An examination of the judgment roll in the original case shows that in the petition of appellant it is alleged that: "It is now and has been continuously from the year 1884 to the date hereof established, printed and published at regular intervals at the city of Napa." The findings of the court follow those allegations. As we construe the judgment, it simply declares that on June 30, 1930, appellant was a newspaper of general circulation. As we view it, the judgment is based upon compliance with the law as it stood in 1930. It therefore follows that, where the requirement in respect to printing is not met and observed, the duty of the court is to vacate a former judgment establishing the standing of such newspaper. We do not agree with appellant that the original judgment establishes the standing of appellant prior to the passage of the act (section 4465). In our opinion, it establishes such standing as of the date it was rendered, and does not relate back to every year since 1884.

[3] The act of the Legislature defining the word "printed" was passed in 1923 (St. 1923, p. 512). Section 4465 of the Political Code is the concluding portion thereof. The Legislature was no doubt apprehensive that the enactment might invalidate publications made prior to the passage thereof, and accordingly made the operation of the act, so far as it related to the requirement of printing, prospective only. Consequently, it is the duty of every newspaper, if it would retain its status as one of general circulation, to meet the requirement as to "printing" according to the present law. This section says that the act does not alter the status of newspapers which failed to comply with this requirement and were otherwise established newspapers prior to 1923, but it does not obviate compliance with the entire act thereafter.

[4] It is next contended that the requirement as to printing is an unlawful exercise of police power. This precise point was raised in the case of the Application of Monrovia Evening Post, 199 Cal. 263, 248 P. 1017, and it was there held that the statute was constitutional and valid. We are of the opinion that an independent country press is vital to the maintenance of our institutions and a democratic form of government, and the Legislature is justified in adopting legislation of this character to promote the general welfare.

Other points raised by appellant are without merit, and no extended discussion of them is necessary.

The judgment is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

132 Cal.App. 445

Ex parte EARL.

Cr. 2354.

District Court of Appeal, Second District, Division 1, California.

June 6, 1933.

1. Divorce ⇐269(2).

Appeal bond being necessary to stay enforcement of order for payment of alimony, husband who failed to obtain bond *held* properly adjudged in contempt for willfully refusing to pay alimony pending appeal (Code Civ. Proc. §§ 942, 946).

2. Divorce ⇐269(1).

That husband had ability to pay $1,700 on order for payment of alimony, but paid only $300, and willfully refused to further comply with order, *held* to justify imprisonment for contempt.

3. Divorce ⇐269(13).

Order adjudging that husband was not in contempt down to day of order, although husband had not paid to wife certain sums

theretofore accrued under order for payment of alimony, *held* not conclusive against validity of subsequent order holding husband in contempt for subsequently refusing to comply with alimony order.

Application by Chaffee Earl for a writ of habeas corpus prayed to be directed to the Sheriff of Los Angeles County to secure release of petitioner from custody on a commitment for contempt for failure to pay alimony.

Petitioner remanded to custody.

Meserve, Mumper, Hughes & Robertson, of Los Angeles, for petitioner.

Roger Marchetti and Thomas S. Tobin, both of Los Angeles, for respondent.

CONREY, Presiding Justice.

On May 26, 1932, by an order of the superior court of Los Angeles county in an action of Alice Bunch Earl, Plaintiff, v. Chaffee Earl, Defendant, the defendant was ordered to make certain payments of money to the plaintiff on account of attorney's fees, costs, and money for support of the plaintiff. Thereafter, in a proceeding wherein defendant was charged with contempt of court by failure to make payments in accordance with said prior order, the court found that the defendant had willfully refused to pay certain of the moneys which by said prior order he had been required to pay, and that he had had the ability to pay the same at the time of such failure and refusal to comply with the order; whereupon it was ordered that the defendant serve two days in the county jail "commencing forthwith." This order and the commitment thereon were made and the defendant was committed to the county jail, all on the 27th day of February, 1933. On the same day, in response to a petition for the writ of habeas corpus, the writ was issued out of this court, and the petitioner was released on bail at 1 o'clock a. m. on February 28th.

Substantially the matter thus has come to be of comparatively slight importance. Nevertheless the case is here and must be decided. Therefore it becomes necessary to examine into the grounds upon which petitioner claims that the court was without authority to impose the sentence.

[1] The first point suggested is that, because defendant had appealed from the order of May 26, 1932, the pendency of the appeal operated as a stay of proceedings, and entitled the defendant to withhold payment without the giving of any appeal bond. It appears that, upon the taking of the appeal, application was made for an order of court fixing the amount of an undertaking on appeal, and that the court fixed the amount at the sum of $15,000. From the affidavits used in the contempt proceeding, it appears that petitioner diligently attempted to obtain such undertaking, but was unable to obtain any surety or sureties on such bond. This fact we think is immaterial, if an undertaking was necessary to stay enforcement of the order. And apparently an undertaking was necessary for that purpose. In Millar v. Millar, 51 Cal. App. 718, 726, 197 P. 811, 814, it was held that an order for the payment of alimony falls within the provisions of sections 942 and 946 of the Code of Civil Procedure, since such appeal is from a judgment or order directing the payment of money. "The undertaking, therefore, as declared in the latter section, stayed 'all further proceedings in the court below upon the judgment or order appealed from.' The section is too plain for controversy." A petition for rehearing after decision in that case was denied by the Supreme Court.

[2] The next point stated on behalf of petitioner is that the order of May 26, 1932, was so excessive that petitioner was never able to comply, and, never having been able to comply, could not be in contempt for his noncompliance. We think that there is no merit in this point. The finding of the court as recited in its order of commitment is that the defendant has had the ability to comply with the order of May 26th, "in this respect; that he has had the ability to pay $1,700 upon said order since November 9, 1932, but has paid only $300 since said date, but has wilfully failed and refused," etc. We are of the opinion that the facts thus found, taken together with the original order itself, are sufficient to sustain the authority of the court to impose the penalty.

[3] The third point is based upon an order made by the superior court in a prior contempt proceeding wherein the court, by an order of date September 29, 1932, adjudged that the defendant was not in contempt down to and including that day, although he had not paid to plaintiff certain sums theretofore accrued under said order of May 26th. We are unable to agree with the contention that said order of September 29, 1932, was conclusive against the validity of the subsequent order now under review.

Let the petitioner be remanded to custody.

We concur: HOUSER, J.; YORK, J.

132 Cal.App. 434

TAYLOR v. ÆTNA LIFE INS. CO.

SAME v. GREAT WESTERN INS. CO.

Civ. 7502, 7503.

District Court of Appeal, Second District, Division 1, California.

June 5, 1933.

Appeal and error ⇐1060(1).

In action on accident policies for death of insured resulting from gunshot wounds inflicted during altercation occurring after automobile collision, persistent misconduct of plaintiff's counsel *held* prejudicial, requiring reversal.

Misconduct complained of occurred during plaintiff's opening statement, during trial of cause, and in closing argument to jury, and consisted of allegedly improper references to trial and acquittal, in criminal proceedings, of person who shot insured; references to the reporter's transcript of coroner's inquest as unintelligible; imputation to defendant's counsel of attempt to mislead jury in questioning witness respecting testimony given at coroner's inquest; remark that jury would have to have better eyes than plaintiff's counsel to see scar which person who shot insured was asked to exhibit to jury; statement that such person, a Mexican who was being examined through interpreter, was aping ignorance of English language; and statement, in substance, during closing argument, that all insurance companies wanted was to collect premiums, but not to pay out money, and that counsel trembled to think of future of his wife and children because he had worked hard for many years and had invested his savings in life insurance policies, but felt that such policies were no protection to his loved ones.

Appeal from Superior Court, Los Angeles County; Percy Hight, Judge.

Actions consolidated for trial and for hearing upon appeal by Gladys Mae Taylor, otherwise known as Mrs. H. G. Taylor, against the Ætna Life Insurance Company, and against the Great Western Insurance Company. From judgment in favor of plaintiff, defendants appeal.

Reversed.

Gibson, Dunn & Crutcher, of Los Angeles (Philip C. Sterry, of Los Angeles, of counsel), for appellants.

Harry L. Cohn and Cohn, Lambert & Jones, all of Long Beach, for respondent.

YORK, Justice.

These two actions were consolidated for trial by stipulation of the parties, and likewise have been consolidated for hearing upon appeal, and are now before this court upon a bill of exceptions.

These actions were brought by plaintiff as beneficiary under accident policies of insurance issued to her husband by the two defendant insurance companies. Plaintiff's husband lost his life as the result of gunshot wounds inflicted during an altercation which occurred after a collision between decedent's car and that of one Martinez. The policy issued by defendant Great Western Insurance Company insured plaintiff and her husband "against the effect of Personal Bodily Injury which is caused solely by accidental means." The policy issued by defendant Ætna Life Insurance Company provided for double indemnity if the death of the assured resulted "directly and independently of all other causes from bodily injuries effected solely through external, violent, and accidental means." The complaints against the defendant insurance companies alleged an accidental death. The Ætna Life Insurance Company interposed a defense that the death of plaintiff's husband was not the result directly and independently of all other causes from bodily injuries effected solely through violent or accidental means. However, it was stipulated that this defendant had, prior to the time of trial, and subsequent to the filing of its answer, paid to the plaintiff the sum of $2,500, the face value of the insurance policy, and that, if said defendant was liable at all, its liability would be only for the double indemnity provided for in said policy. The Great Western Insurance Company interposed the same defense, i. e., that the death was not the result of accidental means, and in addition thereto the defense that, if plaintiff should establish a right to recover, the amount of recovery should be limited to the proportionate amount of the named indemnity ($3,000) which that indemnity bore to the total amount of like indemnity of that and other policies covering the same loss suffered by the beneficiary.

On the issues thus formed, trial was had before a jury resulting in judgments against the Great Western Insurance Company for the sum of $3,000 and against the Ætna Life Insurance Company for the sum of $2,500. The defendants appeal from these judgments.

The appellants maintain that the court made many errors in the course of the trial affecting the plaintiff's right of recovery, in giving certain instructions and in refusing to give requested instructions, and also in its rulings on the admission and rejection of evidence. Appellants also maintain that the court erred in receiving certain exhibits

in evidence, and in refusing to declare a mistrial because of remarks of counsel for the plaintiff, and that counsel for plaintiff was guilty of misconduct which prevented the defendants from having a fair and impartial trial. In connection with the last-named point, appellants contend that plaintiff's counsel was guilty of flagrant misconduct in his opening statement, during the trial of the cause and in his closing argument to the jury, and to each statement so made appellants have taken an exception:

"Exception No. I. Mr. Cohn: I am going to prove it. You are setting up the defense that this man was justified in shooting and killing this fellow.

"Mr. Sterry: He was acquitted by the superior court.

"Mr. Cohn: He was acquitted by the machinery of several million dollars that wanted to avoid paying an insurance policy. I will show it, too.

"Exception No. II. (Mr. Cohn, continuing): We will show you this man was charged with murder and was found 'not guilty' telling this sort of a story—

"Mr. Sterry: Just a minute. I object to what he told.

"Mr. Cohn: It is set up in their pleadings, it is part of their defense, and the jury have a right to know, because we are going to anticipate it in our case in chief, the preposterous tale that he was being beat over the head with a wrench of a car or an automobile crank.

"Mr. Sterry: I assign those remarks as misconduct and ask the court to instruct the jury to disregard them.

"Exception No. III. Mr. Cohn, continuing: We will show you, ladies and gentlemen, as the case progresses, that it was as cold and deliberate and horrible premeditated murder as you ever heard of. We will show you that although one jury was fooled by a bunch of lies that we are now in position to completely refute.

"Exception No. XII. Mr. Cohn: I might say—will you stipulate that this reporter's transcript, that is—I think Mr. Sterry will agree with me, that his whole transcript of the coroner's inquest is a conglomerate mass or mess. Practically two-thirds of it is incomprehensible, and, while I stipulated that the reporter if present would testify this is made from his notes, I am quite confident, if your Honor will read over this transcript, that is supposed to be a shorthand report of that inquest, you would come to the conclusion—couldn't help but come to the conclusion—that it must have been an inexperienced or an incompetent shorthand reporter taking it down or transcribing it, because half of the stuff don't make sense, not only with this witness, but with any of them.

"Mr. Sterry: I object to counsel's remarks.

"Mr. Cohn: You have found it to be true, haven't you?

"Mr. Sterry: No, I haven't, absolutely not.

"Mr. Cohn: Then I ask leave, since counsel won't be fair with me, to read it to the jury, the whole blame thing and see whether any human being could talk the way this stenographer says they talk.

"Mr. Sterry: I assign counsel's remarks as misconduct, and ask the jury to be instructed to disregard them.

"Mr. Cohn: You have been very fair with me up to this point; in fact, you have been very courteous.

"The Court: The jury will be instructed that all statements made by Mr. Cohn with reference to the condition of the transcript will be disregarded and the other statement of Mr. Cohn about opposing counsel will also be disregarded by the jury.

"Mr. Cohn: In that connection, I would like leave, then, for fear the jury may think I am unfair, to read the coroner's inquest. Will you permit me to read it and see if any human being could have given the testimony the way that stenographer said they did?

"Exception No. XIII. Q. (By Mr. Sterry): Referring again to your testimony at the coroner's inquest, page 7, will you read your answer starting on line 2, page 7, down to line 10?

"Mr. Cohn: Now, if that is to be read, your Honor, I insist that the witness be given the right to read on page 12, lines 19 to 22, where he absolutely states to me that this is an error and was not the time he meant.

"Mr. Sterry: Just a minute.

"Mr. Cohn: All right, I will show it to the court. There is no use in misleading the jury. The jury is supposed to hear the truth here, not any trick.

"Exception No. XV. Q. Did he (Mr. Taylor) have a quick temper?

"Mr. Cohn: Objected to as argumentative.

"Mr. Sterry: I am trying to find out what the phrase 'quick tempered' means.

"Mr. Cohn: It means in this case if he loses his head if a Mexican crowded him off of the road.

"Exception No. XIX. Mr. Cohn: Now, may I ask Martinez to come up here and show us the scar of that wound. Come on up here. (Witness comes up before jury.) Now, Doctor, show us on the head where you found that. (Witness indicates.)

"Mr. Cohn: Where? A. Here is the scar. At this time I would say—

"The Court: Go over in front of the jury.

"Mr. Cohn: They have better eyes than I have if they can see it.

"Mr. Sterry: Just a minute.

"The Court: The jury will be instructed to disregard that.

"Mr. Cohn: Turn on the lights and let's see if they can find the scar here.

"The Court: The jury will be instructed to disregard the statement of Mr. Cohn that the jury would have to have better eyes than he has to see it.

"Exception No. XXI. Martinez being first duly sworn through the interpreter, called as a witness on behalf of the defendant, testified as follows: 'Q. By Mr. Cohn: Now, do you know what I am saying to you? Let the witness answer. Do you know now what I am saying to you? I insist, your Honor, in view of Croushorn's testimony and his own admissions that he is aping ignorance of the English language.'

"Exception No. XXII. Mr. Cohn: I protest against the use of an interpreter with this fellow. It puts me at a disadvantage in cross-examination. We have a perfectly honest interpreter, and a good interpreter. I don't mean to cast reflection on her at all, but your Honor has had the experience, and Mr. Sterry has, and I am just handicapped when it comes to cross-examination. I think it is apparent to everyone in the courtroom.

"The Court: I don't think the showing is sufficient that this witness is familiar enough with the English language to be able to answer interrogations intelligently. Objection overruled.

"Mr. Cohn: He didn't know a word I said, after 16 years in the United States.

"Mr. Sterry: I move that be stricken out.

"The Court: The remark is stricken and the jury instructed to disregard it."

In the affidavit of the attorney for the appellants on motion for new trial, it is stated that, during his closing argument to the jury, counsel for plaintiff argued to the jury that it was useless for anyone to pay premiums on any insurance policies, arguing in substance that all the insurance companies wanted was to collect premiums, but not to pay out money, and that he trembled to think of the future of his wife and children, because of the fact that he had worked hard for a great many years and had invested his savings in life insurance policies, but felt that such policies were no protection to his loved ones, all of which naturally would tend to prejudice the jury against the defendants.

While the evidence may be sufficient in law to support the jury's implied finding against appellants on the principal element of the controversy, that is, concerning the circumstances which led to the death of Mr. Taylor, nevertheless, the said evidence is not of that powerfully convincing character which would permit us to say that the persistent misconduct above shown did not result in a miscarriage of justice. For, if the jury had not been thus prejudiced, there might have been a different finding upon the issues of fact which are of controlling force in the case.

The judgments are reversed.

We concur: CONREY, P. J.; HOUSER, J.

132 Cal.App. 387

PEOPLE v. HOENSCHLE.

Cr. 1250.

District Court of Appeal, Third District, California.

June 1, 1933.

1. Criminal law ⇐824(1).

In prosecution for violation of statute requiring motorist to stop, give information, and render assistance after accident, failure to instruct that jury must agree upon at least one of alternative charges enumerated in statute and pleaded in information to find defendant guilty *held* error, though instruction was not requested by defendant (St. 1923, p. 562, § 141, as amended by St. 1929, p. 544, § 62).

2. Witnesses ⇐361(2).

In prosecution against motorist for failure to stop and render assistance after accident, where prosecution, on cross-examination, showed previous conviction of grand theft, failure to permit defendant, on redirect examination, to show that he was found not guilty by reason of insanity, *held* error.

3. Criminal law ⇐20.

Intent to commit criminal act is essential element of crime.

4. Automobiles ⇐351.

In prosecution under California Vehicle Act for failure to stop and render assistance after accident, information *held* defective in not showing that defendant drove or operated vehicle on public highway (St. 1923, p. 562, § 141, as amended by St. 1929, p. 544, § 62).

5. Criminal law ⇐1035(2).

Defendant could not complain that, after court discharged jurors who had tried manslaughter charge, issue of insanity was tried before same jury, where defendant's counsel accepted without objection jurors designated by court.

Appeal from Superior Court, Sacramento County; Martin I. Welsh, Judge.

Allison Hoenschle was convicted of a violation of St. 1923, p. 562, § 141, as amended by St. 1929, p. 544, § 62, and he appeals.

Reversed.

A. M. Mull, Jr., of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

The defendant was charged under two separate informations, one for manslaughter, the evidence showing the killing to have been done by an automobile then driven by the defendant, and the other charging the defendant with a violation of section 141 of the California Vehicle Act (as amended by St. 1929, p. 544, § 62). Upon arraignment he entered pleas of not guilty and not guilty by reason of insanity to both informations. The cases were consolidated for trial, and at the conclusion thereof a verdict of not guilty was returned on the information charging manslaughter, and guilty of the crime of a violation of section 141 of the California Vehicle Act. Thereafter, upon the trial of the issues raised by the plea of not guilty by reason of insanity, the jury found the defendant sane. In due time a motion for a new trial on the charge of violation of section 141 of the California Vehicle Act, and on the finding of sanity, were made, and both denied. A motion in arrest of judgment was likewise presented and denied. After judgment and sentence an appeal was taken from the several adverse rulings of the court.

Appellant now urges several specifications of error, and those bearing most directly upon the determination of the case will be first considered.

[1] Under section 141 of the California Vehicle Act, a defendant may be convicted of any one of several charges, such as failure to stop, render aid, etc., but no instructions were given the jury that they must agree upon at least one of the alternative charges enumerated in the statute and pleaded in the information in order to find the defendant guilty.

In People v. Scofield, 203 Cal. 703, 265 P. 914, 917, the court, considering the precise question here presented, said:

"Here no instruction was requested by the defendant, and it is necessary to determine whether the subject-matter involved in the omission of the court to instruct related to general principles of law applicable to the cause on trial or related to a specific point developed at the trial.

"It is conceded by the prosecution that a defendant may be convicted under said section 141 of a failure to do any one of several things required of him in the event of a collision with another car or with a human being. Of them he may be convicted of a failure (1) to stop immediately; or (2) to give his name and address; or (3) to give the name and address of the passengers in his car; or (4) to give the registration number of his car; or (5) to render necessary assistance. A violation of any of these provisions is in terms made punishable under the penal provisions of the statute. People v. Kaufman [49 Cal. App. 570, 193 P. 953], supra. A failure to perform any one of the required acts is a separate offense. Evidence sufficient to support one charge might be entirely unrelated to and insufficient to support another. The jury might not all agree on any one of the offenses, but might all agree that there had been a violation of some portions of the section. We think the situation here presented called for an instruction from the court on the point contended for by the defendant, even though no such instruction was requested. It is difficult to lay down a rule which will fit all cases, but this much may be said, generally, that, when a defendant is charged with separate and distinct offenses each requiring independent proof, the court should properly instruct the jury as to each offense, even though instructions thereon be not requested by either party."

In the case at bar no instructions as above required were requested nor given by the court.

[2, 3] Appellant also contends that the court erred in not permitting the defendant to show that he was found not guilty by reason of insanity on a prior charge of grand theft. The defendant took the stand in his own behalf in an effort to establish an alibi. Upon cross-examination the prosecution brought out from the defendant that he had been previously convicted of the crime of grand theft. On redirect examination counsel for appellant attempted to show that the defendant had to that charge of grand theft interposed a plea of not guilty by reason of insanity, and he endeavored to show the outcome of that plea, but the district attorney interposed an objection to the question, which objection was by the court sustained. This, we believe, is also error. Intent to commit a criminal act is an essential element of the crime, and it became necessary to establish the finding on the plea of not guilty by reason of insanity before the court could say that the defendant had been convicted of a felony. Although two pleas may be interposed, there is but one trial; "the defendant was charged with the commission of but one crime, and his pleas to the one accusation, constituting his answer and defense, tendered the issues for investigation by the court and the jury selected to try the case." People v. Troche, 206 Cal. 48, 273 P. 767, 772.

[4] We also believe the information is sub-

ject to the objections pointed out by appellant in that it does not therein appear that the defendant drove or operated a vehicle upon a public highway.

In re Worthington on a Writ of Habeas Corpus, 21 Cal. App. 497, 132 P. 82, the court held that a complaint that charges the violation of an act governing the use of automobiles on public highways, which does not aver that the defendant used or operated his automobile on a public highway, fails to state a public offense. The people contend that this rule is superseded by the case of People v. Finley, 27 Cal. App. 291, 149 P. 779, holding that in that case such allegation was not essential, but there the information directly charged the defendant with a violation of section 367c of the Penal Code, which does not refer to public highways, while the case at bar and the Worthington Case were based upon complaints filed under statutes governing the use of automobiles upon public highways.

[5] Appellant objects to the issue of insanity being tried before the jury which had tried the charge of manslaughter for the reason that the court had discharged the jurors before the calling of the trial on the issue of insanity, but the record shows that no objection was made at the time and counsel accepted without objection the jurors designated by the court and cannot now complain.

We do not believe that the other points urged for reversal require comment, in view of our conclusion that the judgment and order should be reversed. It is so ordered.

We concur: R. L. THOMPSON, J.; PLUMMER, J.

132 Cal.App. 395

PEOPLE v. MONDSHINE.

Cr. 2344.

District Court of Appeal, Second District, Division 2, California.

June 2, 1933.

Hearing Denied by Supreme Court June 30, 1933.

1. Criminal law ⇐438.

Photographs of other fires of known illegal character, having no connection with defendant or locality, are inadmissible in arson prosecution.

2. Criminal law ⇐650.

Although conditions in illustrative case and case at hand must be same, determination whether conditions were sufficiently similar to make experiments valuable in aiding jury rests in judge's sound discretion.

3. Criminal law ⇐438, 650.

In prosecution for burning insured property and for arson, photographs of similar buildings and merchandise, and experiments showing effect of insufficient oxygen on fires, *held* admissible to illustrate effect of oxygen on fire and were not objectionable as too remote or as misrepresenting conditions of alleged offense.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

William Mondshine was convicted of burning insured property and for arson, and he appeals.

Affirmed.

Stanley Visel and Peter T. Rice, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

CRAIG, Justice.

Upon an appeal from judgments and order denying a new trial after conviction upon charges of burning insured property and arson, error is assigned to rulings below allowing the introduction of evidence furnished by an expert witness.

[1-3] Following proof that a fire discovered in the defendant's store, which damaged a stock of silk wearing apparel, had originated in crumpled newspapers deposited about the merchandise, and that the room was not ventilated, an official of the bureau of fire investigation qualified to testify as to the origin of such fires was called on behalf of the people. Said witness was permitted over objections by the defendant to testify as to conditions under which the charges before the jury had arisen, and to experiment for the purpose of showing the effect of insufficient oxygen. He also showed photographs of similar merchandise which had been burned under like circumstances at other buildings which he had investigated, as an illustration "of what happens at fires where there is an insufficiency of oxygen." The jury were admonished that such evidence was merely for the purpose of illustrating the effect of oxygen on fire and for no other purpose. It was objected that the evidence in question was too remote and was not germane to the issues, and the appellant here presents the broad principle, as viewed by his counsel, that photographs of other fires of a known illegal character having no connection with the defendant or locality are not admissible in an arson case. It requires no discussion to reveal the dissimilarity of cited authorities which hold that such photographs would not be admissible for

the purpose of showing a correct representation of the object itself or of an existing condition as to which there is conflicting evidence with relation to the corpus delicti. Photographs of other and different bodies or locations or of the same locations under changed conditions in homicide cases and the like have been held inadmissible and calculated to inflame the minds of the jury. But the use of photographs "has been sanctioned for so long a time by the courts that relying upon the accuracy of the representation, the courts not infrequently overlook the fact that a photograph is not evidence of itself, but is used to illustrate evidence. If the fact to be shown by the photograph is not admissible, obviously the photographic representation is not admissible. In this view we are only concerned with the use of photographs as an aid to testimony." Wharton, Crim. Evidence (10th Ed.) vol. II, p. 1030. The evidence tended to show that a fire started in a closed room might burn slowly for some hours. Said experiment and photographs were offered and received, not to prove the offense charged, but to illustrate the effect of insufficient oxygen in a closed room which witnesses had testified would retard combustion. "It has been quite a common thing in cases of homicide to make experiments with fire-arms to determine the carrying distance, the penetrating force, and the distance to which fire will be carried by fire-arms of certain pattern and caliber, and to prove the results of such experiments at the trial, as tending to show the guilt or innocence of the accused." People v. Levine, 85 Cal. 39, 22 P. 969, 24 P. 631, 633. Had evidence of experiments rather than of similar events devoid of human interference been offered, its admissibility would find ample support in judicial precedent. Yet its value and weight in either instance would remain for the jury to determine, while the distinction in character arising from its source would be nil. "Although it must appear that the conditions or circumstances were in general the same in the illustrative case and the case in hand * * * the determination whether the conditions were sufficiently similar to make the experiments of any value in aiding the jury is a matter resting in the sound discretion of the judge. * * * It was said in Commonwealth v. Tucker, supra [189 Mass. 457, 478, 76 N. E. 127, 7 L. R. A. (N. S.) 1056], that 'the true ground of admitting the details and result of such an experiment is that it may be of assistance, but the question whether it may be or whether it may or may not lead to too many collateral questions is largely within the discretion of the court.'" Guinan v. Famous Players-Lasky Corp., 267 Mass. 501, 167 N. E. 235, 245. The evidence in controversy was manifestly tendered as an aid to a clear understanding of the testimony, and for that reason was not subject to objection that it was remote or that it misrepresented the conditions at the scene of the alleged offense.

The judgments and order denying a new trial are affirmed.

We concur: WORKS, P. J.; ARCHBALD, Justice pro tem.

132 Cal.App. 417

NEWMAN v. STEUERNAGEL et al.

Civ. 1206.

District Court of Appeal, Fourth District, California.

June 2, 1933.

Rehearing Denied June 29, 1933.

Hearing Denied by Supreme Court July 31, 1933.

1. Negligence ⇐62(3).

Original act of negligence is not "proximate cause" of injury directly resulting from intervening act of another person which was one not reasonably to be anticipated as reasonably likely to occur because of original act.

[Ed. Note.—For other definitions of "Proximate Cause," see Words & Phrases.]

2. Automobiles ⇐201(5).

Any negligence of motorist in double-parking automobile while he went to make purchase *held* not proximate cause of accident when guest attempted to move car to permit car to leave curb and crashed into another double parked car.

The evidence disclosed that motorist double-parked his automobile, leaving guest sitting in it, but without giving him any instructions, and thereafter when guest went into store motorist told him to go back because car must not be left alone; that car was in way of another automobile whose driver wanted to leave curb; and that guest, after calling to motorist without result, decided to move the car himself, and in doing so crashed into truck in front, which was also double-parked. Under the circumstances, the accident was not the natural, logical, and usual result of manner in which car was parked, but was result of independent act of negligence of guest, which was not to be reasonably anticipated.

3. Negligence ⇐59.

Though to constitute "proximate cause" it is not necessary that precise accident that happened be anticipated, it is essential that defendant shall have had reason to anticipate accident of general nature of one that occurred.

4. Automobiles ⇐193(4).

Guest of oil company's foreman who moved foreman's double-parked automobile to

permit another car to leave curb *held* not company's employee, so as to make company liable for his negligence, but acted merely as friend of foreman or volunteer.

Though there was evidence that oil company's foreman was authorized to hire men, there was no evidence that oil company had anything to do with foreman's car other than that foreman was authorized to himself use car on company business, and the only evidence on issue of employment was that foreman had such guest with him as friend and guest, and left him sitting in car; that he expected to be gone only a short time, and that when guest entered store to make purchase for himself foreman told him he should go back; that they could not leave car on street alone, but guest did not go back to car until he finished making his purchase.

5. Automobiles ⇐193(4).

Employer *held* not liable for negligence of foreman's guest in moving foreman's double-parked automobile to permit another car to leave curb under general rule that master is liable for act of stranger assisting employee in course of employment in emergency or when stranger acts at solicitation and in presence of employee.

6. Automobiles ⇐197(1).

Motorist *held* not liable as employer for negligence of guest in moving double-parked automobile to permit another car to leave curb, where guest acted on own initiative as friend of motorist after unsuccessfully attempting to call motorist.

Appeal from Superior Court, Kern County; Erwin W. Owen, Judge.

Action by John Elliott Newman against William F. Steuernagel, Cypress Petroleum Corporation, and others. Judgment for plaintiff, and defendants named appeal.

Reversed as to appellants.

George W. Nilsson, of Los Angeles, and T. N. Harvey, J. W. Heard, Jr., and Frederick E. Hoar, all of Bakersfield, for appellants.

Conron & Conron and Borton & Petrini, all of Bakersfield, for respondent.

BARNARD, Presiding Justice.

This is an action for damages for personal injuries, which arose under the following circumstances. The defendant Cypress Petroleum Company was operating an oil lease in Kern county, some miles from the city of Taft. The defendant Steuernagel was employed by this company as its foreman upon said lease, it being understood that he should use his own automobile when he needed a car for company service. On April 14, 1930, the defendant Andreola, who was not employed by the oil company, was visiting Steuernagel at the lease. Steuernagel decided to go to Taft to order a part for a Ford tractor in use on the lease, and Andreola accompanied him as a guest in his car. On arriving at the Ford garage in Taft, Steuernagel found the parking space in the immediate vicinity entirely occupied by other automobiles parked in a slanting position head-on toward the curb. He stopped his car in front of the Ford garage, parallel to the curb, but beyond the cars thus parked against the same, and a short distance to the rear of a bakery truck which was similarly double-parked in front of a bakery which adjoined the Ford garage. He stopped his motor and went into the garage, saying nothing except "I will be back," and leaving Andreola sitting in the passenger's position in the front seat of his car. A "short while" later, Andreola also went into the garage to make a purchase for himself. Steuernagel then said to Andreola, "You got to go back in the car. We can't leave the car in the street alone." Thereupon, Andreola proceeded to make the purchase he desired and then went back to the car and sat there. In the meantime, the plaintiff, who was employed by the bakery and who had left the bakery truck in the position referred to, was engaged in bringing out bakery goods and loading them into the truck through a door in the rear end thereof. After Andreola was again seated in the automobile, two men in a car which was parked between the curb and Steuernagel's car desired to leave. They "hollered, blew the horn and said 'Hey, move the car. I got to get out of here.'" Andreola replied: "Just a minute please"; and turned his head and called Steuernagel by his first name. Steuernagel did not answer and did not come out. As to what next occurred Andreola testified: "Well, then they holler at me kind of nasty and kind of swearing at me and I felt kind of cheap myself, I was kind of ashamed for them, I know they got a right to come out so I decided to move over at the steering wheel and move the car for Mr. Steuernagel." Andreola then moved over into the driver's seat and started the car. The car jumped ahead, he got excited, and, in trying to put on the brake with his foot, stepped on the gas throttle instead, and the car struck the plaintiff who was then standing in the rear of the bakery truck, causing the injuries complained of. In this action which ensued the jury returned a verdict against all three defendants, and two of them have appealed from the judgment which followed.

Assuming that the question as to whether Steuernagel was negligent in stopping his car where he did was one of fact for the jury,

the first question that should be decided is whether there is any evidence which will support an implied finding by the jury that this negligence was the proximate cause of the injury to the plaintiff. Since certain acts of Andreola intervened, this depends upon whether these subsequent acts should have been anticipated by Steuernagel. The only evidence material to this point is that Steuernagel double-parked his car, leaving Andreola sitting in it, but without giving him any instructions; that when Andreola went into the store Steuernagel told him to go back because the car must not be left alone; that the car was in the way of another driver who wanted to come out from the curb; that Andreola, after calling to Steuernagel, without result, decided to move the car, and that in moving it he crashed into the truck in front.

[1] It is the general rule that an original act of negligence is not a proximate cause of an injury when the same directly results from an intervening act of another party which was one not to be reasonably anticipated by the first party as reasonably likely to occur and follow through and from his own act. The general rules are thus expressed in 19 Cal. Jur.: "An independent wrongful act, to constitute the proximate cause by displacing the original primary cause, must be so disconnected in time and nature as to make it plain that the damage was in no way a natural or probable consequence of the original wrongful act or omission. If a wrongdoer could have anticipated that an intervening act might, in natural and ordinary sequence follow the original act of negligence, he is not released from liability by reason of the intervening cause." Page 570.

"In order to warrant a finding that negligence or an act not amounting to wanton wrong is the proximate cause of an injury, it must not only appear that the injury is the natural and probable consequence of the negligent or wrongful act but that it ought to have been foreseen in the light of attendant circumstances." Page 562.

In 22 Ruling Case Law, page 134, the rule is thus stated: "It is universally agreed that the mere fact that the intervention of a responsible human being can be traced between the defendant's wrongful act and the injury complained of will not absolve him. On the contrary the general rule is that whoever does a wrongful act is answerable for all the consequences that may ensue in the ordinary course or events, though such consequences are immediately and directly brought about by an intervening cause, if such intervening cause was set in motion by the original wrongdoer, or was in reality only a condition on or through which the negligent act operated to produce the injurious result. Any number of causes and effects may intervene between the first wrongful cause and the final injurious consequence; and if they are such as might, with reasonable diligence, have been foreseen, the last result, as well as the first, and every intermediate result, is to be considered in law as the proximate result of the first wrongful cause. The question always is, was there any unbroken connection between the wrongful act and the injury, a continuous operation? Did the facts constitute a succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? The test is to be found in the probably injurious consequences which were to be anticipated, not in the number of subsequent events and agencies which might arise."

In Hale v. Pacific Tel. & Tel. Co., 42 Cal. App. 55, 183 P. 280, 281, the court said: "The rule, as we understand it, applicable to such cases, is that, where the original negligence of a defendant is followed by an independent act of a third person, which results in a direct injury to a plaintiff, the negligence of such defendant may nevertheless constitute the proximate cause thereof if, in the ordinary and natural course of events, the defendant should have known the intervening act was likely to happen; but if *the intervening act constituting the immediate cause of the injury* was one which it was not incumbent upon the defendant to have anticipated as reasonably likely to happen, then, since the chain of causation is broken, he owes no duty to the plaintiff to anticipate such further acts, and the original negligence cannot be said to be the proximate cause of the final injury." (Italics ours.)

In Reynosa v. Pickwick Stages System, 115 Cal. App. 383, 1 P.(2d) 548, 549, it is said: "An intervening efficient cause is a new and independent force which breaks the causal connection between the original wrong and the injury, and but for which the injury would not have occurred. The law will not look back from the injurious consequences beyond the last efficient cause, where a responsible and intelligent person has intervened, if the chain of events is so broken that they become independent and the result cannot be said to have probably and naturally accrued from the primary cause, or to have been anticipated."

In Katz v. Helbing, 205 Cal. 629, 271 P. 1062, 1064, 62 A. L. R. 825, the court said: "* * * The acts of a defendant are deemed the proximate cause of such consequences as a reasonably prudent man would anticipate as likely to result therefrom. [Citing cases.] Intervening wrongful acts of third persons, but for which injuries complained of would not have been received, ordinarily break the chain of causation, be-

cause they are not to be anticipated as probable consequences, but are occasional and exceptional results."

[2, 3] The respondent concedes the rule as stated, but insists that the evidence discloses that Steuernagel should have anticipated the result that actually happened, and that the jury was justified in so finding. It is argued that he parked his car where he knew it would have to be moved, and placed Andreola in control of the vehicle for that purpose; that the very event that was anticipated actually happened and at the hands of the person designated to perform the act; that Andreola "did nothing other than that which he was bid to do, as he was requested to do it"; and that his act was therefore not an efficient intervening cause which broke the chain of causation.

In effect, the argument is that Steuernagel authorized and expected Andreola to move the car and, therefore, the moving of the car should have been and was anticipated. However, as we understand the rule laid down by the above and other authorities, the thing that should have been anticipated in order to take away the intervening character of a subsequent negligent act is a thing that would naturally make the original act effective in causing an injury. Even if Steuernagel should have foreseen that a necessity would arise for moving the car and should have further foreseen that Andreola would take that action, the essential question here is whether he should also have foreseen that Andreola would move the car in such a manner as to crash into the truck ahead. While it is not necessary that the precise accident that happened be anticipated, it is essential that the defendant shall have had reason to anticipate an accident of the general nature of the one that occurred. Royal Indemnity Co. v. Midland Counties Public Ser. Corp., 42 Cal. App. 628, 183 P. 960. The general nature of the accident with which we are here concerned is one arising from the moving of the vehicle left in the street. It is not a case where a car is so parked, on a hill or under other circumstances, that the manner of parking may directly lead to its moving and causing damage. The moving of this car could come only from another intentional act, and such moving as might be required to permit a blocked car to come out from the curb would be only a few feet, and is a thing which in ordinary experience can be and usually is done without injurious result. It cannot be said that a prudent and experienced man, knowing that he was double-parking his car and that a truck was likewise double-parked a few feet ahead and in plain sight, if he had stopped to think of the matter at all, and if he had expected a guest sitting in the car to move the same, would have or should have anticipated that his parking in that manner might reasonably result in the guest moving the car with such negligence as to crash into that truck. One is bound to anticipate what usually happens, but not the unusual or what is unlikely to happen. Bush v. Weed Lumber Co., 63 Cal. App. 426, 218 P. 618. The injury to the plaintiff came, not as a natural, logical, and usual result of the manner in which this car was parked, but from another and independent act of negligence. We think the evidence conclusively shows that the chain of causation was broken by the intervening negligence of a third person which was not to be reasonably anticipated, and that Steuernagel's negligence in parking the car, if any, was not the proximate cause of the accident. A contrary finding by the jury is not supported by the evidence.

[4] It must next be determined whether either of these appellants may be held responsible for the negligent acts of Andreola in moving the car. It is undisputed that Andreola had never been employed by the Cypress Petroleum Company, and that he accompanied Steuernagel on this occasion as his guest. The respondent argues that Steuernagel had authority to employ men, that he expressly employed Andreola on this occasion when he told him to watch the car which was being used on a business errand, and that this request, coupled with the fact that an emergency existed and that Andreola rendered the service in the presence of Steuernagel, makes him a servant of the oil company, and that company liable for his negligence.

While there is evidence that Steuernagel was authorized to hire men at the lease being operated by the company, there is no evidence that the oil company had anything to do with Steuernagel's car other than the fact that they had authorized Steuernagel to himself use the car on company business. While the respondent argues that Steuernagel, as the servant of the company, employed Andreola to watch the car, the only evidence is that Steuernagel had Andreola with him as his friend and guest; that he left him sitting in the car; that he expected to be gone only a minute; that when Andreola entered the store he told him, "You got to go back in the car. We can't leave the car in the street alone"; that Andreola did not go at once but made a purchase and went when he had finished that; that Steuernagel had not asked Andreola to move the car; that when the other parties wanted to get out from the curb Andreola asked them to wait and called to Steuernagel; and that when Steuernagel did not appear, he *"decided to move over at the steering wheel and move the car for Mr. Steuernagel."* Not only is this evidence not sufficient to disclose an actual employment establishing a relation of master and servant, but it rather definitely shows that Andreola was not employed for

the purpose in question; that when told to go back to the car he completed his own business and went when he got ready; that he expected Steuernagel to attend to the car and called to him for that purpose; and that in finally moving the car he was actuated by his own decision and not by any employment, express or implied. Without doubt he moved the car in part as an accommodation to the men who wanted to get their car out and in larger part as an act of friendship for Steuernagel. Stoddard v. Fiske, 35 Cal. App. 607, 170 P. 663.

[5] The respondent also insists that, irrespective of any express employment, the Cypress Petroleum Company is liable for the acts of Andreola under the general rule that a master is liable for the act of a stranger who assists an employee in the course of his employment, either (1) in an emergency or (2) when the stranger acts at the solicitation and in the presence of the servant. It is argued that this case is practically analogous to the case of Kirk v. Showell, Fryer & Co., 276 Pa. 587, 120 A. 670. In that case it was held that the jury could properly infer an implied authority on the part of a servant to obtain help where the size and weight of an object were such as to require aid in handling the same, where the servant could not leave the goods in order to obey a police officer's order to move a truck in which the same had been brought to the placed involved and where help was actually secured to meet such an emergency. Conceding the general rule, no such emergency here appears. The act to be done, the moving of the car, did not require an extra man, and there was no reason why Steuernagel could not leave what he was doing and attend to this duty. This is not even a case where it appears that he was not available for this purpose, as he was just inside the garage, and it would have taken but a moment to go and inform him of the situation. Not only could he reasonably perform the service himself, but the act performed was not done at his request or in his presence. The testimony is that he had not told Andreola to move the car. His statement that they could not leave the car in the street alone indicates that he expected the car to remain where it was, and Andreola's testimony that he decided to move the car for Steuernagel after first calling to him prevents any inference that Andreola considered that he had been told to move the car or acted upon such an instruction. While Steuernagel was not far away the moving of the car could not be said to have been done in his presence, within the meaning of the rule referred to, since he was inside the building, cars were parked between, and the evidence shows that his back was turned and that he knew nothing of the whole occurrence until he heard the crash. In our opinion, the Cypress Petroleum Company is not liable for any negligence of Andreola upon any theory of his employment by their servant Steuernagel.

[6] For largely the same reasons, no relationship of master and servant or principal and agent appears as between Steuernagel and Andreola. Andreola's act in moving the car was based upon his own decision and not upon any employment, express or implied. He was actuated by friendship for Steuernagel, and, believing that it was Steuernagel's duty to move the car, he first tried to call him for that purpose and then decided to do the act for him. In taking this responsibility upon himself he was a mere volunteer. We think this situation conclusively appears from the evidence and that it was not a matter upon which the jury were entitled to draw a different conclusion. Stoddard v. Fiske, supra.

The views herein expressed make it unnecessary to consider a number of other points presented.

The judgment appealed from is reversed in so far as the same relates to the two appellants.

We concur: MARKS, J.; JENNINGS, J.

132 Cal.App. 136

PEOPLE v. BROWNING.

Cr. 1258.

District Court of Appeal, Third District, California.

May 20, 1933.

Hearing Denied by Supreme Court June 19, 1933.

1. Holidays ⇐5.

Judgment of conviction pronounced on holiday over express objection of accused is void (Code Civ. Proc. § 134; Pol. Code, § 10).

2. Holidays ⇐5.

Irregularity in judicial proceeding because conducted on holiday, a nonjudicial day, may be specifically or tacitly waived by failure to timely make objection (Code Civ. Proc. § 134; Pol. Code, § 10).

3. Holidays ⇐5.

That criminal case was argued and jury instructed on public holiday declared because of banking conditions *held* not to invalidate judgment, in view of defendant's waiver of right to discontinuance (Code Civ. Proc. § 134; Pol. Code, § 10).

Defendant acquiesced in proceedings on holiday, and waived right to discontinu-

ance of trial where defendant had knowledge of holiday before verdict was rendered, and her counsel participated in arguments to jury, offered instructions, and permitted jury to render verdict with full knowledge of existence of holiday, without objection, speculating on the chance of obtaining a favorable result.

4. Holidays ⇐5.

Where accused participates in legal proceedings on holiday, speculating on recovery of favorable verdict, accused is estopped to challenge validity thereof after its rendition (Code Civ. Proc. § 134; Pol. Code, § 10).

5. Holidays ⇐5.

Where accused had actual knowledge of holiday before verdict of guilty was rendered, it is immaterial to validity of verdict that he may not have had knowledge at time case was argued and jury instructed (Code Civ. Proc. § 134; Pol. Code, § 10).

6. Criminal law ⇐304(2).

Judicial knowledge of holiday and executive proclamation thereof are presumed (Code Civ. Proc. §§ 134, 1875; Pol. Code, § 10).

7. Holidays ⇐5.

Court does not lose jurisdiction of person or of cause by intervention of holiday during trial (Code Civ. Proc. § 134; Pol. Code, § 10).

8. Holidays ⇐5.

Verdict may be lawfully received on holiday, and, therefore, recording of verdict, merely incidental to rendition, may also take place on holiday (Code Civ. Proc. § 134; Pol. Code, § 10).

9. Abortion ⇐13.

In prosecution under indictment charging abortion by use of instrument, instructions defining crime, containing reference to use of drugs, *held* not erroneous as being confusing and misleading (Pen. Code, § 274).

Instructions defining offense of abortion, containing reference to use of either drugs or instruments with intention of procuring a miscarriage, were not misleading and confusing because of reference to drugs, notwithstanding indictment only charged defendant with using an instrument on the body of a pregnant woman, with intention of procuring a miscarriage, in view of general rule that, when statute defines a crime and declares that it may be committed by means of one of several specified methods, it is not ordinarily erroneous or prejudicial to include them all, by the use of the language of the statute, in instructing the jury as to what acts constitute the crime, provided the jury is clearly informed of the means on which the prosecution relies for a conviction.

10. Criminal law ⇐772(3).

Where indictment was read to jury, they presumptively have knowledge of offense charged.

11. Abortion ⇐1.

Gist of offense of committing abortion is intent to procure miscarriage (Pen. Code, § 274).

12. Criminal law ⇐829(3).

Refusal of defendant's instructions that crime charged is confined to intention of committing miscarriage by means of instrument, and not otherwise, *held* not error, in view of instructions given (Pen. Code, § 274).

Instructions given told jury in substance that, before they could find defendant guilty, they must find that defendant used instrument or instruments in and about body of named person with intent to bring about a miscarriage of pregnant woman, as alleged in the indictment.

13. Criminal law ⇐829(3).

Defendant's instructions that, to warrant conviction, jury must find beyond reasonable doubt that defendant used instrument with express intention of procuring miscarriage, *held* properly refused, in view of instructions given (Pen. Code, § 274).

Requested instructions were properly refused, where jury had been repeatedly instructed that gist of offense of committing abortion was intent of procuring a miscarriage, and that the jury should not convict the defendant, unless they found that she had used an instrument in and about the body of named person with intent to bring about a miscarriage.

14. Criminal law ⇐807(1).

Instruction precluding conviction, if jurors were uncertain whether instrument was used for purpose of procuring abortion, or merely to discover whether patient was suffering from venereal disease, *held* properly refused as argumentative (Pen. Code, § 274).

15. Abortion ⇐1.

Although pregnancy is material fact in prosecution for abortion, it is sufficient to prove that accused believed patient was pregnant (Pen. Code, § 274).

16. Criminal law ⇐738.

Intention with which alleged criminal act is performed may be manifested by surrounding circumstances, and is question of fact.

17. Abortion ⇐11.

Evidence *held* to support implied finding that defendant used instrument on body with intention of procuring miscarriage, warranting conviction of abortion (Pen. Code, § 274).

18. Criminal law ⇐1170(2).

In prosecution for procuring abortion, excluding testimony as to what diseases might cause miscarriage, if error, *held* harmless, where medical witness testified that gonorrhœa might cause miscarriage (Pen. Code, § 274).

19. Witnesses ⇐406.

In prosecution for abortion, wherein defendant denied receiving money for services, entry in memorandum book showing payment by person with similar name *held* competent as tending to impeach defendant (Pen. Code, § 274).

20. Criminal law ⇐1169(5).

Where inadmissible evidence was stricken out, and jury instructed to disregard it, error was cured.

21. Witnesses ⇐267.

Trial court is vested with considerable discretion in confining cross-examination to reasonable bounds.

22. Criminal law ⇐728(5).

Examination of state's witness in presence of jury, relating to refusal to answer questions on ground they might incriminate her, *held* not prejudicial, in absence of request for instructions to disregard incident (Code Civ. Proc. § 2065).

23. Criminal law ⇐1144(½).

Where proceedings on motion are not before appellate court, court must assume that motion was correctly determined.

24. Criminal law ⇐1119(3).

Alleged misconduct of trial judge on first trial is not reviewable where proceedings complained of were not included in record on appeal.

25. Criminal law ⇐1166½(12).

Action of trial court in being hasty, impatient, unreasonably arbitrary, and in causing humiliation to counsel for defense, does not, standing alone, justify reversal, but merely accentuates other errors.

26. Criminal law ⇐1166½(12).

Misconduct of trial judge, to warrant reversal, must clearly deprive accused of fair and impartial trial.

Appeal from Superior Court, Madera County; Stanley Murray, Judge.

Margaret Browning was convicted of the crime of abortion, and she appeals.

Judgment and order denying a new trial affirmed.

Conley, Conley & Conley, of Fresno, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

The appellant was convicted of the crime of abortion. A reversal of the judgment is sought on the ground that a portion of the trial was conducted on a holiday, that the court erred in its charge to the jury and in the reception of testimony, and that both the judge and district attorney were guilty of prejudicial misconduct.

The trial began February 27, 1933, and continued from day to day, to and including March 2, 1933. For the protection of the banking business of the state of California which was seriously threatened, the Governor proclaimed March 2d, 3d, and 4th as public holidays. Neither the court nor counsel heard of this proclamation until after the cause had been finally submitted to the jury for decision. The cause was argued to the jury by respective counsel, and the court delivered its charge to the jury on the morning of March 2d. The deliberations of the jury continued for several hours. During their consideration of the evidence, the jury returned into court, and at their request, for the purpose of refreshing their memories, the testimony of several witnesses was read to them by the reporter. About 10 o'clock at night the jury returned its verdict against the defendant. The verdict was received, read, and duly declared by the jury in open court. At the request of defendant's attorney, the jury was polled. Thereupon, for the first time, the court's attention was called to the fact that March 2d had been previously proclaimed a holiday, and the defendant then objected to the recording of the verdict on the ground that it was therefore void. The objection was overruled. The verdict was recorded. The jury was discharged, and the cause was continued to a subsequent judicial day at which time sentence was duly pronounced. A motion for a new trial upon this and other statutory grounds was made and denied. From the judgment and order denying the motion for new trial, the defendant has appealed.

Section 134 of the Code of Civil Procedure provides that:

"No court, other than the supreme court, must be open for the transaction of judicial business on any of the holidays mentioned in section 10, except for the following purposes:

"1. To give, upon their request, instructions to jury when deliberating on their verdict;

"2. To receive a verdict or discharge a jury;

"3. For the exercise of the powers of a magistrate in a criminal action, or in a proceeding of a criminal nature.

"Injunctions and writs of prohibition may be issued and served on any day. * * *"

Section 10 of the Political Code declares

that "holidays within the meaning of this code, are every Sunday, * * * and every day appointed by the president of the United States or by the governor of this state for a public fast, thanksgiving or holiday. * * *"

Section 10, supra, was amended March 6, 1933, as an urgency act, defining special holidays as distinguished from general holidays, and authorizing all court proceedings, sessions of school, and business transactions to be performed on such special holidays which are not specifically prohibited in the proclamation of such holidays. The amendment reads in part:

"Provided that on any day appointed by the President or by the governor as a special or limited holiday all courts, public schools and public offices of this state, * * * shall be open and shall function in their normal and usual manner * * * except only * * * the particular class of business or persons expressly limited or restricted by the provisions of the proclamation appointing or declaring such special or limited holiday."

This amendment was adopted too late to affect the validity of the judgment in the present case. It was not enacted until four days after the challenged proceedings of trial in this case had transpired. Nor does the case of Vidal v. Backs (Cal. Sup.) 21 P.(2d) 952, upon which the respondent relies, aid the judgment in this cause. That case was decided by the Supreme Court May 1, 1933. It applied the foregoing amendment to section 10 of the Political Code in support of the validity of a judgment of foreclosure which was made and entered March 8, 1933, two days after the amendment was adopted.

[1, 2] There is no doubt that a judgment of conviction which is pronounced on a holiday over the express objection of an accused person is void. In re Smith, 152 Cal. 566, 93 P. 191; In re Dal Porte, 198 Cal. 216, 244 P. 355. But the irregularity of proceeding with judicial transactions on a holiday may be expressly waived, or tacitly waived by failure to object thereto.

[3] We are of the opinion the judgment in the present case is not invalid merely because the cause was argued and the jury instructed on a holiday. The defendant acquiesced in these proceedings, and waived his right to a discontinuance of the trial, on account of the holiday, by participating therein and by failing to object thereto until after the verdict had been rendered. State ex rel. Walter v. Superior Court, 49 Wash. 1, 94 P. 665, 17 L. R. A. (N. S.) 257; State v. Brownfield, 160 La. 171, 106 So. 734, 735, 43 A. L. R. 475; State v. Duncan, 118 La. 702, 43 So. 283, 10 L. R. A. (N. S.) 791, 11 Ann. Cas. 557; State v. Foss, 158 La. 471, 104 So. 211; State v. Cook, 78 S. C. 253, 59 S. E. 862, 15 L. R. A. (N. S.) 1013, 125 Am. St. Rep. 788, 13 Ann. Cas. 1051; Shepherd v. Superior Court, 54 Cal. App. 673, 202 P. 466; In re Murphy, 79 Cal. App. 64, 248 P. 1044.

[4] In the present case it appears that neither the judge of the court nor the parties to the suit were aware of the fact that the Governor had proclaimed March 2d as a holiday until after the cause was submitted to the jury. But it is apparent the defendant had knowledge of the holiday before the verdict was rendered. Defendant's counsel participated in the arguments to the jury and offered instructions which were given to the jury. He was present when the testimony of certain witnesses was read to the jury at their request. With full knowledge of the existence of the holiday, he permitted the jury to render its verdict, without objection, speculating on the chance of obtaining a favorable result of the trial. At the defendant's request, the jury was polled. For the first time when the clerk was directed to record the verdict, she raised the objection that the proceedings were void. A defendant is estopped from participating and acquiescing in legal proceedings on a holiday, speculating on the recovery of a favorable verdict, and then challenging the validity thereof, for the first time after the verdict has been rendered.

[5, 6] Since the defendant had actual knowledge of the holiday before the verdict was rendered, it is immaterial that he may not have had that information at the time the case was argued and the jury instructed. Moreover, all parties are presumed to have had the knowledge of the holiday proclamation. Judicial knowledge of the existence of a holiday and of the executive proclamation thereof are presumed. Section 1875, Code Civ. Proc.; Poheim v. Meyers, 9 Cal. App. 31, 98 P. 65, 66; Mullan v. State, 114 Cal. 578, 46 P. 670, 34 L. R. A. 262; French v. Senate, 146 Cal. 604, 80 P. 1031, 69 L. R. A. 556, 2 Ann. Cas. 756; State ex rel. Walter v. Superior Court, 49 Wash. 1, 94 P. 665, 17 L. R. A. (N. S.) 257. In the case of Poheim v. Meyers, supra, it is said: "Of the existence and effect of these holidays the court must take judicial notice."

In the case of State ex rel. Walter v. Superior Court, supra, is authority directly in support of the conclusion that the defendant waived her objection to the irregularity of proceedings in the present case. The statute of Washington, with respect to holidays, is exactly like that of California. For the protection of the banking business in that state the Governor proclaimed a holiday. Upon this holiday the Walter trial proceeded. Additional evidence was admitted, and arguments of counsel were made without objection. The cause was submitted, and a judgment was subsequently rendered on a judicial day. Upon a writ of review, the Su-

preme Court held that neither the proceedings nor the judgment were void since the petitioner waived his right to a discontinuance of the trial and acquiesced therein by failure to object to the proceedings on that ground.

So, also, in the Brownfield Case, supra, where the defendant was tried and convicted of a crime on a holiday, the court held that he waived the irregularity of proceeding with the trial on that day by his failure to object to the continuation of the trial until after the verdict had been rendered. In that case the court quoted with approval from the Duncan Case, supra, as follows: "Two questions were presented. * * * The second one was whether an accused could waive the right not to be tried on such a day, and, if so, could he waive it by his silence and inaction? The court decided both questions adversely to the defendant. In that case it was said: 'The proceedings on a statutory legal holiday are not necessarily null. They may be held on that day by consent. Besides, an accused may be concluded by his silence, if he chooses to remain silent when he is represented by counsel amply able to protect his rights.'"

The foregoing decisions with relation to the doctrine of waiver have been approved by intimation of the California Appellate Court in two cases. In the Shepherd Case, supra, upon a writ of prohibition, the order of a court granting a new trial was declared void because it was filed by the judge on a Saturday afternoon, which was the last day upon which the court was authorized by the provisions of section 660 of the Code of Civil Procedure to pass upon the motion. But the court said: "If we were only called upon to consider the effect of a court order made and entered on a holiday, but within time, we would not hesitate to hold with the respondent, and say that the action of the trial court resulted in a mere irregularity, which was waived by the subsequent attitude of the petitioners in not calling the attention of the respondent, or of the plaintiffs in the action, to their objection to the procedure until after the time within which the plaintiffs might have appealed from the judgment against them."

A rehearing of this case was denied by the Supreme Court.

In the case of People v. Maljan, 34 Cal. App. 384, 167 P. 547, 549, on appeal from a judgment of conviction of the crime of embezzlement, the defendant contended he should have been granted a new trial because arguments of counsel were made and instructions were given to the jury on a Saturday afternoon, which was a holiday. The court said: "The defendant cannot be heard to complain of this, for his attorney on his attention being called to the fact that the hour of noon had arrived, distinctly and in open court waived the right to object to the trial proceeding into the afternoon, and this is a matter in which the defendant's waiver is binding upon him."

The Supreme Court also denied a hearing in this case.

In re Murphy, 79 Cal. App. 65, 248 P. 1044, 1046, upon petition for a writ of habeas corpus, the court quoted with approval the foregoing language which was used in the Maljan Case, and in determining whether a final judgment which was entered on a judicial day became void by reason of prior judicial proceedings conducted on a holiday, without objection thereto on the part of the defendant, the court held that "at the time the court entered judgment in this case it had jurisdiction over both the cause and the petitioner, which gives to the judgment full vitality when questioned upon habeas corpus proceedings."

[7, 8] The authorities appear to concede that a court does not lose jurisdiction of the person of the litigants or of a cause, by the mere intervention of a holiday in the midst of a trial. The conducting of court proceedings upon such nonjudicial day, which proceedings are not specifically excepted from the prohibition of the holiday statute, appear to be considered mere irregularities which may be specifically waived, or tacitly waived by failing to make timely objections thereto. In support of the conclusion that jurisdiction of the cause is not lost by the intervention of a holiday, it will be observed that section 134 of the Code of Civil Procedure specifically authorizes the performance of certain judicial acts in the course of criminal trials on a nonjudicial day. Juries may be lawfully instructed in the course of their deliberations, at their own request. Verdicts may be received by the court. The recording of a verdict is merely incidental to its rendition. Since a verdict may be lawfully received on a holiday, it follows that it may also be lawfully recorded. There was therefore no merit in the defendant's mere objection to the recording of the verdict. Since the statute specifically authorizes the giving of instructions during their deliberations at the request of the jury, by inference, it sanctions their deliberations on a holiday. Furthermore, all functions of a magistrate may be performed in proceedings of a criminal nature. The primary reason for setting apart statutory holidays dates back to the ancient religious lunar month holy day called Shabattum. It was intended to afford an opportunity for rest from labor, during which period rites of worship might be observed. The modern Sabbath followed. Other holidays for public festivities and thanksgiving have been added. The modern spirit of holidays confers a privilege to refrain from labor, rather than a command to desist from work in accordance with the doctrine of dies non juridicus. The holiday

does not oust the court of jurisdiction, and the right to be relieved of the necessity of transacting judicial business on such days may be waived.

The judgment in this case is therefore not void merely because the cause was argued and the jury was instructed on a holiday.

[9] The appellant asserts that the giving of four instructions to the jury at the request of the prosecution was misleading, confusing, and therefore erroneous. We think not. The defendant was indicted and convicted under the provisions of section 274 of the Penal Code of the crime of using an instrument upon the body of Emily Caton, a pregnant woman, with the intention of procuring a miscarriage. The defendant was not charged with attempting to procure a miscarriage by means of drugs. Section 274, supra, makes it a crime to use either instruments or drugs with the intention of procuring a miscarriage. These challenged instructions define the crime which is prohibited by the statute by employing the language included therein. In effect, they instruct the jury that the crime consists of the use of either drugs or instruments with the intention of procuring a miscarriage. The appellant claims these instructions are erroneous because they wrongfully include the element of a separate offense committed by the use of drugs, and that they are not confined to the crime of intending to procure a miscarriage by means of instruments, with which offense only the defendant was charged.

These instructions were not erroneous. They constitute an effort in the language of the statute to define the crime of "intending to procure the miscarriage of a pregnant woman," which is prohibited by the provisions of section 274, supra. When a statute defines a crime and declares that it may be committed by means of one of several specified methods, it is not ordinarily erroneous or prejudicial to include them all, by the use of the language of the statute, in instructing the jury as to what acts constitute the crime, provided the jury is clearly informed of the means upon which the prosecution relies for a conviction. People v. Ruiz, 144 Cal. 251, 77 P. 907, 908; People v. Patrick, 277 Ill. 210, 115 N. E. 390, 393. In the Ruiz Case, supra, the defendant was charged and convicted of grand larceny committed by stealing some calves. The jury was given the definition of grand larceny in the language of section 487 of the Penal Code, declaring that the crime was accomplished by stealing a "horse, mare, gelding, cow, steer, bull, calf, mule, jack, jenny, sheep or lamb." As in the present case, it was there contended this instruction was "confusing and misleading." In holding that the instruction was properly given, the court said: "In the instruction the jury were told that they could convict the defendant only if they believed from the evidence * * * that he had done the specific thing charged."

In the Patrick Case, supra, on appeal from a judgment of conviction of abortion, wherein an instruction was given similar to the ones which are challenged in the present case, the court upheld the validity of the following instruction, to wit: "Whoever, by means of any instrument, medicine, drug, or other means whatever, causes any woman, pregnant with child to abort," is guilty of a felony.

In the present case the jury was specifically instructed that: "Before you can find the defendant guilty you must find that the defendant used an instrument or instruments in and about the body of Emily Caton, with the intent to bring about a miscarriage of Emily Caton, a pregnant woman, as alleged in the indictment."

[10] The indictment was read to the jury. They must be presumed to have known the defendant was charged with intending to procure a miscarriage by means of an instrument and not by means of drugs.

[11] The last of these challenged instructions charges the jury that the "gist of the offense of committing an abortion is the intent of procuring a miscarriage." This is a correct statement of the law. People v. Richardson, 161 Cal. 552, 120 P. 20; 1 Cal. Jur. 102, § 3.

These four instructions were properly given to the jury. They were neither misleading nor erroneous.

[12] The appellant charges prejudicial error in the refusal of the court to give her proffered instructions numbered 12, 15, and 20. These instructions each declare that the crime with which defendant is charged is confined to the intention of committing a miscarriage by means of an instrument, and not otherwise. These instructions are sufficiently covered by the one above quoted, which was given to the jury at the request of the prosecution. It did not constitute error to refuse to give these instructions.

[13-15] The refusal to give defendant's instructions numbered 4, 11, 12, 15, 17, 19, and 20, which were offered as a part of the court's charge, is assigned as reversible error. Each of these instructions, in effect, charges the jury that the defendant may not be convicted unless they find beyond a reasonable doubt that she used an instrument upon the body of Emily Caton, with the express intention of procuring a miscarriage. No. 4 emphasizes the necessity of finding that the intention to procure a miscarriage existed by saying that, if the jurors were uncertain as to whether an instrument was used for that purpose or merely to discover whether the patient was suffering from a venereal disease, then they could not agree upon a verdict of conviction.

After carefully examining the entire charge which was given to the jury, we are satisfied those challenged instructions were sufficiently covered by others which were given to the jury. The jury was repeatedly instructed that the "gist of the offense of committing an abortion is the intent of procuring a miscarriage." The jury was instructed as above quoted that they could not convict the defendant unless they found that she had used an instrument in and about the body of Emily Caton "with the intent to bring about a miscarriage." The challenged instruction No. 4 above mentioned is open to the criticism that it is argumentative. The jury was adequately instructed that, as a necessary element of the offense with which the defendant was charged, they must find that she was actually pregnant at the time of the alleged criminal operation. While pregnancy is a material and necessary fact to be proved in a prosecution for this offense (1 Cal. Jur. 110, § 9), it is not necessary to prove that the accused person absolutely knew that the patient was pregnant. It is sufficient for the purpose of establishing the crime to prove that the accused person believed that the patient was pregnant. It has been held to be sufficient if the accused was merely suspicious of that fact, provided it is satisfactorily shown that she used the instrument or drugs with the intention of procuring a miscarriage. People v. Richardson, 161 Cal. 552, 120 P. 20. Defendant's instruction No. 17 was erroneous, and therefore properly refused because it included the following admonition: "Before you can find the defendant guilty, you must first find that Emily Caton was pregnant; second, that Margaret Browning knew or had reason to believe that Emily Caton was pregnant."

It was not prejudicial error to refuse to give the seven instructions last mentioned. It appears that the jury was fairly and fully instructed with respect to all the necessary elements of the crime with which the defendant was charged.

[16, 17] It is contended the evidence is insufficient to support the verdict in this case chiefly because there is no direct proof that an instrument was actually inserted or used upon the patient in the course of the treatment which was administered to the patient. We think the verdict and judgment are adequately supported by the evidence.

It appears that the defendant was a married woman living with her husband on a farm near Chowchilla. She was neither a physician nor a licensed nurse. For many years before her marriage she had served in a hospital and elsewhere as a practical nurse. After the commission of the offense with which she was charged, she was found to be possessed of a set of obstetric instruments. She admitted that she was accustomed to treat women who came to her afflicted with female ailments. Emily Caton was employed as a domestic servant in a home at Merced. She was pregnant. She told Verbie Grigsby she was pregnant, and "wanted to have something done" about it. November 10, 1932, she went to the home of the defendant in company with Verbie Grigsby. She told Mrs. Browning she was pregnant. She was instructed to remove her clothing and take her place upon a table. She did so. She testified regarding the operation which was performed by the defendant, "Some instruments were used on me." She also said that a pan containing some instruments in water was placed on the gas stove. She admitted that she did not actually see the instruments, but she testified that, while she was lying on the table, she heard the "sound of the instruments rattling together." She also said that an instrument was inserted in her "private parts." The operation caused her some pain. She paid the defendant $10. She left with instructions to return a few days later, but was apprehended by an officer to whom she told her story. She became quite sick. After a subsequent examination in a hospital by Dr. Dearborn, he performed an operation which he said was necessary to save her life. On November 16th, six days after the alleged criminal operation by the defendant, the doctor removed from the patient a dead fetus and the placenta. He said an infection had taken place inside the uterus. In reply to the question, "Could you tell * * * whether or not that incomplete abortion was spontaneous or induced?" he replied, "It was induced." The defendant admitted that she used a sponge forceps to insert medicated gauze in the patient's vagina to treat the inflamed, swollen, and diseased organ, which condition she claims existed.

The intent with which the instrument was used by the defendant, was a matter for the determination of the jury. The intention with which an act is performed may be manifested by the surrounding circumstances. The jury was fully instructed in that regard. In People v. Fewkes, 214 Cal. 142, 4 P.(2d) 538, 540, it is said: "Intent is a question of fact which may be proved, like any other fact, by acts, conduct and circumstances connected with the offense."

The foregoing facts constitute ample evidence to support the implied finding of the jury that the defendant did use an instrument upon the body of Emily Caton with the intention of procuring a miscarriage. The judgment is therefore sufficiently supported by the evidence.

[18-21] Numerous errors are assigned by the appellant with respect to rulings of the court in admitting testimony during the course of the trial. After a careful examination of each of these charges, we are of the opinion none of them constitutes prejudicial error. The sustaining of an objection to the general question as to what diseases might cause a

miscarriage was not prejudicial. It is conceded that this question was directed toward establishing proof that a miscarriage might be caused by gonorrhea. Dr. Ransom testified that gonorrhea might cause a miscarriage. The exclusion of evidence is harmless when the fact is proved by other witnesses. 2 Cal. Jur. 1022, § 608; Silvey v. Harm, 120 Cal. App. 561, 572, 8 P.(2d) 570. The evidence of the entry which was contained in the defendant's memorandum book, as follows: "1932 10 Keaton 10" was properly admitted. The defendant denied receiving any money in payment for her services from Emily Caton, who testified that she had paid her $10. It was contended that this payment was made August 10, 1932. The name Keaton sounds much like that of Caton. It is reasonable to assume it was spelled by the defendant as it sounded to her, and that the entry in her memorandum book indicates she was crediting Emily Caton with $10 paid on ——— 10, 1932. If so, this entry tends to impeach defendant. The evidence was competent. It was a matter for the jury to determine whether the entry had reference to the payment of $10 received by the defendant on that date from Emily Caton. The evidence of another entry in that book with relation to another person was stricken out, and the jury was instructed to disregard it. This cured the error of admitting it in the first instance. We do not think the cross-examination of Sheriff Rhodes was unduly restricted. A court has considerable discretion in confining the examination of a witness to reasonable bounds. We think the defendant was not prejudiced by the rulings of court in that regard.

[22] Ethel Pitman was called as a witness in behalf of the prosecution. She said that she knew the defendant. When she was asked if she had visited her home in July, 1932, she refused to answer, saying that she had talked with her the night previous to the trial and that "She threatened me. * * * She said it would cause me trouble." At the request of counsel for the defendant, who then said: "I will ask the court to instruct this witness as to her rights under the provisions of the code," the judge told the witness she need have no fear, that she was under the protection of the court, but that she had a legal right to refuse to answer questions on the ground that the answers might tend to incriminate her. Thereupon the witness declined to answer further questions.

It is contended this incident was prejudicial to the defendant, and should have been conducted out of the presence of the jury. We think that any prejudice which may have followed was waived by the defendant's failure to ask the court to instruct the jury to disregard it. It does not appear there was any previous knowledge on the part of the court or counsel that the witness was going to decline to answer questions, or what reason she might assign for this refusal. Her prompt refusal to answer when she was instructed that she might do so under the provisions of section 2065 of the Code of Civil Procedure on the ground that her answers might tend to incriminate her leads to the clear inference that she was in some way associated with the defendant in this or other criminal operations in violation of section 274 of the Penal Code. She was instructed regarding her right to refuse to answer questions at the request of defendant's attorney. Her conduct on the witness stand was evidently a surprise to both the court and counsel. The court was not requested to admonish the jury to disregard her answers. The incident does not furnish grounds for a reversal under the circumstances of this case.

Finally, it is contended that both the judge and the district attorney were guilty of prejudicial misconduct which entitled the defendant to a reversal of the judgment. No specific misconduct of the district attorney is pointed out in the appellant's briefs. We are therefore required to assume little confidence is placed in this charge so far as he is concerned, and that there is no merit in the contention in regard to him.

[23-25] The misconduct which is assigned to the court consists of alleged general prejudice against the defendant exhibited by the "demeanor and the conduct of the trial judge during the trial," in his rulings upon the introduction of evidence, in restricting the cross-examination of Dr. Ransom, Ethel Pitman, and Sheriff Rhodes as above related, and in permitting evidence of the entry in the memorandum book of the payment of $10 to the defendant. It is also stated that this cause was tried twice, that the jury disagreed at the first trial, and that, because of judge's conduct on that trial, the defendant formally moved the court to disqualify the judge from further participation in the proceedings; that in support of the motion the affidavits of many spectators of the first trial were filed declaring that the trial judge had not given the defendant a fair and impartial trial; that a counter affidavit was filed by the trial judge, and that another judge heard and determined the motion adversely to the defendant. The proceedings on that motion are not before the court on appeal. We must therefore assume the motion was correctly determined. The conduct of the judge upon another trial, the proceedings of which are not included in the record on this appeal, may not be considered upon this charge of misconduct. We have carefully read the entire record on appeal, and observe no evidence of unfair treatment of the defendant or her counsel during the trial. We have heretofore disposed of the specific instances assigned as evidence of misconduct. We are unable to see any evidence of unfairness or misconduct on the part of the judge in restricting the cross-examina-

tion of witnesses, in rulings upon the introduction of evidence, or in any remarks which were made by the judge in the course of the trial. The general charge of misconduct is too intangible and uncertain to furnish a basis for discussion. In 8 California Jurisprudence, 613, § 596, it is said: "The action of the trial court in being hasty, impatient, unreasonably arbitrary and in causing humiliation to counsel for the defense, does not, standing alone, justify a reversal, but merely accentuates the effect of other errors disclosed by the record."

[26] We do not infer that the judge was guilty of any such lack of judicial demeanor. But the misconduct of a trial judge which will warrant a reversal of the judgment should be so definite and apparent as to leave little doubt that it has resulted in depriving the accused of a fair and impartial trial. The record in this case certainly discloses no such conduct. The charge of prejudicial misconduct on the part of the judge is without merit.

There appears to have been no miscarriage of justice in the present case.

The judgment and the order are affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

132 Cal.App. 360

PEOPLE v. FRANK et al.

Cr. 249.

District Court of Appeal, Fourth District. California.

May 31, 1933.

Hearing Denied by Supreme Court June 29, 1933.

1. Depositions ⇐35.

Where state's application for taking of deposition was made at session of court where case was pending and all parties were present and application was brought on for hearing by order to show cause returnable forthwith, deposition was admissible, though application was not made on three days' notice (Pen. Code, §§ 1336, 1338, 1404).

2. Depositions ⇐35.

Provision requiring three days' notice of application for permission to take deposition may be waived (Pen. Code, § 1338).

3. Depositions ⇐55.

Statute respecting application for permission to take deposition did not regulate time for taking deposition, three day notice being for hearing (Pen. Code, § 1338).

4. Depositions ⇐64(1).

Words "testimony of witness taken in support of an information" used in statute respecting depositions, refer to testimony taken at preliminary examination which district attorney must use as basis for formulation of information (Pen. Code, § 1343).

Pen. Code, § 1343, requires that testimony must be reduced to writing and authenticated in same manner as testimony of witness taken in support of an information.

[Ed. Note.—For other definitions of "Testimony," see Words & Phrases.]

5. Depositions ⇐69.

Deposition *held* entitled to be received in evidence though not read to witness and not signed by him (Pen. Code, §§ 806, 809, 811, 864, 869, 1343).

6. Criminal law ⇐627(4).

State's taking of deposition did not constitute "trial" within statute requiring ten days after service of copy of testimony taken before grand jury before trial, word "trial" having technical reference to trial before jury (Pen. Code, §§ 925, 1345).

[Ed. Note.—For other definitions of "Trial," see Words & Phrases.]

7. Criminal law ⇐542.

Legislature having provided when and how testimony of deceased witness may be used in criminal case, statute will be presumed to be exclusive and constitute exception made in statute that where provision is made in Penal Code, rules of evidence applicable to civil actions do not apply (Pen. Code, § 1102, § 686, subd. 3; Code Civ. Proc. § 1870, subd. 8).

8. Criminal law ⇐722(3).

In kidnapping prosecution, prosecutor's use of words "mob" and "prison house" *held* not misconduct where they were not inappropriate terms under circumstances disclosed by evidence.

9. Criminal law ⇐1171(1).

In kidnapping prosecution, prosecutor's improper comment on knowledge possessed by himself not put in evidence *held* not prejudicial.

Facts disclosed that prosecutor, in argument, expressed wish that jury might have been present as he was and witnessed respectable character of place and have seen what there occurred, all of which had been testified to by witness who was present.

10. Attorney and client ⇐14.

Attorneys are officers of the court.

11. Criminal law ⇐633(1).

Orderly conduct of case is by law made duty and responsibility of judge.

12. Criminal law ⇐655(5).

That judge in kidnapping case adjudged defendant's attorney in contempt where he persisted in being heard on objection after

court ordered him to desist did not show misconduct in general attitude of judge.

Facts disclosed that when one of attorneys representing a defendant was addressing court, particular attorney who was finally adjudged in contempt, interrupted proceedings with objection, he was informed that objection would be heard at conclusion of remarks of counsel then in progress, but he persisted in being heard, and court finally made order adjudging him in contempt, that court offered to appoint public defender to represent defendant whose counsel was under arrest, and defendant refused to have appointment made, whereupon judge sent word to return attorney into court, but attorney refused to come into court unless permitted to make objection, and court then permitted him to return and attorney then made objection which could have been effectively made at conclusion of argument of counsel.

13. Criminal law ⇐511(4).

In kidnapping prosecution, evidence corroborating testimony of accomplice *held* insufficient to sustain conviction as to certain defendant (Pen. Code, § 1111).

Evidence corroborating testimony of accomplice was in substance that soon after crime was committed, proof of which existed without reference to testimony of accomplice, defendant moved to town about 20 miles distant and obtained post-office box in another town under assumed name; that he left state by airplane with one who had been wounded in affray; that when arrested in another state he gave false name and address; that his wife wrote letter containing language which gave rise to inference of guilty knowledge; that he attempted to obtain release of car which was in custody of police and which had been used in connection with commission of crime; and that when arrested for crime he made no denial of guilt.

Appeals from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Louis Frank and others were convicted of kidnapping, and they appeal.

Affirmed as to defendants Sheldon and Orsatti, and reversed as to defendant Frank, and case remanded.

William I. O'Shaughnessy, of San Francisco, for appellant Louis Frank.

Anderson & Anderson, of Los Angeles, for appellant Ralph Sheldon.

Clifford Thoms, of Los Angeles, for appellant Jesse Orsatti.

U. S. Webb, Atty. Gen., William F. Cleary, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., and Tracy Chatfield Becker, Deputy Dist. Atty., both of Los Angeles, for respondent.

ANDREWS, Justice pro tem.

Defendants Ralph Sheldon, Jesse Orsatti, Louis Frank, and certain others not involved in this appeal were indicted on the 19th day of January, 1932, for kidnapping. Thereafter they were arraigned, entered pleas of not guilty, and the case continued to January 25, 1932, at 2 o'clock p. m. On January 25th the case was called, all defendants were present in person and with counsel, further pleas were entered and the cause continued to January 26, 1932, at 10 o'clock a. m. when all defendants were again present with counsel. An application was made on behalf of the people to take the testimony of Tadashi Wakabayashi. This application was resisted by defendants, but after a hearing the court made an order for the taking of the deposition at 6 o'clock p. m. on January 26, 1932. The case was continued to February 1, 1932, and a trial by jury was commenced on that date which lasted until the 4th day of March, 1932, resulting in verdicts of guilty as to defendants Sheldon, Orsatti, and Frank. Motions were made by each defendant for a new trial. These were denied and judgment as to each defendant was entered committing each to the state's prison. From the orders denying new trials and from the judgments these defendants have brought these appeals.

[1-3] (1) The deposition of Tadashi Wakabayashi was received in evidence over the objection of all defendants. (a) Was the notice a sufficient compliance with section 1338 of the Penal Code which provides that the application must be made upon three days' notice? The procedure used by the state to bring on the hearing was an order to show cause, returnable forthwith, and served upon defendants the same day it was issued. Penal Code, § 1336, provides for taking a deposition in certain emergencies any of which might require a notice of less than three days, and although no provision is made for shortening time because of the exigencies of a given case, if the provision for notice should be regarded as a procedural regulation and not necessarily involving substantive right, it would come within that classification of directory regulation which might be varied by a special order of court upon proper showing. The granting of the order to show cause, as was done in this proceeding fixing the time at less than three days, would in effect be an order shortening time.

The application having been made at a session of court where the case was pending not for any limited purpose requiring special

notice, and all parties being present, any motion could be made involving any feature of the case without notice as can be done in any proceeding in court where the cause is before the court for whatever action that may be properly taken. The provision in this section reads the same as the section which provides for taking depositions of witnesses residing out of the state. Whether it should be held that time may be shortened, or that the order made when all parties are before the court, which is the purpose of giving the notice, it is undoubtedly true that the provision is one which may be waived. The three-day provision was mandatory in form as is the case in every Code section, civil and criminal, which provide for taking depositions and may be said to be intended for any purpose which it would serve. The statute does not regulate what should be the limit as to the time to be fixed for taking the deposition, the three-day notice is for the hearing.

On the hearing of the application defendants objected to the order, not because the sickness of the witness did not require it, but upon the ground that the shortness of the notice afforded no time for preparation. Nevertheless, the deposition was taken under order of court with all defendants present, except the defendant Frank who had the opportunity to be present had he so desired, and the witness was cross-examined at length by counsel for defendants. In People v. Feigelman, 65 Cal. App. 319, 223 P. 579, this was held to constitute a waiver of notice. Penal Code, § 1404, provides that a departure from the form or mode prescribed in respect to any proceeding, or an error or mistake therein, does not render it invalid unless it has actually prejudiced the defendant or tended to his prejudice in respect to a substantial right. The prejudice here referred to would have relation to the ability of the defendants to resist the making of the order, and possibly, to whatever failure to protect their rights during the taking of the deposition could be shown to have resulted from the shortness of the notice, and would have no relation to the fact of the taking, or the effect of the deposition or its introduction in evidence.

Section 1345 of the Penal Code provides that upon the reading of the deposition on the trial objections to questions and answers may be made as if the witness were being examined orally in court. This provision might to some extent limit the injury which would result from the taking of the deposition on the short time notice. So far as the objection as to notice is concerned, the deposition was receivable in evidence.

[4, 5] (b) Was the deposition required to be read to the witness and signed by him? Penal Code, § 1343, requires that the testimony must be reduced to writing and authenticated in the same manner as the testimony of a witness taken in support of an information. This deposition was not read to the witness and was not signed by him. To determine what is meant in the statute by the words "taken in support of an information," it must be ascertained what are the provisions relating to testimony upon which an information depends. Section 806 of the Penal Code, under the general heading "The Information," says: "The complaint is the allegation in writing made to a court or magistrate that a person has been guilty of some designated offense." Penal Code, § 811, under the general heading "The Warrant of Arrest," provides: "When an information is laid before a magistrate * * * he must examine on oath the informant or prosecutor, and any witnesses he may produce, and take their depositions in writing, and cause them to be subscribed by the parties making them." Penal Code, § 864, a part of the chapter relating to preliminary examination before a magistrate, provides: "At the examination, the magistrate must first read to the defendant the depositions of the witnesses examined on taking the information." Penal Code, § 869, being part of the same chapter, provides: "The testimony of each witness in cases of homicide must be reduced to writing, as a deposition, by the magistrate, or under his direction, and in other cases upon the demand of the prosecuting attorney, or the defendant, or his counsel. The magistrate before whom the examination is had may, in his discretion, order the testimony and proceedings to be taken down in shorthand in all examinations herein mentioned, and for that purpose he may appoint a shorthand reporter. The deposition or testimony of the witness must be authenticated in the following form: * * * Second—It must contain the questions put to the witness and his answers thereto, each answer being distinctly read to him as it is taken down, and being corrected or added to until it conforms to what he declares is the truth, except in cases where the testimony is taken down in shorthand, the answer or answers of the witness need not be read to him. * * * Fourth—The deposition must be signed by the witness, * * * except in cases where the deposition is taken down in shorthand, it need not be signed by the witness. Fifth—The reporter shall, * * * transcribe into longhand writing, his said shorthand notes, * * * and certify and file both said original and copy with the county clerk." Penal Code, § 870, provides that: "The magistrate * * * must keep the depositions taken on the information or the examination until they are returned to the proper court; * * * the magistrate must order a transcript of the depositions taken on the information, or on the examination, to be immediately furnished said defendant or his attorney, after the commitment of said defendant." Penal Code, § 809, reads: "When a defendant has been examined and committed, as provided in section

872 of this code, it shall be the duty of the district attorney, within fifteen days thereafter, to file in the superior court of the county in which the offense is triable an information charging the defendant with such offense. * * * It may charge the offense, or offenses, named in the order of commitment, or any offense, or offenses, shown by the evidence taken before the magistrate to have been committed."

The words "taken in support of an information" as used in section 1343 have reference to the testimony taken at the preliminary examination which the district attorney must use as a basis for the formulation of the information. If the depositions taken at the time the complaint is first made for the warrant of arrest may become a part of the evidence used in such examination under section 864, it is plain that testimony taken in shorthand under section 869 becomes part of the evidence used in support of the information. In actual practice such shorthand evidence becomes, it is believed, the principal and practically the only evidence used for the purpose. Depositions authenticated in either form would answer the requirements of section 1343. The deposition, therefore, was certified in the form which entitled it to be received in evidence.

[6] (c) Objection was further made by defendants to this deposition upon the ground that its taking constituted the beginning of the trial of the case and that ten days had not elapsed from the service upon them of the copy of the testimony taken before the grand jury as provided in Penal Code, § 925. Penal Code, § 1093, regulates the proceedings which should be had on the trial of the case. It provides for the reading of the information to the jury, the introduction of evidence by the state and by defendants, the argument to the jury, and the charge of the judge. Depositions are taken in preparation for the trial and are offered and received in evidence. It is true that proceedings for the taking and in the taking of depositions are part of the proceedings in the case regulated by the rules of procedure governing the general rights of a defendant and there is analogy between this proceeding and the trial. The word "trial," however, as used in the Code provision, must be held to have a technical reference to the trial before the jury which is also indicated by the wording of section 1345.

(2) Rulings of the court assigned as error relate to: (a) The admission of testimony concerning the stolen auto; (b) the purchase and delivery of a radio; (c) pistols being carried in a car; (d) conversations between Doolen and Wagner; (e) the burning of stolen clothing and a house; (f) the testimony of Wagner; (g) the testimony of Slaughter, Schack, Coit, and Mittwer in connection with the Long Beach occurrence.

While the objections to these different elements of the testimony do not rest upon identical grounds, running strongly through them is the common ground that they have no possible relation to the issues of this case and are introduced by the state to create an atmosphere of general criminality on the part of defendants of crimes unrelated in character to the crime here involved and must have influenced the jury prejudicially against the defendants. An examination of the record as to each and all of these assignments of error indicates that the evidence had a fair tendency in every instance to show the relation existing between the defendants, to corroborate the testimony of the accomplice Doolen, and to support the theory of a conspiracy.

[7] (3) Transcript of testimony given by the witness Tadashi Wakabayashi in the trial which grew out of the Long Beach shooting incident was offered in evidence. This evidence involved some of the same issues connected with the present case. The objection of the state to its admission was sustained. Penal Code, § 1102, provides that the rules of evidence in civil actions are applicable also to criminal actions except as otherwise provided in this Code. Subdivision 8 of section 1870 of the Code of Civil Procedure provides that the testimony of a witness deceased, given in a former action between the same parties relating to the same matter, may be given upon trial. Penal Code, § 686, subd. 3, provides that a defendant in a criminal action is entitled to be confronted with the witnesses against him in the presence of the court, except, testimony taken at the preliminary examination, and testimony of a witness taken conditionally, in which cases the testimony may be read upon proof that the witness is dead. This section seems to be a regulation upon the subject of the introduction of testimony given in former proceedings, the subject being one where the rights of a defendant in a criminal action would preclude the use of testimony in former actions unless specifically authorized by statute, and the Legislature having undertaken to provide when and how such testimony may be used in a criminal case, the statute will be presumed to be comprehensive and exclusive and constitute the exception made in section 1102 that where the provision is made in the Penal Code, the rules of evidence applicable to civil actions do not apply.

[8, 9] (4) Defendants complain of certain rulings of the trial court denying privilege of voir dire examination of the witness Doolen and of his cross-examination as to the mention of a Jane Doe in the indictment, and as to his financial condition, and because the cross-examination of the witness Clara Frank was permitted. The cross-examination which was allowed demonstrated that examination on voir dire would have availed nothing and at most it was regulation of the order of

proof. The other regulations seem to have been fairly within the limitations made necessary by the issues of the case and do not constitute reversible error.

(5) The conduct of the district attorney in the trial is assigned as error. It is contended that he made use of the word "mob" in referring to defendants; that he used the term "prison house," referring to the place where the persons who were kidnapped were detained; that in his argument to the jury he made reference to knowledge which he possessed but which had not been introduced by his testimony in the case; and that generally he sought to create a sentiment of hostility toward defendants unwarranted by his duty as prosecutor. In the light of the record the indictment against him is without force. In the modern handling of criminal prosecutions, where the defense is often vigorous, resourceful, and evasive, the district attorney must meet with adequate diligence and determination the methods used to escape conviction to the end that those guilty of serious crimes may not go free to continue to prey upon society. The use of the words "mob" and "prison house," were not inappropriate terms under the circumstances disclosed by the evidence, and, while he had no right to comment upon knowledge possessed by himself, not put in evidence, the offending comment had a basis in the testimony of a witness who testified to the presence of the district attorney on the occasion. His reference to the incident expressed the wish that the jury might have been present as he was and have witnessed the respectable character of the place and have seen what there occurred, all of which had been testified to by a witness then and there present. While the remark should not have been made, a review of the evidence neither indicates it could have influenced the result of this trial which lasted a month, nor discloses any miscarriage of justice, and the error cannot be held to be reversible.

[10-12] (6) Defendants complain of the conduct of the judge in his treatment of counsel for defendants and that his favorable attitude toward the prosecution was such as to influence the jury and result in error. The outstanding incident of these objections was an order adjudging one of the attorneys in contempt and the comments and orders made in connection with that incident. The record shows that the attorneys for defendants were all making frequent objections and taking frequent exceptions to the conduct of the case by the court and to the actions of the district attorney and that one of the attorneys representing a defendant was addressing the court when the particular attorney who was finally adjudged to be in contempt undertook to interrupt the proceedings with an objection. He was informed by the court that the objection was not in order but that it would be heard at the conclusion of the remarks of counsel then in progress. Notwithstanding this notice the attorney persisted in being heard and the court again cautioned him that he was obstructing the proceedings and ordered him to desist. The attorney still interrupted and the court notified him that his conduct would be regarded as contempt of court if persisted in further. In defiance of this warning he insisted upon entering an objection which the court refused to hear and made an order adjudging him in contempt. Notwithstanding the order the attorney insisted upon interposing the objection and the court instructed the bailiff to take him into custody and prevent further interruption. Notwithstanding the efforts of the bailiff the attorney insisted upon his right to interrupt and make his objection and the court ordered him taken from the court room, which was done. Thereupon the court offered to appoint the public defender to represent the defendant whose counsel was under arrest. Defendant refused to have the appointment made. Thereupon the judge sent word to return the attorney into court and the bailiff returned a reply from the attorney that he would not come into court unless permitted to make his objection. The court permitted him to return to the court room and the attorney immediately made the objection, which consisted of an exception to some conduct of the district attorney earlier in the proceedings. The court then resumed the hearing of the attorney who had been interrupted. The nature of the objection was such that it could have been effectively made at the conclusion of the argument of counsel.

The orderly conduct of a case is by law made the duty and responsibility of the judge. Attorneys are officers of the court deriving their right to practice their profession from that fact. The relation between the court and counsel is generally one of mutual respect and understanding. Only occasionally does it develop that some member of the bar, whether influenced by his fee or by an ambition to attain a certain kind of reputation, or from an overzealous desire to serve his client, or from failure to appreciate and observe the obligation imposed upon him by law as an officer of the court, insists upon the right to make unseemly interruptions of the proceedings and refuses to observe the reasonable regulations imposed by the court. Under such circumstances the duty of the court arises from necessity to make such an order as will enable it to continue its business. So far as the record discloses the order of commitment made in this instance was justified and the error of the court, if any, was in failing to enforce the order. If that course had resulted in the defendant by his own choice being unrepresented by counsel,

and if the whole incident had resulted in possible prejudice and error, it would be error of which defendant could not complain, it having resulted from the misconduct of himself and of his own counsel.

The record indicates that the court was careful on all occasions to give full hearing and attention to all the objections and contentions of defendant and that the trial was conducted without any show of favoritism or prejudice. The administration of law is not an exact science, it is administered by human instrumentality with those weaknesses and limitations inherent in our human nature. The criminal law is everywhere hedged about with exceedingly careful provisions regarding the rights of those charged with crime. Defendants rarely appreciate how their rights are guarded in the administration of justice. Defenses occasionally take on the method of persistent technical objections not necessarily contributing to success, as it is observed that men of the profession who are quiet, fair, and professional in behavior, seem to have equal success. Most counsel recognize that their standing as officers of the court outweighs other considerations and conforms as of course to the orders of the court regulating the trial. There is nothing in the record indicating error arising from misconduct in the general attitude of the judge.

(7) All defendants insist that the attempt at corroboration of the testimony of the accomplice Doolen does not measure up to the statutory requirement and therefore no conviction can be sustained arising out of the testimony as a whole. Penal Code, § 1111, relating to this subject, has been given careful attention in the briefs of defendants wherein the construction placed upon that section by the courts of last resort of this state have been brought to the attention of this court. In the case against Sheldon, in addition to the testimony of the accomplice and evidence tending to corroborate the same, the deposition of the witness Tadashi Wakabayashi furnishes evidence of identification and of complicity in the crime, which, having been apparently believed and acted upon by the jury, takes the question of corroboration out of consideration in his case. Likewise in the case against Orsatti the facts surrounding his confession passed upon by the court for the purpose of receiving the same in evidence and presumably acted upon by the jury in arriving at its verdict makes it unnecessary to give the question of corroboration attention as to him. In this connection it is held that the record discloses that the evidence relating to the circumstances under which the confession of Orsatti was made leaves the question not one of law to be here determined as such, but a question of fact properly to be passed upon by both judge and jury in turn.

[13] As to defendant Frank, the question of corroboration is presented. The evidence relied upon by the state is, (a) that soon after the crime was committed, proof of which exists without reference to the testimony of the accomplice, this defendant moved from Los Angeles to a town about twenty miles distant; (b) that either he or his wife obtained a postoffice box in still another town under an assumed name; (c) that he left the state by airplane with one Wagner, who had been wounded in the Long Beach affray; (d) that when arrested in Arizona he gave a false name and address; (e) that his wife wrote a letter to some person in Oregon, certain language in which gave rise to an inference of guilty knowledge; and (f) that in July, 1931, he attempted to obtain release of a car which was in custody of the police and which had been used in connection with the commission of the crime; (g) that when arrested for the crime he made no denial of guilt.

It is evident that in a city of more than a million inhabitants many people may have moved from one place to another at or about any particular time and that if obtaining a postoffice box under another name would in any degree be indicative of having committed a crime, it could not be said to have relation to this particular crime. That he left the state with Wagner would be of no significance unless the fact that Wagner was a party to the crime for which defendant is on trial was known to Frank at the time as shown by testimony other than that of the accomplice. When arrested the fact that he gave a false name and address and denied identity, if leading to suspicion of some guilt, would not relate to any particular act. It appears from the testimony that at the time of his arrest he was notified it was upon the charge involved in this case and that he said nothing. Under some circumstances where one is confronted with a charge and fails to make denial, inference may be drawn that his silence constitutes admission of the truth of the charge. The inference would be stronger or weaker according as the circumstances seemed to necessitate a response. When arrested, whether guilty or innocent, a denial would be of no avail. Without the testimony of the accomplice the corroborating evidence in no way tends to connect defendant Frank with the crime.

The judgments and orders appealed from are affirmed as to defendants Sheldon and Orsatti, and reversed as to defendant Frank and the case remanded for new trial.

We concur: BARNARD, P. J.; JENNINGS, J.

132 Cal.App. 343

KELLER v. KELLER.

Civ. 4669.

District Court of Appeal, Third District, California.

May 31, 1933.

1. Divorce ⇐253.

In divorce action, evidence *held* to support decree in so far as title to property was concerned, as against wife's contention that certain property was her separate property.

2. Divorce ⇐130.

Evidence *held* to support divorce decree to husband for extreme cruelty.

No acts of physical violence were charged or shown, but there was evidence to show that wife wrongly accused husband of intimacy with other women, and that she left home and remained away for several days at a time, and often visited his office and abused and quarreled with him in presence of customers and employees.

3. Divorce ⇐184(6).

In absence of collusion, and where both spouses seek divorce for cruelty, reviewing court may be justified in supporting judgment of divorce on corroboration which might otherwise be examined more critically.

4. Divorce ⇐127(4).

While divorce cannot be granted on uncorroborated testimony of parties to action, it is sufficient if there is substantial corroboration of one or more of material charges constituting extreme cruelty (Civ. Code, § 130).

Civ. Code § 130, requires substantial corroboration in divorce case, but it is not necessary that each of charges of cruelty on which party relies for divorce should be corroborated by other evidence.

5. Divorce ⇐130.

Evidence *held* to support decree denying divorce to wife for extreme cruelty.

6. Appeal and error ⇐870(6).

While statute does not authorize appeal from order denying new trial, that order may be reviewed on appeal from judgment (Code Civ. Proc. §§ 956, 963).

7. Appeal and error ⇐959(3).
Pleading ⇐236(3).

Permitting amendment to pleadings before entry of judgment in furtherance of justice is in discretion of court, and will not be interfered with except for clear abuse of discretion (Code Civ. Proc. § 473).

8. Pleading ⇐236(4).

Except for relief afforded in furtherance of justice under statutes, there is no statute allowing amended pleading after judgment has been rendered (Code Civ. Proc. § 473).

9. Divorce ⇐104.

After interlocutory divorce decree, court properly denied motion to file amended answer alleging for first time that plaintiff and defendant were never legally married.

10. New trial ⇐99.

New trial for newly discovered evidence should not be granted except on strong satisfactory showing of materiality and truth of new evidence, and affirmative showing that moving party was not guilty of laches in failing to discover evidence in time for trial.

11. Divorce ⇐184(4).

In divorce action, reviewing court must assume that records of court where plaintiff secured former divorce would disclose that he was divorced before marriage with defendant.

Appeal from Superior Court, El Dorado County; George H. Thompson, Judge.

Action by John E. Keller against Fannie M. Keller, for divorce, in which defendant filed a cross-complaint. From an adverse judgment, defendant appeals.

Affirmed.

Clifford A. Russell, George E. McCutchen, and Johnson & Lemmon, all of Sacramento, for appellant.

Darlington & Lyon, of Placerville, and White, Miller, Needham, Harber & Mering, of Sacramento, for respondent.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

The respondent secured a decree of divorce from the appellant on the ground of extreme cruelty. The real and personal property possessed by the spouses was divided between them. It was all held as community property. In a cross-complaint the defendant also asked for a divorce from the plaintiff on the ground of cruelty. This was denied. From the interlocutory decree which was entered the defendant has appealed.

A reversal of the judgment is sought on the grounds that the interlocutory decree is not supported by the evidence chiefly because it is asserted the alleged acts of cruelty are not adequately corroborated; that the court erred in assigning to the plaintiff lots 5, 6, 7, and 8 of Bijou Park, a subdivision in El Dorado county, which tract is claimed as the separate property of the defendant; that the family homestead known as "Homecrest," which was assigned to the defendant, was her separate property, and should not have been taken into account in distributing their com-

munity property; and that the court erred in denying defendant's plea for a divorce as set out in her cross-complaint and in denying the motion for a new trial.

The evidence respecting the charges of cruelty on the part of both the plaintiff and the defendant is conflicting. The plaintiff was previously married and divorced. The plaintiff and defendant were married at Goldsboro, N. C., September 19, 1909. They lived together as husband and wife for twenty-one years. Two sons were born as the issue of the marriage. Both are fully grown. It is conceded that it is impossible for the spouses to continue to live together as husband and wife. Their differences are irreconcilable. The chief controversy on this appeal is concerning the distribution of the property.

[1] At and prior to their marriage the plaintiff and defendant were engaged in the profession as actors on the public stage. For several years they traveled together and appeared upon the same programs. There is satisfactory evidence that for a year prior to their marriage their earnings were commingled in the same bank account. The defendant took charge of this bank account and had possession of the passbook. The plaintiff had implicit confidence in her ability and honesty. She appears to have been the business manager of their joint enterprise. During this early period no account was ever rendered between them. Joint accounts were kept in a Brooklyn bank and subsequently in a Kansas City bank. The defendant failed to produce at the trial the passbooks covering several years during which these accounts were maintained. The court was unable to obtain an accurate statement of these accounts.

As soon as the divorce from plaintiff's first wife was secured, these parties were married. About the time of their marriage it was contemplated they might ultimately settle in Brooklyn, where the mother of the defendant resided. With this in view they purchased a lot adjoining the home of Mrs. Keller's mother. It was purchased subject to a mortgage which was subsequently paid from their community funds. The defendant contends this lot was purchased with her separate money, and that this lot furnished a nucleus from which the Placerville homestead was afterwards purchased. Reasonable inference, however, may be drawn from the evidence indicating that the initial payments upon this Brooklyn property were made from the joint funds of the spouses, which account was in charge of the defendant.

In 1919 the spouses abandoned their profession of acting and settled in Placerville, where they established a real estate business, which prospered. They were successful in disposing of several subdivisions. They accumulated considerable real and personal property. It was their custom to take deeds to many parcels of land which they acquired in the name of the defendant. Deeds of reconveyance of these properties were, however, immediately executed by her to the plaintiff. These deeds were not recorded. This appears to have been solely for business convenience. During the many years of their married life the defendant made no claim to any of these parcels of land as her separate property. It would be futile and arduous to attempt to trace the title to these many tracts of land through the intricate details of a multitude of transactions covering over twenty years of married life. It is unnecessary to say that the five hundred page transcript on appeal in this case contains an inexorable conflict of evidence respecting the title to both real and personal property. It is sufficient to say there is substantial evidence derived from facts, circumstances, and necessary inferences disclosed by the record to support the court's findings to the effect that all of the real and personal property which is distributed between the parties hereto, including the Bijou Park tract and the Placerville homestead, were the community property of the spouses. The decree is therefore adequately supported by the evidence so far as the title to the property is concerned.

[2] The complaint charged the defendant with extreme cruelty toward plaintiff, consisting of acts which caused him grievous mental suffering. No acts of physical violence were charged. The court found that the defendant wrongfully accused plaintiff with having been intimate with other women; that upon numerous occasions, without previous notice, the defendant left home and remained away for several days at a time without informing plaintiff of her whereabouts; that the defendant often visited the real estate office of the plaintiff and abused and quarreled with him in the presence of customers and employees to his great embarrassment and the detriment of their business; and that the defendant frequently used opprobrious language toward the plaintiff in the presence of their children and others.

All of these findings are adequately supported by evidence on the part of plaintiff by the recital of numerous incidents which occurred frequently during a period of about three years prior to their separation. Many of these incidents are corroborated by other disinterested witnesses. The findings and decree are sufficiently corroborated. Both sons were witnesses at the trial and corroborated their father generally regarding the defendant's disrespectful and abusive treatment of her husband. Howard Keller confirmed his father's charge that his wife had wrongfully accused him of having been intimate with another woman whose name she mentioned. At least half a dozen witnesses corroborated

plaintiff's testimony to the effect that the defendant was generally abusive, quarrelsome, and critical of him. A number of specific incidents were also corroborated. At least two employees in the real estate office related circumstances which occurred on several occasions when she engaged in quarrels with the plaintiff in the presence of customers, degrading, belittling, and criticizing him without cause. We are satisfied the court's findings that the defendant was guilty of extreme cruelty as above specified are sufficiently supported by the evidence. There is proof that this conduct on the part of the defendant caused the plaintiff grievous mental suffering. A disinterested witness testified that his health was impaired and that he became sick and extremely nervous on that account, and that he was therefore unable to properly attend to his business.

[3, 4] Where there is no evidence of collusion between the parties, and upon the contrary, where both spouses seek a divorce on the grounds of cruelty, and concede that it is impossible for them to continue to live together as husband and wife, a reviewing court may be justified in supporting a judgment of divorce upon corroboration which might otherwise be examined more critically. It is true that a divorce may not be granted on the uncorroborated testimony of a party to the action. Section 130, Civ. Code. But this does not mean that each and all charges of cruelty upon which a party relies must be corroborated by evidence other than that which is furnished by the complainant. It has been said that the chief reason the law requires corroboration in divorce proceedings is to avoid collusion between the parties. 9 Cal. Jur. 731, § 89. However, the statute above cited does require substantial corroboration in a divorce case even when it is apparent there is no collusion between the parties to the suit. It is not necessary that each of the charges of cruelty upon which a party relies for a divorce shall be corroborated by other evidence. It is sufficient if there is substantial corroboration supplying evidence of facts, circumstances, or necessary inferences in support of one or more of the material charges constituting such extreme cruelty as will warrant the granting of a divorce on that ground. 9 Cal. Jur. 738, § 96; Percy v. Percy, 188 Cal. 765, 207 P. 369; Hill v. Hill, 106 Cal. App. 309, 289 P. 227; Wilson v. Wilson, 124 Cal. App. 655, 13 P.(2d) 376.

[5] For the reasons heretofore assigned, we are also of the opinion there is ample evidence to support the findings of court and that portion of the decree which denies the defendant a divorce upon her cross-complaint, in spite of the fact that there is a conflict upon the issues which are therein contained.

[6-8] Finally, it is contended the court erred in denying defendant's motion for a new trial upon the ground of newly discovered evidence to the effect that the plaintiff was not finally divorced from his first wife at the time of his alleged marriage to the defendant.

While section 963 of the Code of Civil Procedure does not authorize an appeal from an order denying a motion for new trial, that order may be properly reviewed on appeal from the judgment, under the provisions of section 956 of the same Code.

The defendant affirmatively alleged that she was married to the plaintiff September 19, 1909. The cause was tried in June, 1931. The court found that the parties were married on September 19, 1909. These findings were filed September 24, 1931. An interlocutory decree of divorce was accordingly entered. Subsequently the defendant moved for a new trial on the ground, among others, of newly discovered evidence. This motion was supported by affidavits and a proposed amended answer in which it was asserted for the first time that the plaintiff and defendant were never legally married, for the reason that plaintiff had not secured a divorce from his first wife at the time of the purported marriage of these parties on September 19, 1909. The counter affidavit of plaintiff was filed in opposition to this motion, in which he averred that he was divorced from his first wife, Clara Keller, in the state of Kansas by a decree which was rendered September 17, 1909. The motion for a new trial was thereupon denied. It is not contended the belated application to file an amended answer was made to conform to the evidence adduced at the trial. There was no issue at the trial regarding the plaintiff's former divorce. The proposed amended answer alleges that "a purported marriage ceremony was performed at Goldsboro, North Carolina, upon the 19th day of September, 1909." The affidavit of the plaintiff avers that he was divorced from his former wife two days prior thereto. It may be conceded that under the provisions of section 473 of the Code of Civil Procedure, in the furtherance of justice, a court, in the exercise of sound discretion, may permit an amendment to pleadings at any time prior to the entry of judgment, particularly when the amendment is sought to conform to the evidence. Such amendments are permitted only in the sound discretion of the court, and will not be interfered with on appeal except for a clear abuse of discretion. 21 Cal. Jur. 181, § 126; 49 C. J. 472, § 597; Dressler v. Johnston (Cal. App.) 21 P.(2d) 969; Coyle v. Coyle, 212 Cal. 715, 300 P. 5. Except for the relief afforded in the furtherance of justice, by section 473, supra, to file an amended pleading, there is no statute of California allowing this to be done after a judgment has been rendered. Regarding the right to file such amended pleadings, the text which is found in 49 C. J. 483, § 623, says:

"In the absence of statutory authority express or implied amendments of the pleadings cannot be made after judgment, unless such judgment has been vacated. But under statutory sanction such amendment may be permitted. This power, it is said, must be sparingly exercised, and in any event an amendment will be allowed only for the purpose of sustaining the judgment, and not for the purpose of reversing it. The allowance of amendments after judgment is always in the discretion of the court."

[9] This cause was tried on the theory that a valid marriage existed between the plaintiff and the defendant. That fact was never questioned during the trial. Since the record of the divorce of plaintiff from his former wife was readily available, and these discreet intelligent parties recognized the validity of their marriage by participating in a formal wedding ceremony and by living as husband and wife for twenty-one years, after a hotly contested divorce trial which lasted many days, and after the adoption of findings and the rendering of a decree holding that the marriage was valid, a trial court may well look with suspicion upon an affidavit which is filed for the first time on motion for a new trial, in which it is merely averred in general terms that at the time of the marriage which is here involved the plaintiff was incapable of consummating marriage with the defendant because he was then married to another living woman from whom he had not secured a divorce. These circumstances should be considered in determining whether the trial judge abused his discretion in denying the motion to file an amended answer. There is no evidence of an abuse of discretion. The motion to file an amended answer was properly denied.

[10] A motion for new trial upon the ground of newly discovered evidence should not be granted except upon a strong and satisfactory showing of the materiality and truth of the new evidence, together with an affirmative showing that the moving party was not guilty of laches in failing to discover the evidence in time for the trial. 20 Cal. Jur. 183, § 120; Arnold v. Skaggs, 35 Cal. 684; Putnam v. Pickwick Stages, 98 Cal. App. 268, 276 P. 1055, 1057. In the case last cited it is said:

"To justify the granting of the motion on the ground of newly discovered evidence, the moving party must make a strong case and must show due diligence to discover and produce the evidence on a former trial, and that his failure to do so was not the result of his own laches, and the action of the trial court will not be disturbed except upon a clear showing of an abuse of discretion."

[11] The records of the court where the plaintiff secured his former divorce were available. We must assume these records disclose the fact that he was divorced prior to his marriage with the defendant. There is no showing of an abuse of discretion on the part of the trial judge in denying the motion for a new trial in the present case.

The judgment is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

132 Cal.App. 330

POE v. FRANCIS.

Civ. 7634.

District Court of Appeal, Second District, Division 2, California.

May 31, 1933.

1. Bills and notes ⇐496(1).

Assignee cannot maintain action on note without proof of assignment.

2. Pleading ⇐122.

Statement in answer that "defendant is informed and believes and [therefore] denies the assignment to plaintiff" *held* meaningless and raised no issue.

3. Pleading ⇐126.

Denial that payee assigned note for valuable consideration raises no issue as to assignment.

4. Pleading ⇐126.

Defendant's allegation that payee did not transfer or assign note prior to maturity and for valuable consideration does not in itself state any defense.

5. Bills and notes ⇐443(3).

Mere fact that present holder paid nothing for note does not preclude recovery, but only permits all defenses that might be urged against original payee.

6. Bills and notes ⇐476(2).

In action on note by assignee thereof, defendant's allegation that consideration failed through payee's failure to deliver consideration to defendant, not specifying how payee failed or what consideration was, *held* too evasive to present defense.

7. Pleading ⇐121(2).

In action on note, defendant's allegation that he had no knowledge of assignment to plaintiff, and therefore denied assignment, *held* not proper form of denial.

8. Bills and notes ⇐476(2).

Defendant's allegation that face amount of notes and trust deeds in payment for which note in suit was delivered greatly exceeded value of lands *held* not to present de-

fense of failure of consideration; there being no claim that actual value of trust deeds was less than face of note in suit.

9. Bills and notes ⇐476(1).

In action on note, allegation that note was given in payment for trust deeds, face of which greatly exceeded value of land and that payee knew actual value of land, *held* to present no defense; there being no allegation that payee made any representation respecting matter or that defendant himself did not know true value of land.

10. Bills and notes ⇐476(2).

In action on note, answer respecting alleged failure of consideration *held* evasive and insufficient.

Defendant alleged that note was executed and delivered in payment for certain trust deeds and notes secured thereby, and that defendant was informed and believed that lands were of no value, or merely nominal value, and not worth more than 10 per cent. of face of trust deeds; that payee of notes knew value of land, and that he knew that trust deeds were in amounts greatly in excess of real value of land, and that makers of trust deeds were of no financial responsibility; that payee of notes refused to make assignments of trust deeds at time note was issued, and had since failed to make assignments of all trust deeds; that defendant relied on statements of payee as to genuineness of trust deeds, good faith of makers, and value of land, and that, acting on this reliance, he executed note; that failure of payee to deliver to defendant assignments of trust deeds prevented latter from dealing in and with trust deeds; and that such failure operated as fraud on defendant.

11. Pleading ⇐93(1).

While one may plead inconsistent defenses, one may not admit and deny in same breath.

12. Mortgages ⇐235.

Assignment of note sufficiently transferred trust deed securing it.

13. Pleading ⇐350(3).

It will be presumed that answer under oath fully presented only defense available, and, when defense thus presented is insufficient, defendant has had his day in court, and judgment may be rendered on pleadings.

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Action by Arlo D. Poe against S. R. Francis. From a judgment on the pleadings in favor of plaintiff, defendant appeals.

Affirmed.

Bertin A. Weyl, of Los Angeles, for appellant.

Benj. M. Stansbury, Paul Vallee, and Mott, Vallee & Grant, all of Los Angeles, for respondent.

PARKER, Justice pro tem.

This is an appeal from a judgment on the pleadings, which judgment was so rendered in favor of plaintiff after answer filed.

The complaint is in three counts, each founded upon a promissory note alleged to be unpaid. The first count sets up the execution and delivery of a certain promissory note payable to one Huttig, the assignment, transfer, and indorsement thereof to plaintiff before maturity and for value, partial payment, and the nonpayment of balance. The second count contains the same allegations with reference to another promissory note. The third count sets up a third note, and contains the same allegations with reference to execution, delivery, and nonpayment. The allegation of transfer and assignment to plaintiff makes no reference to time of transfer, whether upon or after maturity, or whether any consideration attended the assignment and transfer to plaintiff. We shall consider the answer with reference to each count.

Count 1: Defendant admits the execution and delivery of the note as alleged. The answer then proceeds: Defendant is informed and believes and on that ground denies the assignment to plaintiff and alleges that the payee of the note did not, prior to maturity, assign the note for a valuable consideration, and that the payee did transfer subsequent to maturity without consideration, and that the original payee was, at the time the complaint was filed, the owner of the note. Further, it is alleged that the original payee failed and refused and neglected to deliver to defendant the consideration for which the said note was executed and delivered, and that the consideration for said note has wholly failed. The answer admits partial payment, and denies that anything is due or unpaid thereon.

[1-4] There are two attempted denials. Under the authority of Cuneo v. Lawson, 203 Cal. 190, 263 P. 530, plaintiff cannot maintain the suit without proof of the assignment, and, if issue is properly joined on that point, a judgment on the pleadings would be improper. However, an attempted denial in these words, "defendant is informed and believes and therefore denies," means nothing, and cannot raise an issue of any sort. Further, a denial that the payee did assign for a valuable consideration raises no issue as to the assignment. Likewise an allegation that the payee did not transfer or assign the note prior to maturity and for a valuable consideration in itself sets forth no defense.

[5, 6] The holder of a note who obtains possession thereof and rights thereto subsequent to maturity, or who obtains such rights prior to maturity with notice, etc., has not the protection afforded a holder before maturity without notice and for valuable consideration. Yet, in the absence of some defense to the note, the mere fact that the present holder paid nothing for it does not preclude recovery, but only permits all defenses that might be urged against the original payee. The allegation as to failure of consideration presents at best merely a conclusion of law. The allegation consists of the bald statement that the consideration has failed through the failure of the payee to deliver such consideration to the defendant. There is no allegation that defendant executed and delivered the note without consideration, nor that he had not received adequate consideration. The only allegation is that the original payee failed to deliver the consideration, with no specification of how he failed or what the consideration was. This form of denial partially admits that there was a consideration which has failed since the execution of the note, and hence that the note was supported in its execution by such consideration. It seems plain that the denial is too evasive to deserve further attention.

Count 2: The situation as far as this discussion may apply is the same with reference to this count, save that it is admitted that nothing has been paid upon the note in suit and alleged that nothing is due thereon.

[7] Count 3: Same allegations and attempted denials as in counts 1 and 2. As to the denial of assignment, the wording is somewhat different here. Defendant sets forth that he has no knowledge thereof, and therefore denies. This, too, is not a proper form of denial. The denial is not based on lack of information or belief. In any event, the attempted denial merely sets up that the assignment was not for a valuable consideration, which, as we have noted, is immaterial, in the absence of a defense to the notes, conceding that the same defense could be made against a holder without consideration as could be made against the original payee.

The foregoing disposes of the preliminary questions presented. To each of the counts a second defense was attempted. Defendant alleges that each note was executed and delivered in payment for certain trust deeds of certain lands and notes secured thereby, and that defendant is informed and believes that the said lands were of no value or merely nominal value, and not worth more than 10 per cent. of the face of the trust deeds; that the payee of the notes knew the value of the lands, and knew that the trust deeds were in amounts greatly in excess of the real value of said lands, and that the makers of said trust deeds were of no financial responsibility; that the payee of the notes refused to make assignments of the trust deeds at the time the notes in controversy were issued; and that he has since failed to make assignments of all of the trust deeds. It is further alleged that defendant relied upon the statements of the payee as to the genuineness of the trust deeds, the good faith of the makers and the value of the lands, and that, acting upon this reliance, he executed the notes; that the failure of the payee to deliver to defendant assignments of the trust deeds prevented the latter from dealing in and with the trust deeds, and such failure operated as a fraud upon him.

[8-11] In analyzing this general defense, we find no failure of consideration alleged, in that there is no claim that the actual value of the trust deeds was less than the face of the notes. Nothing indicates what was the total of the notes secured by trust deeds. For instance, from all that appears the trust deed notes may have been of the face value of $1,000,000, in which case the claim of defendant that the lands were worth only one-tenth of that amount would show full consideration for the notes sued on, totaling less than $20,000. The further allegation that the payee knew the actual value of the lands securing the trust deed notes means nothing, for the obvious reason that there is no allegation that said payee ever represented to defendant what the value of the lands was. Nor is there any allegation that said payee ever made any representations on any matter connected with the transfer, or at all. Nor is there allegation that defendant himself was without knowledge of the true value of the lands. Taking the answer in its broadest sense, and disregarding all recognized rules of good pleading, it can be seen that, even if the allegations thereof stood uncontradicted, no valid defense is presented. True, in certain phrases the answer hints at some kind of a defense against the notes, but in the next phrase is a direct allegation destroying the inference possible from the first. The condition presents nothing but pure evasion. It is conceded that one may plead inconsistent defenses. That does not mean, however, that one can admit and deny in the same breath. For instance, a denial couched thus: Defendant admits the execution and delivery of said note, and alleges that the same has been paid in full on account of the fact that the note was never executed or delivered, would be absolutely meaningless. The answer here would parallel the illustration.

[12] On the point that there was no assignment of the trust deed after assignment of the note, we consider the assignment of the note sufficiently transferred the chose. 1 Daniel, Neg. Ins. 834; Duncan v. Hawn, 104 Cal. 10, 37 P. 626; Civ. Code, §§ 1084, 2909.

[13] While we are of the opinion that a party should always be allowed his day in

court, and that a hearing on the merits should, whenever possible, be had, yet the entire procedure calculated to insure this assumes that there are merits; and, where one under oath presents his pleading, it will be presumed that he has fully stated his side of the controversy therein with fairness and good faith. When the defense thus presented is insufficient and being presumed as the only defense available, the defendant has had his day in court.

The judgment is affirmed.

We concur: WORKS, P. J.; STEPHENS, J.

132 Cal.App. 269

PISANI v. MARTINI et al.

Civ. 8732.

District Court of Appeal, First District, Division 1, California.

May 26, 1933.

1. Appeal and error ⇐909(6).

On appeal, defendants cannot for first time claim benefit of conclusive statutory presumption that highway is outside of business or residential district, absent evidence on question (St. 1923, p. 517, § 28½(c), as added by St. 1929, p. 510, § 7).

2. Trial ⇐252(8).

Instruction that plaintiff was negligent as matter of law if jury found "from the evidence" that plaintiff walked along highway outside of business or residence district otherwise than close to his left-hand side thereof *held* properly refused, absent evidence that automobile accident occurred within or without business or residential district (St. 1923, p. 517, § 28½(a–c), as added by St. 1929, p. 510, § 7, and § 150½, as added by St. 1929, p. 546, § 66).

3. Trial ⇐315.

Jury is not presumed to know the law, and any attempt to apply it to facts constitutes violation of its duty, in absence of instructions thereon.

4. Trial ⇐314(1).

Trial court's suggestion that jury retire for further deliberation after jury announced that it could not agree upon verdict *held* not misconduct.

Trial court's remarks in no way indicated how the case should be decided, nor did they carry any implication of intimidation or coercion, but court merely stated that the case had been well tried, and that it was one in which an agreement should be reached, and then asked the jury if it did not think that by talking the matter over it could agree, to which a juror replied that they might try, and thereupon the jury retired and later brought in a verdict.

5. Appeal and error ⇐230.

Defendant who raised issue as to her liability by answer, and urged point on motion for new trial, could raise question of insufficiency of evidence on appeal.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by Joseph Pisani against Angelo Martini and Lena Martini. From a judgment in favor of plaintiff, defendants appeal.

Judgment affirmed as to Angelo Martini, and reversed as to Lena Martini.

Charles W. Haswell, of San Francisco, for appellants.

J. E. McCurdy, of San Mateo, and Walter McGovern and Abraham M. Dresow, both of San Francisco, for respondent.

KNIGHT, Justice.

While walking along a highway in San Mateo county known as the Half Moon Bay highway, about 6 o'clock on the night of December 13, 1931, the plaintiff Pisani was struck and injured by an automobile driven by the defendant Angelo Martini, as a result of which Pisani brought this action for damages, and upon trial before a jury was awarded a verdict for $2,500. From the judgment entered on said verdict defendants have appealed.

At the time of the impact Pisani was walking along the extreme outer right edge of the highway, off the paved portion. He had just crossed over from the left side in order to avoid two automobiles, one following the other, which were approaching him in the opposite direction and on the same side of the highway. One of the automobiles was being driven by a man named Torres and was towing the other. After crossing over to the right side of the highway, Pisani traveled a distance of approximately 50 feet when Martini, who was following the other two automobiles, overtook said automobiles and attempted to pass them on the left side and in doing so struck Pisani.

Section 150½ of the California Vehicle Act (as added by St. 1929, p. 546, § 66), provides that "it shall be unlawful for any pedestrian to walk along and upon any highway outside of a business or residence district otherwise than close to his left-hand edge of the highway." And subdivisions (a) and (b) of section 28½ of said act (as added by St. 1929, p. 510, § 7), define a business and a residential dis-

trict, which, according to sections 115 and 116 of said act (as amended by St. 1931, p. 2122, §§ 37, 38) are required to be signposted.

[1-3] In the present case appellants proposed the following instruction, which the trial court refused to give: "I instruct you that the California Vehicle Act provides as follows: 'Sec. 150½. It shall be unlawful for any pedestrian to walk along and upon any highway outside of a business or residence district otherwise than close to his left-hand edge of the highway.' If you find *from the evidence* that the plaintiff violated this provision of the statute, then I instruct you that he was guilty of negligence as a matter of law, and if you further find that such negligence on his part proximately caused or contributed to this accident in the slightest degree, then your verdict must be in favor of the defendants." (Italics ours.) Another instruction to the same general effect, but omitting the provisions of said section 150½, was also proposed by appellants and by the court refused. As will be noted, the instruction proposed stated in substance and effect that, if the jury found "*from the evidence*" that plaintiff was walking upon the highway "outside of a business or residence district" otherwise than close to his left-hand side thereof, he was guilty of negligence as a matter of law. But no instruction was proposed or requested by appellants defining such districts, nor did the court give any such instruction of its own motion; and, furthermore, no evidence whatever was introduced to show whether the accident occurred within or without a business or a residential district, as the same are defined by said Vehicle Act. Respondent contends, therefore, that, since under the general rule appellants, as the defendants in the action, were charged with the burden of establishing contributory negligence and failed to offer any evidence whatever to prove a violation of the statutory provisions embodied in their instructions, the provisions of that statute were not involved, and consequently the trial court was justified in refusing to give an instruction based thereon. Such contention appears to be amply supported by the decision in the case of Corcoran v. Pacific Auto Stages, Inc., 116 Cal. App. 35, 2 P.(2d) 225, decided about a year prior to the trial of the present action, and afterwards denied a hearing before the Supreme Court; and the effect of that decision was doubtless before the parties hereto and the trial court when the present action was tried. But as shown by that decision, the Vehicle Act further provides, subdivision (c), § 28½, that "every public highway shall be conclusively presumed to be outside of a business or residential district unless its existence within a business or residential district shall be established by clear and competent evidence as to the nature of the district, and unless signposted when and as required by this act"; and after the appeal in the present action was taken a case was presented to the District Court of Appeal of another district (Gayton v. Pacific Fruit Express (Cal. App.) 15 P.(2d) 217, 222, involving the same question, and it was there held, apparently contrary to the rule of the Corcoran Case, supra, that: "Where, as in the present case, there is no evidence that the signs were posted and a complete failure of evidence on the question of the street being in either a business or residential district, the presumption established by subdivision (c) of the section comes into play at the close of the evidence and conclusively establishes the street as outside a business or residential district. This conclusive presumption becomes evidence which defendants may invoke in support of a defense of contributory negligence." The decision in this later case was not reviewed by the Supreme Court, and as stated therein the facts thereof were somewhat different from those of the Corcoran Case, supra, in that there was some evidence introduced in the Corcoran Case, according to the decision, upon the question of whether the accident occurred within or without a business or residential district; whereas, in the Gayton Case, as here, there was an entire absence of evidence upon the subject. However, assuming as appellants contend that there is a conflict between the two cases as to the legal principle declared, and assuming further, as appellants contend, that the later case states the correct rule, it is evident that the theory on which they urged the defense of contributory negligence was based exclusively upon the law as declared in the Corcoran Case, namely, that they were required to show by evidence that the accident occurred outside of a business or residential district, and that they did not rely upon nor seek to invoke the aid of the presumption created by subdivision (c) of said section 28½ of the Vehicle Act. This clearly appears from two sources: First, the instructions they proposed, and which the court refused to give, plainly and unequivocally stated that the jury should determine the question of whether the accident occurred within or without a business or residential district "from the evidence"; and, second, they did not take any measures whatever, as did the appellants in the Gayton Case, supra, to inform the jury of the existence of the presumption created by said vehicle act. In the Gayton Case, as will be seen from the decision therein, the appellants proposed an instruction embodying the provisions of subdivision (c) of section 28½ of the Vehicle Act which creates said presumption; and the trial court refused to give the same. Here appellants proposed no instruction whatever, nor did they request the trial court to give any, embodying or relating to the presumption created by the provisions of subdivision (c) of said section 28½; nor did they propose, or request the court to give, any instructions defining a business or

residential district. It is our conclusion, therefore, that on account of their failure so to do they are not entitled to claim the benefit of said presumption for the first time on appeal, nor are they in a position to complain of the action of the trial court in refusing the instructions they did propose, for the reason that, even though said proposed instructions had been given, the jury would still have been left entirely in the dark as to the existence of said presumption, and as to what did or did not constitute a business or residential district. In other words, as repeatedly held, the jury must take the law of the case from the court through the medium of instructions. It is not presumed to know the law, and, if in the absence of instructions it assumes to possess such knowledge, any attempt to apply it to the facts of the case constitutes a violation of its duty.

[4] Nor do we find any merit in appellants' contention that there was misconduct on the part of the trial court in suggesting to the jury that it retire for further deliberation after it had announced that it could not agree upon a verdict. The remarks of the court in no way indicated how the case should be decided, nor did they carry any implication of intimidation or coercion. The court stated, in substance, merely that the case had been well tried, and that it was one in which an agreement should be reached. It then asked the jury if it did not think "that by talking the matter over" it could agree, to which a juror replied, "We might try." Thereupon the jury retired and later brought in a verdict.

[5] The action was instituted against "Angelo Martini, First Doe and Second Doe" as defendants, it being alleged in the complaint merely that "the defendants, acting through said defendant Angelo Martini, drove and operated" said automobile in a careless and negligent manner, etc. Later Martini's wife was served with summons in the action and substituted as party defendant in the place of one of the fictitious parties; and she filed a separate answer denying generally all the allegations of the complaint. It is now asserted, in her behalf, that there was no evidence whatever to connect her with the ownership or operation of, or the right of control over, said automobile; and it is contended, therefore, that the evidence is wholly insufficient to sustain any judgment against her. Respondent does not dispute the claim of lack of such evidence, but contends that the point should have been raised on motion for nonsuit or for a directed verdict, or on proceedings for new trial, and that the question of the insufficiency of the evidence cannot be raised for the first time on appeal. We find no merit in respondent's contention. The issue as to the liability of Martini's wife was raised by her answer; and on her motion for new trial she urged the points that the evidence was insufficient to justify the verdict against her, and that said verdict and judgment were against law. She is entitled, therefore, to raise the question of the insufficiency of the evidence on this appeal.

Accordingly, the judgment as to Lena Martini is reversed; and as to Angelo Martini it is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

132 Cal.App. 408

HIBERNIA SAVINGS & LOAN SOC. v. ELLIS ESTATE CO. et al.

Civ. 4877.

District Court of Appeal, Third District, California.
June 2, 1933.

1. Appeal and error ⇐1048(6).
Evidence ⇐558(1).

Denying cross-examination of witnesses as to value of mortgaged property whether they considered income proper element of value *held* error, but not prejudicial, where evidence of other witnesses was sufficient to justify revocation of order appointing receiver on ground that mortgaged property was worth less than mortgage.

2. Evidence ⇐553(2).

Hypothetical question to witness as to value of mortgaged property was properly excluded, where rental value of the part occupied by owner was not included.

3. Appeal and error ⇐1048(6).
Evidence ⇐558(1).

Denying cross-examination of witnesses as to value of mortgaged property whether they knew of any sales of real property in vicinity within last six months or year *held* error, but not prejudicial, where evidence of other witnesses was sufficient to justify revocation of order appointing receiver on ground that mortgaged property was worth less than mortgage.

4. Evidence ⇐113(15, 16), 142(1).

Value of property cannot be proved by evidence of sales of other property or of offers to buy or sell property in question.

5. Appeal and error ⇐900.

All presumptions are in favor of judgment or order appealed from.

6. Appeal and error ⇐901.

Burden is on appellant to show reversible error.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

7. Appeal and error ⇐1135.

Where no miscarriage of justice appears, judgment will be affirmed, notwithstanding errors not affecting substantial rights of parties (Const. art. 6, § 4½).

Appeal from Superior Court, Yuba County; K. D. Mahon, Judge.

Action by the Hibernia Savings & Loan Society against the Ellis Estate Company and others. From an order revoking order appointing a receiver, plaintiff appeals.

Affirmed.

See, also, 216 Cal. 280, 13 P.(2d) 929.

Tobin & Tobin and Geo. A. Clough, all of San Francisco, and Rich, Weis & Carlin, of Marysville, for appellant.

Richard Belcher, of Marysville, for respondent.

MILLER, Justice pro tem. delivered the opinion of the court.

This is an appeal from an order revoking an order appointing a receiver. The action was for the foreclosure of a mortgage on a piece of business property in the city of Marysville. On plaintiff's ex parte application a receiver was appointed, who duly qualified and took control of the property covered by the mortgage involved in the action. Defendant the Ellis Estate Company occupied a part of the property, and the remainder was rented for $705 a month. In the affidavit forming the basis of the order appointing the receiver, it is alleged on information and belief: "That the mortgaged property was of a value less than the amount secured by the mortgage." The defendant moved for an order vacating the order appointing the receiver, and on the hearing of that motion defendants produced a number of witnesses who testified that the mortgaged property was of a value in excess of $100,000, and counsel stipulated that there were present in court two witnesses called on behalf of defendants, namely, A. H. Gorwood and A. L. Galligan, both duly licensed real estate brokers in the city of Marysville, who were ready to, and, if called, would, testify that the property in question was of a value in excess of $100,000. Several of the witnesses who testified for defendant were, on cross-examination, asked the following question: "Q. Would the amount of income be regarded by you as a proper element in estimating the value of said property?" The question was objected to on the ground that it was incompetent, irrelevant and immaterial. The objection was sustained.

[1] Likewise, on cross-examination, the following question was asked: "Q. Did you take into consideration, in arriving at the value of said property, the income therefrom?" To that question objection was made on the ground that it was incompetent, irrelevant, and immaterial. The objection was sustained.

Each of these questions was proper on cross-examination, and the objection thereto should have been overruled. However, we do not think that the ruling constituted reversible error, in view of the other testimony in the case that is free from objection and is sufficient, in itself, to amply support the order appealed from, even if the testimony of the witnesses who were being cross-examined when these questions were propounded had been weakened by the cross-examination, or was entirely disregarded. Central Pacific R. R. Co. v. Pearson, 35 Cal. 247, 262.

Appellant propounded the following hypothetical question, namely: "If it should appear that the income from the property involved in this action is $8,400 per year, that the taxes thereon are approximately $3,300, the annual cost of insurance approximately $1,425, cost of scavenger service $72 per year, the interest upon the mortgage indebtedness thereon approximately $4,600 per year, cost of lights $71, cost of water $135 per year, cost of advertising $60 per year, and the cost of repairs, management and operation $1,417, making a total cost of interest, taxes and expenses in connection with the operation thereof approximately $11,000, and showing a deficit in the operation of said building, after applying the income, of approximately $2,600, what would you say was the value of such a property?"

[2] The question was objected to by defendant upon the ground that it is incompetent, irrelevant, and immaterial, and that all of the circumstances and elements involved in a proper hypothetical question as to the value of said property are not contained in said question. The court sustained the objection, and appellant urges the ruling of the court as error. We think the ruling of the court was proper under the objection urged. The rental value of the part of the property occupied by the owner was not embraced in the question.

[3] Appellant also propounded the following question on cross-examination to one of respondents' witnesses: "Q. Do you know of any sales of real property in the vicinity of the property involved in this action within the last six months or a year?" This was objected to as incompetent, irrelevant and immaterial, and the objection sustained. We think the question was proper and should have been answered. But the entire testimony of the witness to whom the question was propounded could be disregarded, and still there would be ample evidence in the record, entirely free from any objection what-

ever, to support the order of the court, and while it was error to sustain the objection it was not a reversible error.

[4] A witness called on behalf of plaintiff testified, on direct examination, that certain properties assessed for $3,165 had been sold on November 22, 1931, for $2,300, and that there had been several foreclosure sales within six months prior to the hearing. On direct examination, he was asked the following question: "Q. Will you kindly state at what price said properties were sold, and the assessed valuation of said property in the city assessment and in the county assessment?" The question was objected to as being incompetent, irrelevant, and immaterial. The objection was sustained, and properly so. The rule in California is well settled that "the value of property cannot be proved by evidence of sales of other property, or of offers to buy or sell the property in question." Merchants' Trust Co. v. Hopkins, 103 Cal. App. 473, 478, 284 P. 1072, 1074.

There appears to be some dispute between counsel for the respective parties as to whether all the evidence that was taken on the hearing of the motion was brought up in the record. The record contains the following statement: "Whereupon the following proceedings were had, among other proceedings." Then follows certain testimony in recital form, and it is contended by plaintiff that the expression, "proceedings" does not refer to evidence. However, if it did not, it would seem strange that a recital of certain evidence immediately followed the term, "whereupon the following proceedings were had, among other proceedings."

[5, 6] It is well settled that all presumptions and intendments are in favor of supporting the judgment or order appealed from, and that an appellant has the burden of showing reversible error, and that, in the absence of such showing, the judgment or order appealed from will be affirmed. Dahlberg v. Dahlberg, 202 Cal. 295, 260 P. 290; Coleman v. Farwell, 206 Cal. 740, 276 P. 335; Moore v. United States Fidelity & Guaranty Co., 122 Cal. App. 205, 9 P.(2d) 562.

[7] The record does not show affirmatively that the evidence brought up was all the evidence taken at the hearing, but, even if it did so show, there appears to have been no miscarriage of justice, and that the errors committed were not reversible errors. Const. of Calif., art. 6, § 4½; Coleman v. Farwell, 206 Cal. 740, 276 P. 335.

The order appealed from is therefore affirmed.

We concur: PULLEN, P. J.; R. L. THOMPSON, J.

132 Cal.App.Supp. 787

HUIE v. SOO HOO et al.

No. 197.

Appellate Department, Superior Court, City and County of San Francisco, California.

May 4, 1933.

1. Automobiles ⇐381.

Lien of garage keeper allowing automobile to leave garage for daily use by owner *held* subordinate to rights of innocent purchaser for value without notice buying automobile when not in garage (Civ. Code, §§ 3051, 3051a).

Garage keeper's lien for storage and supplies was subordinate to rights of innocent purchaser for value from owner without notice of garage keeper's lien when automobile was not in garage, in view of fact that "lien" is not an interest in the thing, but only a right of detainer as security for payment of a debt, and that the policy of the law is against upholding secret liens and charges to the injury of innocent purchasers or incumbrancers for value.

[Ed. Note.—For other definitions of "Lien," see Words & Phrases.]

2. Liens ⇐16.

General rule is that, if claimant whose lien depends on possession, actual or constructive, is deprived of possession fraudulently, he may still assert right to lien.

Appeal from Municipal Court, City and County of San Francisco; Alden Ames, Judge.

Action in claim and delivery by Fannie B. Huie, also known as Fannie B. Hine, against Howard Soo Hoo, and John Tseng, individually and doing business as New Pacific Garage. Judgment for plaintiff, and defendant John Tseng appeals.

Affirmed.

S. M. Saroyan and John Truman, both of San Francisco, for appellant.

Hatch & Mahl, of San Francisco, for respondent.

Edgar C. Levey and Marvin E. Lewis, both of San Francisco, amici curiæ.

JOHNSON, Presiding Judge.

[1] This action in claim and delivery presents the question whether the lien of a garage keeper for storage of an automobile and for supplies and service furnished has priority over the rights of an innocent purchaser for value, without notice of the lien, where the owner was permitted to remove the automobile from the garage for use in business

day by day, and the sale was made at a time when the automobile was not in the garage.

The case was tried upon an agreed statement of facts. It appears therefrom that the automobile in question was owned by the Triangle Produce Company, and for some time prior to May 18, 1931, was kept in a garage in San Francisco operated by the defendant John Tseng under the name of New Pacific Garage. The Triangle Produce Company was allowed credit for storage charges and supplies furnished and service rendered, and, notwithstanding accumulated charges therefor, was permitted to take the car from the garage day by day for business or other purposes.

On May 18, 1931, the unpaid charges amounted to $230.68; and in the evening of that day the car was taken from the garage by a person not identified. After being so removed, the car was sold and delivered by the Triangle Produce Company to the plaintiff, who is admitted to have been a bona fide purchaser for value, without knowledge or notice of any claim or lien on the part of the defendant Tseng, the proprietor of the garage. Upon delivery of the car to the plaintiff, it was placed in plaintiff's private garage, where it was found later by Tseng and moved to his own garage. Thereupon plaintiff instituted this action to recover possession, and judgment was rendered in her favor. From that judgment the defendant John Tseng prosecutes this appeal.

In Pacific States Finance Corporation v. Freitas, 113 Cal. App. (Supp.) 757, 295 P. 804, and General Motors Acceptance Corporation v. Silva, 113 Cal. App. (Supp.) 773, 295 P. 810, we had occasion to consider the rights of a garage keeper to a lien for charges for storage and supplies contracted by a person in possession and control of an automobile under a contract of conditional sale, and who was permitted by the garage keeper to remove the car day by day for use in his own pursuits. In those cases it was held that, notwithstanding such temporary withdrawal of the automobile, it continued to be constructively in the possession of the garage keeper, and that his lien was not lost by reason of his parting conditionally with the physical possession, and hence was enforceable, not only against the vendee under the contract of conditional sale, but also against the conditional vendor.

Using those decisions as a point of departure, the defendant contends that he was constructively in possession of the automobile of the Triangle Produce Company at the time of the sale to plaintiff, and that plaintiff took title charged with defendant's lien and subject to defendant's right to retake the car into his actual possession, to be held until his charges should be paid.

A distinction is to be made, however, between the situation of an innocent purchaser and that of a conditional vendor. The latter yields the control of the car to his vendee, and the vendee, thus becoming the "legal possessor," may so deal with the garage keeper as to give him the same right to a lien upon the car under section 3051 of the Civil Code, as if the transactions were had with the legal owner, subject only to the limitation prescribed by section 3051a. Lindsay v. Kleiber Motor Truck Co., 110 Cal. App. 479, 294 P. 454. So also is the lien acquired under section 3051 superior to that of a prior chattel mortgage. Mortgage Securities Co. v. Pfaffmann, 177 Cal. 109, 169 P. 1033, L. R. A. 1918D, 118; First National Bank v. Silva, 200 Cal. 494, 254 P. 262; Kranzthor v. Al. G. Faulkner Co., 43 Cal. App. 441, 185 P. 305.

Among the cases cited on behalf of defendant are Caldwell v. Tutt, 10 Lea (78 Tenn.) 258, 43 Am. Rep. 307, and Welsh v. Barnes, 5 N. D. 277, 65 N. W. 675, where the lien of a livery stable keeper for board of a horse was held superior to that of an execution or attachment creditor, whose levy upon the horse was made when the animal was temporarily in use by the owner. Here again there is a distinction between such creditor and an innocent purchaser; for, as said in Caldwell v. Tutt, supra, the owner's creditor "must take his shoes, and can only take his property cum onere, as the owner himself held it at the time of seizure."

Defendant's reliance is placed for the most part on State v. Shevlin, 23 Mo. App. 598, and Frank v. Daily, 92 N. J. Law, 118, 105 A. 9.

In State v. Shevlin the court was dealing with a controversy between a stableman and a chattel mortgagee; and there was lack of proof as to whether the mortgage of the horse was made while it was in the stable or temporarily in use by the owner. Shortly after the mortgage was made, the horse was removed to another stable without payment of the charges for board, and the stableman thereupon seized the horse under a writ of replevin. The mortgagee then filed his claim, against which the stableman gave a bond to have the sheriff retain the horse in his custody. Upon obtaining judgment later, the stableman bought the horse at execution sale, and then in the case cited was sued on the bond by the mortgagee. In its opinion the court expressed the view that the lien of a stableman upon a horse subsists as against a mortgagee or purchaser without notice, provided the animal is permitted to be only temporarily removed from the stable, but is lost if the stableman voluntarily parts with the general custody before his charges are paid. There was a quotation drawn by us from this case in Pacific States Finance Corp. v. Freitas, supra, in support of the view that, as against a conditional vendor, uninterrupted physical possession by a garage keeper was not essential to the persistence of his lien. We were not there considering the rights of

an innocent purchaser, or using the case as an authority upon that point.

As regards the rights of an innocent purchaser taking title from an owner permitted to have temporary custody, there are really few precedents in jurisdictions where the rule of constructive possession obtains.

Much confidence is placed by defendant in the decision of the Supreme Court of New Jersey in Frank v. Daily, supra, under the Garage Keepers' Lien Act of that state, which in Crucible Steel Company v. Polack Tyre & Rubber Co., 92 N. J. Law, 221, 104 A. 324, 326, was held constitutional as against an attack by a conditional vendor. In the course of the discussion on the subject of validity of the statute, the court, after remarking that the prime object was to secure payment of a debt incurred by the owner or his representative, proceeded to say: "The fact that a third party, ignorant of the lien upon the property, might in good faith and for a valuable consideration acquire interest therein, while such property was out of the possession of the lienor and in the possession of the owner or his representative, cannot, as has already been observed, affect the validity of the statute, as this was a matter falling purely within the exercise of the wisdom and judgment of the Legislature when the law was enacted."

The decision in Frank v. Daily, supra, wherein the rights of an innocent purchaser were involved, was based, without other reasoning, upon the passage just quoted. Moreover, it must be borne in mind that in that case the garage keeper, while he had furnished certain supplies for the car, had never had possession of it.

Frank v. Daily was a decision by the Supreme Court on appeal from a district court; but through our own research there has been brought to our attention the later case of Lanterman v. Luby, 96 N. J. Law, 255, 114 A. 325, wherein there was an appeal from the Supreme Court to the Court of Errors and Appeals. In that case a garage keeper, who while in possession had supplied tires to the owner of the car, was asserting a lien against an innocent purchaser without notice. Treating this particular phase of the case, the court said (pages 258, 259 of 96 N. J. Law, 114 A. 325, 326): "Where * * * the parties themselves agree with each other that the owner may take the chattel away from the possession or control of the lien claimant, and that the lien shall nevertheless continue, such agreement, as against the owner who was a party to it, will be good, but it will not be binding against a subsequent innocent purchaser for value without notice. * * *

"Secret liens upon chattels are an obstruction and a menace to trade, and as such are against the policy of the law. They attempt to contradict and to destroy the universally accepted and natural, as well as legal, badge of ownership of chattels, which is possession. The law is most jealous in its protection of an innocent purchaser of a chattel for value without notice, who has relied upon possession as the badge of ownership. If the property has been stolen, his title may be bad, but, short of that, if he has looked for liens or incumbrances where the law has told him to look, as for instance, for chattel mortgages in the record where they are required to be recorded, and he finds none, he is entitled to rely upon what the possession tells him."

And, in further elucidation of the distinction between an innocent purchaser and a conditional vendor, the court made the following statement (page 261 of 96 N. J. Law, 114 A. 325, 327): "It is true that in Crucible Steel Co. v. Polack Tyre & Rubber Co., supra, where a conditional vendee ordered the repairs to the auto truck in question, and then defaulted on his contract of purchase of the truck, and his vendor took it back under the conditional sale contract, we held that the lien was good against the truck in the hands of the vendor, because under these circumstances such vendor was not an innocent purchaser for value without notice, but, under the express provisions of the act, occupied rather the position of a principal with the conditional vendee his representative. For these very reasons that case is clearly distinguishable from this one."

Nowhere in this decision is any reference made to the case of Frank v. Daily, supra; but the decision, being that of the court of ultimate authority in New Jersey, and being in itself so thorough, is for us the more persuasive precedent. In Goldsmith Bros. v. Gensenleiter & Co., 28 Pa. Co. Ct. R. 399, and 14 Pa. Dist. R. 516, it was likewise held that an innocent purchaser of a horse, without knowledge of a stableman's lien, was not liable for the debt, though he put the horse in the same stable.

A similar view as to the paramount right of an innocent purchaser appears to be entertained in Kamarin v. Sidney Garage, 137 Misc. 744, 244 N. Y. S. 337, although the court refrained from an absolute committal.

A lien is not an interest in the thing, but only a right of detainer as security for payment of a debt. Johnson v. Razy, 181 Cal. 342, 344, 184 P. 657. And in this state, as declared in Palmer v. Howard, 72 Cal. 293, 295, 13 P. 858, 1 Am. St. Rep. 60, and repeated in Stockton S. & L. Soc. v. Purvis, 112 Cal. 236, 242, 44 P. 561, 53 Am. St. Rep. 210, and Ferguson v. Murphy, 117 Cal. 134, 138, 48 P. 1018, 1019, "the policy of the law is against upholding secret liens and charges to the injury of innocent purchasers or incumbrancers for value."

[2] It is a general rule that, if a claimant whose lien depends upon possession, actual

or constructive, is deprived of possession fraudulently, he may still assert his right to a lien. Nevertheless in the amendment to section 3051, Civil Code, made in 1929, that rule is to some extent modified in behalf of innocent purchasers and incumbrancers by the provision that, where the possession of, or lien upon, any automobile held under a claim of lien pursuant to that section is lost by reason of fraud, trick, or device, the repossession of such automobile by the garage keeper shall revive the lien so lost, subject to the qualification that any lien thus revived shall be subordinate to the rights of others acquiring title or lien in good faith and for value between the time of loss of possession and the time of repossession.

Since it is thus declared to be the policy of the law to protect an innocent purchaser or incumbrancer, even though the garage keeper is induced by fraud or trick to part with possession, no good reason is suggested for withholding like protection when the garage keeper voluntarily consents to let the owner have daily use of the car, trusting to an express or implied promise of return and relying on payment of his charges in due course.

In temporarily parting with possession, a garage keeper necessarily takes the chance of losing his lien by an owner's sale to an innocent purchaser for value who is without notice of the claim.

We are therefore of the opinion that the plaintiff as an innocent purchaser for value without notice is entitled in this action to recover the car taken from her by the defendant, and the judgment in plaintiff's favor is accordingly affirmed.

CONLAN and GOODELL, JJ., concur.

132 Cal.App. 426

RICHARDSON et al. v. CITY OF REDONDO BEACH et al.

Civ. 4723.

District Court of Appeal, Third District, California.

June 3, 1933.

1. Municipal corporations ⇐293(2).

In describing improvement in resolution of intention and notice of improvement, considerable latitude is to be allowed (St. 1911, p. 733, § 3, as amended by St. 1923, p. 106).

2. Municipal corporations ⇐293(2).

Resolution of intention and resolution ordering work for construction of pier, and notice of improvement, *held* sufficiently to describe improvement, giving city council jurisdiction (St. 1911, p. 733, § 3, as amended by St. 1923, p. 106).

Resolution of intention and notice of improvement described work as building of creosoted wooden pier with cement concrete deck from foot of main street westerly, southerly, and easterly in form of horse shoe to westerly terminus of certain streets in such city, all of such work to be done in accordance with, and as particularly delineated and described on, numbered profile and plan approved by city council on certain date and on file in city engineer's office, and further in accordance with specifications adopted by city council and on file in office of city clerk; and reference was made to such profile or plan and to specifications for full and complete description of work or improvement proposed.

3. Municipal corporations ⇐516.

City council's determination, on conflicting testimony, that work on local improvement has been performed according to contract, is conclusive and cannot be collaterally attacked, unless proceedings are void (St. 1911, p. 730, as amended).

4. Municipal corporations ⇐538.

In action to enjoin collection of local improvement assessments, allegation that city council arbitrarily, unreasonably, and fraudulently denied plaintiff's appeal, accepted work, and confirmed assessment as presented to superintendent of streets *held* not sufficient pleading of fraud (St. 1911, p. 730, as amended).

5. Fraud ⇐43.

Fraud must be pleaded in specific language descriptive of acts relied on to constitute fraud.

It is not sufficient to allege fraud in general terms or in terms which amount to mere conclusions.

6. Municipal corporations ⇐493(6).

In action to enjoin collection of local improvement assessments, question whether council, in denying plaintiffs' appeals and objections and confirming assessment, abused discretion to extent amounting to constructive fraud must be determined solely from record of proceedings before council (St. 1911, p. 730, as amended).

Appeal from Superior Court, Los Angeles County; V. F. Thompson, Judge.

Action by James R. Richardson and others against the City of Redondo Beach and others. From a judgment in favor of plaintiffs, defendants appeal.

Reversed.

Harry Polglase, City Atty., of Redondo Beach, and Arthur M. Ellis, James Howard, Milton Bryan, and Brown & Brown, all of Los Angeles, for appellants.

Whitehead, Bole & Blythe and Arthur S. Guerin, all of Los Angeles, for respondents.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

In this appeal we are unfortunate in not having the assistance of a brief on behalf of respondents, the record before us consisting of the clerk's transcript of some 125 pages, a reporter's transcript on appeal consisting of approximately 450 pages, and a brief by the appellants Kranz and Municipal Bonding Company only. A record of such size presenting technical questions of engineering and intricate problems of law should not be thus lightly cast upon the court. An issue presented to a court justifies the co-operation of both court and counsel. We have endeavored, however, to acquaint ourselves with the facts of the case and the law involved in this appeal.

The city of Redondo Beach, a municipal corporation, instituted proceedings under the provisions of the "Improvement Act of 1911" for the construction of a pier. The work was completed by the contractor and thereupon an assessment was made and filed by the superintendent of streets of the city of Redondo Beach, and a hearing was had thereon as provided by law. At the hearing certain property owners presented appeals to the city council in which they contended that the pier was in certain instances not in accordance with the plans and specifications for the improvement. The council, however, accepted the work as done by the contractor and confirmed the assessment.

Thereafter three of the appealing property owners filed suit to enjoin the collection of these assessments, the issuance of bonds thereon, and to declare all proceedings null

and void and to set aside the lien of the assessment on the ground that the improvement as constructed did not conform to the plans and specifications thereof, the action being brought by the three plaintiffs on behalf of all of the property owners of the district.

At the trial the plaintiffs introduced in evidence the transcript of the testimony taken before the city council at the time of the hearing of the appeals, and also introduced additional evidence over objection of defendants, of a different character than that offered and received by the city council at the time of the hearing of the original appeals. It also appeared at the trial that the lien of the plaintiffs herein had, previously to the trial of this action, been paid and released.

At the termination of the trial the court rendered judgment in favor of plaintiffs and against defendants, declaring that the proceedings initiating the improvement were null and void for the reason that the resolution of intention and notice of improvement did not properly describe the improvement and that the assessment issued for the improvement did not constitute a lien upon the property of plaintiffs nor of others located within this assessment district, and defendants were enjoined from taking steps to collect the assessment and from applying for a reassessment to cover the expenses of the work.

[1, 2] The first question to determine is whether or not the resolution of intention and notice of improvement were sufficient under the provisions of the Improvement Act of 1911 (St. 1911, p. 730 as amended). Section 3 of the Improvement Act of 1911, as amended (St. 1923, p. 106), reads in part as follows: "The said resolution of intention shall be sufficient if it states in general terms the class or kinds of work contemplated such as grading, paving, sewering or other work or improvements, and gives in general the location of the proposed improvement and refers to plans, profiles, detailed drawings and specifications or such of them as may be suitable or proper for the full and detailed description of the said proposed work or improvement."

Turning now to the resolution of intention and notice of improvement we find the description of the work set forth as follows:

"That the public interest and convenience require and that it is the intention of the City Council of the City of Redondo Beach to order the following work to be done, to-wit:

"The building of a creosoted wooden pier with a cement concrete deck from the Foot of Emerald Street, Westerly, Southerly and Easterly in the form of a horseshoe, to the Westerly Terminus of Pier Avenue in said City, all of said work to be done in accordance with and as particularly delineated and described on Profile, Plan, Cross-section and Detail Nos. 280 of Municipal Pier, City of Redondo Beach, Calif., Sheets 1, 2, 3, 4 and 5, approved and adopted by this City Council on February 27, 1928, and on file in the office of the City Engineer of said city, and in further accordance with Specifications No. 130 for the Construction of a Creosoted Wooden Pier, With a Cement Concrete Deck, in the City of Redondo Beach, California, which said Specifications have been duly approved and adopted by the City Council of said City and are on file in the office of the City Clerk. Reference is hereby made to the said Profile, Plan, Cross-section and Detail No. 280 of Municipal Pier, City of Redondo Beach, Calif., Sheets Nos. 1, 2, 3, 4 and 5 and to Specifications of 130 for a full and complete description of the work or improvement proposed to be constructed."

The description as given in the resolution of intention and notice gives the starting point of the pier, which is fixed and definite, the courses in which the pier is to run, its general form and the termination, which is also a fixed and definite location. Also is given in general terms the kind and class of materials of which the pier is to be constructed, and refers to the plans and specifications for further particulars.

It is well settled that considerable latitude is to be allowed under section 3 of the act, and no contention is made that the plans and specifications are not sufficient in every detail to show the design and construction of the improvement, and the notice and resolution refers specifically to these plans and specifications and tells where they may be seen and examined.

In Walsh v. Swanson, 64 Cal. App. 587, 222 P. 190, the court said: "Furthermore, this general description is to be read with the plans and specifications adopted for the improvement and referred to in the resolution of intention. That part of the resolution of intention reads: 'The said improvements are to be made * * * in accordance with the specifications, or plans and specifications prepared therefor and on file in the office of said board and to which reference is hereby made.'"

To the same effect is the case of Federal Construction Co. v. Kneese, 37 Cal. App. 659, 174 P. 694, in which the rule is thus expressed: "The next objection is that the resolution of intention is uncertain in some particulars. The plans, however, which accompanied the resolution of intention, and the specifications that are referred to therein, if we understand counsel correctly, answer these objections by making the lines, which it might be impossible to locate if the resolution of intention stood alone, quite certain as to location. * * * This disposes of

criticisms aimed at the resolution of intention. It seems to be sufficient."

It therefore appears that the resolution of intention and the resolution ordering the work and the notice of improvement are sufficient within the meaning of the statute and the board acquired jurisdiction thereby.

The next point urged for reversal is that the court erred in admitting extrinsic, additional, and different evidence and expert testimony than that presented before the council regarding the alleged variations between the improvement as constructed and the plans and specifications adopted.

At the hearing before the board some three hours were consumed in the taking of testimony on the protest to the acceptance of the improvement, and some six or eight witnesses examined. At the trial before the superior court occupying four days, ten witnesses were sworn and examined, among whom were only one or two who had testified before the board. An examination of the testimony taken before the board indicates that additional and different evidence was offered and received by the trial court, all over the timely objections of counsel.

[3] The Legislature has confided to the board of trustees or the governing body charged with the duty of initiating and performing the specific improvement, the duty of determining whether or not the work has been performed according to the contract, and that body having decided upon conflicting testimony is conclusive. Its act is an exercise of a quasi judicial power and cannot be attacked collaterally by any of the parties thereto, unless the proceedings are absolutely void.

In the case of Lambert v. Bates, 137 Cal. 676, 70 P. 777, the court, passing upon an order of the town council of Berkeley, in overruling certain objections to the work, said:

"The legislature has thus not only provided a tribunal for the purpose of determining whether the contractor has completed his contract according to its terms, but it has also declared that the decisions and determinations of that tribunal upon this question shall be 'final and conclusive' as to all errors which it might have remedied. Whether the work in the present case was done, in conformity with the contract, to the official grade, was a fact to be determined in the first instance by the superintendent of streets. The street improvement act declares that all street work shall be done under his direction and to his satisfaction, and it is alleged herein, and found by the court, that the work was accepted and approved by him, and that he thereupon made the assessment upon which the action is brought. If in fact he accepted the work and made the assessment before the contract was fulfilled, such determination or act was an error of that officer which the council could have remedied. It was within the functions of that body, upon the defendant's appeal, to determine whether in fact the work provided for in the contract had been fully performed or not; and, under the above provision of section 11, its action in overruling said appeal, and dismissing the same, is final and conclusive upon him. The council acted judicially in its determination upon the appeal (Belser v. Hoffschneider, 104 Cal. 455, 38 P. 312); and, as in the case of the judgment of any tribunal for which there is no review provided by statute, its action must be held conclusive whenever the fact determined by it is brought into question before any other tribunal. [Citing cases.]

"The legislature did not intend by the above provision that the appeal should be prosecuted in a perfunctory manner, or should be a mere formality. By declaring that the determination of the council shall be 'final and conclusive,' it intended that that body should be the final tribunal for the determination of all questions that might be appealed to it, so far as such determination was of a question of fact, or depended upon evidence that might be presented in support of the appeal. Houghton's Appeal, 42 Cal. 35; Bixler's Appeal, 59 Cal. 550. This provision cannot be construed as authorizing a person merely to take an appeal to the council without presenting to that body sufficient evidence to support his appeal, or any evidence in its support, and afterwards seek to have the grounds of his appeal sustained before another tribunal, and under additional or different evidence. * * *

"If he failed or omitted to present to that body the evidence which he afterwards presented to the superior court upon the trial herein, he is in the same position as any litigant who has rested his case upon insufficient evidence."

The Supreme Court has recently had under consideration the Improvement Act of 1911, in the case of Hannon v. Madden, 214 Cal. 251, 5 P.(2d) 4, 6, where it again plainly lays down the rule enunciated above.

It is there determined also that the board had wide plenary powers in order they may have wide latitude in matters of discretion for the definite reason that in determining the question of compliance with improvement contracts wide discretion is necessary from the very nature of the work and official efficiency requires that their hands be not too tightly bound.

"Where an appeal has been taken to the council, its decision may be attacked in a legal proceeding only upon pleading and proof that the board acted fraudulently or that its action is so palpably unreasonable and arbitrary as to raise an inference of plain abuse of discretion as a matter of law." Hannon v. Madden, supra.

[4-6] The allegation in the instant case is "that said city council arbitrarily, unreasonably, and fraudulently denied said appeals, accepted said work and confirmed the assessment as presented to the Superintendent of Streets."

This is not a sufficient pleading of fraud. "Fraud must be pleaded in specific language descriptive of the acts which are relied upon to constitute fraud. It is not sufficient to allege it in general terms, or in terms which amount to mere conclusions.' Hannon v. Madden, supra. The finding by the court was "that the council in denying the appeals and objections of plaintiffs and confirming said assessment, abuse its discretion to such an extent as to amount to constructive fraud upon the property owners within the assessment district." Neither the allegations in the complaint nor the proof support this finding nor is a finding of constructive fraud an issue for the trial court; that being a matter to be determined only from the record of the proceedings before the original tribunal. Rutledge v. City of Eureka, 195 Cal. 404, 234 P. 82.

The foregoing being determinative of the appeal we do not pass upon the other points urged by appellant, which probably will not again arise if the matter is tried anew.

The judgment is reversed.

We concur: PLUMMER, J.; R. L. THOMPSON, J.



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